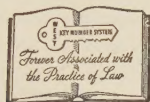




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CASES REPORTED

Vols. 233-236 P.

	P.	
	Vol.	Page
A. C. Blumenthal & Co. v. Cryer, App.	236	216
Adams-Campbell Co. v. Jones, App.	236	322
Ainger; Hanscome-James-Winship v., App.	236	325
Albrexstondare; People v., App.	235	87
Allan; Powell v., App.	234	339
All Persons, etc.; Sheehan v., Sup.	234	1113
Altamirano v. Cheo, App.	236	960
Amador; Vicino v., App.	236	369
American Marine Paint Co. v. Nyno Line, App.	233	366
Anaheim Co-op. Orange Ass'n v. Industrial Accident Commission of State of California, App.	233	1115
Anderson v. Julius Levin Co., App.	234	442
Andreoli v. Hodge, App.	236	333
Appelbaum; Ryland v., App.	233	356
Ardzroomi; White v., App.	235	461
Armstrong v. Rau, App.	236	937
Arnold v. Superior Court in and for City and County of San Francisco, App.	234	912
Atkinson v. United Railroads of San Francisco, App.	234	863
Aubel v. Sosso, App.	236	319
Automotive Finance Corporation; Garratt v., App.	235	745
Aymard; Feigenbaum v., App.	236	156
Backesto's Estate, In re, App.	235	670
Barney; Turgeon v., App.	233	394
Barton; Powers v., App.	234	435
Bashaw Co. v. Wood & Stevens, App.	236	346
Bauer v. Willis, Sup.	233	342
Bauman v. Edgar, App.	236	943
Beard v. Lancaster Midway Oil Co., App.	236	970
Beck; Hildebrand v., Sup.	236	301
Beckner; Kofoid v., App.	234	113
Berry's Estate, In re, Sup.	233	330
Berto, Ex parte, Sup.	235	735
Biardo, Ex parte, two cases, Sup.	235	737
Bidwell; Cook v., App.	233	995
Bidwell; Riedy v., App.	233	995
Bihn; Ehlers v., App.	235	673
Billing; Bisconer v., App.	236	329
Birch v. Monroe, App.	234	125
Bird v. Murphy, App.	236	154
Bisconer v. Billing, App.	236	329
Blanchard; People v., App.	235	467
Blenkiron; Davies-Overland Co. v., App.	236	179
Blumenthal & Co. v. Cryer, App.	236	216
Board of Public Works of City of Los Angeles; Miller v., Sup.	234	381
Board of Public Works of City of Los Angeles; Zahn v., Sup.	234	388

CASES REPORTED

P.

	Vol.	Page
Board of Sup'rs of Contra Costa County; Galvin v., Sup.	235	450
Boericke & Runyon Co.; Murphy v., App.	236	966
Bognuda v. Pearson, App.	234	857
Bonds of Orosi Public Utility Dist., In re, Sup.	235	1004
Bonfield v. Bonfield, App.	236	162
Booth; People v., App.	236	987
Boyle; City and County of San Francisco v., Sup.	233	965
Brain, Ex parte, App.	233	390
Brannon; People v., App.	233	88
Broady v. Jennings, App.	234	120
Brown; People v., App.	235	72
Brown v. Riley, Sup.	236	144
Brown v. Superior Court of California in and for Los Angeles County, App.	234	409
Brown's Estate, In re, Sup.	236	144
Buck; Jones v., App.	233	82
Building Trades Council of Sacramento; Greenwood v., App.	233	823
Burns Hammam Baths; Clark v., App.	236	152
Bussenius v. Warden, App.	236	371
Butler; Finn v., Sup.	235	992
Buttulia; People v., App.	233	401
Caffaro v. Romani, App.	233	412
California Law & Adjustment Co. v. Superior Court of Los Angeles County, App.	234	408
Calmus; Shannon v., App.	234	107
Campe-Rose Co.; Salisbury v., App.	236	174
Careaga v. Moore, App.	234	121
Carmel Canning Co.; Dolan v., App.	234	926
Carmignani, Ex parte, App.	235	1033
Central Sav. Bank v. Coulter, App.	236	956
Cerruti, Ex parte, Sup.	235	737
Chambers v. Larronde, Sup.	235	1024
Chapelle, In re, App.	234	906
Chas. Corriea & Bros.; McDevitt v., App.	233	381
Cheo; Altamirano v., App.	236	960
City and County of San Francisco v. Boyle, Sup.	233	965
City of Eureka; Rutledge v., Sup.	234	82
City of Los Angeles; Coen v., App.	234	426
City of Los Angeles; Larkey v., App.	233	991
City of Los Angeles v. Morris, App.	236	925
City of Los Angeles; Powell v., App.	234	345
City of Lynwood; Patterson v., App.	236	933
City of Oakland; Great Western Power Co. of California v., Sup.	236	307
City of Oakland v. Parker, App.	233	68
City of Richmond; Ellis Landing & Dock Co. v., App.	234	336
City of San Diego; People v., App.	236	377
City of Signal Hill v. Los Angeles County, Sup.	236	304
City of Stockton; Gnekow v., Sup.	235	992
City of Stockton; Williams v., Sup.	235	986
City Properties Co. v. Southern California Bond & Finance Corporation, Sup.	234	1112
Civil Service Commission of Los Angeles County; Cronin v., App.	236	339
Clark, Ex parte, App.	234	109
Clark v. Burns Hammam Baths, App.	236	152
Clark; People v., App.	233	980
Clark; People v., App.	234	438
Clary's Estate, In re, App.	234	851

CASES REPORTED

P.

	Vol.	Page
Clinton; People v., App.	233	78
Clinton; People v., App.	236	929
C. O. Bashaw Co. v. Wood & Stevens, App.	236	346
Coen v. City of Los Angeles, App.	234	426
Cohen; People v., App.	235	658
Colburn; Parker v., Sup.	236	921
Coleman; Steineck v., App.	236	962
Coleman; Williams v., App.	233	397
Collins; Coulter v., App.	235	465
Collins; People v., Sup.	233	97
Colombo; People v., App.	233	413
Connelly; People v., Sup.	234	374
Connors; People v., App.	233	362
Consolidated Pipe Co. v. Lancaster Midway Oil Co., App.	236	970
Continental Casualty Co. v. Industrial Accident Commission of California, Sup.	234	317
Cook v. Bidwell, App.	233	995
Cooper v. Reardon, App.	236	180
Cope v. Flanery, App.	234	845
Corriea & Bros.; McDevitt v., App.	233	381
Corrigan v. Superior Court in and for Solano County, App.	236	364
Cottage Gardens Nurseries; Sunset Pub. House v., App.	233	402
Coulter; Central Sav. Bank v., App.	236	956
Coulter v. Collins, App.	235	465
Countryman; Empire Securities Co. v., App.	233	403
Covell v. Lee, App.	235	79
Cowsert v. Stewart, App.	236	940
Craig; People v., Sup.	235	721
Craig v. Shea, App.	235	660
Crockett Land & Cattle Co.; Pacific Gas & Electric Co. v., App.	233	370
Cronin v. Civil Service Commission of Los Angeles County, App.	236	339
Crotty; People v., App.	233	395
Cryer; A. C. Blumenthal & Co. v., App.	236	216
Curran v. Superior Court in and for Fresno County, App.	236	975
Dalzell; McGown v., App.	236	941
Dare; Sponable v., Sup.	235	725
Dare's Estate, In re, Sup.	235	725
Davies-Overland Co. v. Blenkiron, App.	236	179
Davis v. Superior Court of California in and for Alameda County, App.	236	151
Degnen; People v., App.	234	129
De Mund; Hughes v., App.	233	93
De Mund; Hughes v., Sup.	233	94
Diamond Match Co. v. Sanitary Fruit Co., App.	234	322
Dolan v. Carmel Canning Co., App.	234	926
Dolan; Jackson v., App.	236	318
Dolan; Jackson v., App.	236	319
Dolan; Sprague v., App.	233	84
Donohue; Walton v., App.	233	76
Drew; Roach v., App.	236	568
Duffy v. Duffy, App.	235	62
Duke; Jensen v., App.	234	876
Dunlap, Ex parte, App.	234	338
Eagan v. Sykes, App.	236	926
Eames v. Philpot, App.	236	373
Eberhart v. Salazar, App.	235	86
Eckard v. Superior Court in and for Los Angeles County, Sup.	234	80

CASES REPORTED

P.

	Vol.	Page
Eddy; Starkweather v., Sup.	235	734
Edgar; Bauman v., App.	236	943
Edwards; People v., App.	236	944
Edwards Associates v. Railroad Commission of California, Sup.	235	647
Ehlers v. Bihn, App.	235	673
Ehrhart v. Industrial Accident Commission, App.	234	908
Ekstromer; People v., App.	235	69
Ellis Landing & Dock Co. v. City of Richmond, App.	234	336
Empire Securities Co. v. Countryman, App.	233	403
Engert; Tolley v., App.	235	651
Engert; Tolley v., App.	235	652
English v. Shipley, App.	234	334
Eulless v. Westphal, App.	235	742
Evers v. Stratton, App.	235	656
Ewell, Ex parte, App.	236	205
Ewell v. Ward, App.	236	207
Ewing; People v., App.	234	917
Fabricius v. Vieira, App.	233	397
Fairbanks; Lisher v., App.	233	74
Farley v. Stirling, App.	233	810
Federal Mut. Liability Ins. Co. v. Industrial Accident Commission, Sup.	233	335
Feigenbaum v. Aymard, App.	236	156
Fidelity & Casualty Co. of New York; Maryland Casualty Co. v., App.	236	210
Fink; Forrest v., App.	234	860
Finkle v. Superior Court of California in and for San Bernardino County, App.	234	432
Finn v. Butler, Sup.	235	992
Firpo v. Murphy, App.	236	968
First Nat. Bank v. Superior Court of California in and for Los Angeles County, App.	234	420
Flanery; Cope v., App.	234	845
Forrest v. Fink, App.	234	860
Foss; Unit Const. Co. v., App.	234	903
Franchise Motor Freight Ass'n v. Seavey, Sup.	235	1000
Frank; People v., App.	236	189
Frankfort v. Superior Court of California in and for Los Angeles County, App.	235	60
Frederickson; Gardiner v., App.	234	117
Fuller & Co. v. McClure, Sup.	235	731
Gaidos v. Industrial Accident Commission of California, App.	236	160
Galbraith v. Panini, App.	235	66
Gallo's Estate, In re, App.	235	66
Galvin v. Board of Sup'rs of Contra Costa County, Sup.	235	450
Gardiner v. Frederickson, App.	234	117
Garratt v. Automotive Finance Corporation, App.	235	745
Gates v. Pendleton, App.	236	365
George; People v., App.	236	934
Gilmore v. Pearson, App.	235	665
Gnekow v. City of Stockton, Sup.	235	992
Godeau v. Levy, App.	236	354
Golden West Credit & Adjustment Co. v. Superior Court of California in and for City and County of San Francisco, App.	235	738
Goodman; Pacific Acceptance Corporation v., App.	236	964
Great Western Power Co. of California v. City of Oakland, Sup.	236	307
Greenberg v. Superior Court in and for City and County of San Francisco, App.	235	92

CASES REPORTED

P.

	Vol.	Page
Greenwood v. Building Trades Council of Sacramento, App.	233	823
Haines, Ex parte, Sup.	234	883
Haley & Co. of California v. McVay, App.	233	409
Hall v. Superior Court in and for Imperial County, three cases, App.	233	80
Halley; La Mesa, Lemon Grove & Spring Valley Irr. Dist. v., Sup.	235	999
Hamblin v. Superior Court of Los Angeles County, Sup.	233	337
Hammond Lumber Co. v. Industrial Accident Commission, App.	234	915
Hanlon Dry Dock & Shipbuilding Co.; Rosener v., App.	236	183
Hanscome-James-Winship v. Ainger, App.	236	325
Harnett v. Sacramento County, Sup.	235	445
Harrington; Myers v., App.	234	412
Harris v. Miller, Sup.	235	981
Hart v. Industrial Accident Commission of California, App.	235	748
Havens; Pickering v., App.	233	346
H. D. Haley & Co. of California v. McVay, App.	233	409
Heard v. Tate, App.	235	662
Heide; Wright & Hogan v., App.	236	219
Hendricks; People v., App.	236	214
Hetzel; Simons Brick Co. v., App.	236	357
Higbee; People v., App.	233	79
Higbee; People v., App.	236	929
Hildebrand v. Beck, Sup.	236	301
Hind v. Oriental Products Co., Sup.	235	438
Hoagland; Humboldt Oil Co. v., App.	233	404
Hodge; Andreoli v., App.	236	333
Holdener v. Howard, App.	236	971
Holloway's Estate, In re, Sup.	235	1012
Holmes; People v., App.	234	332
Hoopes v. Superior Court of California in and for Los Angeles County, App.	235	739
Hoopes v. Superior Court of California in and for Los Angeles County, App.	235	742
Hopkins; Mohawk Oil Co. v., Sup.	236	133
Houston; Kennedy v., App.	235	670
Howard; Holdener v., App.	236	971
Hughes v. De Mund, App.	233	93
Hughes v. De Mund, Sup.	233	94
Huling; People v., App.	234	924
Humboldt Oil Co. v. Hoagland, App.	233	404
Hunter; People v., App.	235	67
Industrial Accident Commission; Ehrhart v., App.	234	908
Industrial Accident Commission; Federal Mut. Liability Ins. Co. v., Sup.	233	335
Industrial Accident Commission; Hammond Lumber Co. v., App.	234	915
Industrial Accident Commission; Ives v., App.	235	53
Industrial Accident Commission; Moore Shipbuilding Co. v., App.	233	392
Industrial Accident Commission; Royal Indemnity Co. v., App.	233	381
Industrial Accident Commission; United States Fidelity & Guaranty Co. v., Sup.	234	369
Industrial Accident Commission; W. S. Smith & Son v., App.	236	962
Industrial Accident Commission of California; Continental Casualty Co. v., Sup.	234	317
Industrial Accident Commission of California; Gaidos v., App.	236	160
Industrial Accident Commission of California; Hart v., App.	235	748
Industrial Accident Commission of California; Owl Drug Co. v., App.	234	921
Industrial Accident Commission of State of California; Anaheim Co-op. Orange Ass'n v., App.	233	1115

CASES REPORTED

P.

	Vol.	Page
Industrial Accident Commission of State of California; State Compensation Ins. Fund v., App.	234	116
Inglewood School Dist. of Los Angeles County; Matot v., App.	235	667
Irvine; Macowsky v., App.	234	839
Isbell; Mitsuda v., App.	234	928
Isert v. Riecks, Sup.	234	371
Ives v. Industrial Accident Commission, App.	235	53
Jackson v. Dolan, App.	236	318
Jackson v. Dolan, App.	236	319
Jacobs, Malcolm & Burt v. Northern Pac. Ry. Co., App.	234	328
James; People v., App.	235	81
James v. Schafer, App.	233	70
Jarvis v. Webber, Sup.	236	138
Jenks v. Lurie, Sup.	234	370
Jennings; Broady v., App.	234	120
Jensen v. Duke, App.	234	876
Johnson v. Williams, Sup.	233	330
Jones; Adams-Campbell Co. v., App.	236	322
Jones v. Buck, App.	233	82
Jones v. Southern Pac. Co., App.	236	336
Joy v. Rousseau, App.	236	972
Judnich; O'Connell v., App.	235	664
Julius Levin Co.; Anderson v., App.	234	442
Kelly; People v., App.	234	110
Kennedy v. Houston, App.	235	670
Keown v. Trudo, App.	234	910
Kinney, Ex parte, App.	235	460
Kinney v. Kinney, App.	234	913
Koch v. Triest, App.	236	930
Kofoed v. Beckner, App.	234	113
Kohler & Chase; Morton v., App.	233	415
Kuhn; MacDonald v., App.	234	118
La Mesa, Lemon Grove & Spring Valley Irr. Dist. v. Halley, Sup.	235	999
Lancaster Midway Oil Co.; Beard v., App.	236	970
Lancaster Midway Oil Co.; Consolidated Pipe Co. v., App.	236	970
Lanzit; People v., App.	233	816
Larkey v. City of Los Angeles, App.	233	991
Larronde; Chambers v., Sup.	235	1024
Larsen; Larson v., App.	236	979
Larson v. Larsen, App.	236	979
Lee; Covell v., App.	235	79
Levin Co.; Anderson v., App.	234	442
Levy; Godeau v., App.	236	354
Liberty Bank v. Superior Court of California, in and for Los Angeles County, Sup.	235	995
Lieberman v. Superior Court of California in and for Orange County, App.	236	570
Lisher v. Fairbanks, App.	233	74
Little v. Yanagisawa, App.	233	357
Lombardi v. Sinanides, App.	235	455
Looney v. Scott, App.	235	76
Los Angeles City High School Dist. of Los Angeles County v. Quinn, Sup.	234	313
Los Angeles County; City of Signal Hill v., Sup.	236	304
Luitwieler v. Luitwieler, App.	234	329
Lurie; Jenks v., Sup.	234	370
Lyle v. Seller, App.	233	345
Lyon v. Lyon, App.	233	988

CASES REPORTED

P.

	Vol.	Page
McAdoo v. Moore, App.	233	391
McClemegen; People v., Sup.	234	91
McClure; W. P. Fuller & Co. v., Sup.	235	731
McConnell v. Quinn, App.	236	200
McCuaig; Orosi Public Utility Dist. v., Sup.	235	1004
McDevitt v. Chas. Corriea & Bros., App.	233	381
MacDonald v. Kuhn, App.	234	118
McDonald v. Southern Pac. Co., App.	236	172
Mace; People v., App.	234	841
McGown v. Dalzell, App.	236	941
Maciel; People v., App.	234	877
McKeon v. O'Toole, App.	235	464
Macowsky v. Irvine, App.	234	839
McVay; H. D. Haley & Co. of California v., App.	233	409
Mahony; Ward-Lewis Lumber Co. v., App.	234	417
Maltman's Estate, In re, Sup.	234	898
Marr v. Southern California Gas Co., Sup.	233	108
Martin v. Pacific Gas & Electric Co., Sup.	234	321
Martin; People v., App.	233	85
Maryland Casualty Co. v. Fidelity & Casualty Co. of New York, App.	236	210
Massachusetts Bonding & Insurance Co.; Smith v., App.	236	176
Matot v. Inglewood School Dist. of Los Angeles County, App.	235	667
Mihara; Stukev v., App.	234	919
Miller v. Board of Public Works of City of Los Angeles, Sup.	234	381
Miller; Harris v., Sup.	235	981
Miller; People v., App.	234	905
Milligan; Zeller v., App.	236	349
Mitsuda v. Isbell, App.	234	928
Mohawk Oil Co. v. Hopkins, Sup.	236	133
Monroe; Birch v., App.	234	125
Monterey Fish Products Co.; People v., Sup.	234	398
Moore, Ex parte, App.	233	805
Moore; Careaga v., App.	234	121
Moore; McAdoo v., App.	233	391
Moore Shipbuilding Co. v. Industrial Accident Commission, App.	233	392
Morani; People v., Sup.	236	135
Morris; City of Los Angeles v., App.	236	925
Morton v. Kohler & Chase, App.	233	415
Murphy; Bird v., App.	236	154
Murphy v. Boericke & Runyon Co., App.	236	966
Murphy; Firpo v., App.	236	968
Murphy v. Murphy, App.	235	653
Murphy; People v., App.	235	51
Murphy; People v., App.	235	53
Myers v. Harrington, App.	234	412
Myers v. Stringham, Sup.	235	448
Nelson; People v., App.	233	403
Nelson; People v., App.	236	208
New York Life Ins. Co. v. Rose, App.	233	343
New York Oversea Co. v. Warfield-Pratt-Howell Co., App.	234	405
Nightingale v. Williams, App.	233	807
Norcross; People v., App.	234	438
Northcott, Ex parte, App.	235	458
Northern Pac. Ry. Co.; Jacobs, Malcolm & Burt v., App.	234	328
Nyno Line; American Marine Paint Co. v., App.	233	366
O'Connell v. Judnich, App.	235	664

CASES REPORTED

P.

	Vol.	Page
Odson v. Swanson, App.	233	354
O'Gorman v. Wachter, App.	235	57
One 1924 Studebaker Sport Automobile; People v., App.	234	856
One 1923 Buick Coupe Automobile, Model 23-36; People v., App.	236	198
One 1923 Oakland Sport Automobile, Model 6-44; People v., App.	236	194
Oriental Products Co.; Hind v., Sup.	235	438
Orosi Public Utility Dist. v., McCuaig, Sup.	235	1004
Ortiz, Ex parte, App.	234	877
O'Toole; McKeon v., App.	235	464
Owl Drug Co. v. Industrial Accident Commission of California, App.	234	921
Pacific Acceptance Corporation v. Goodman, App.	236	964
Pacific Gas & Electric Co. v. Crockett Land & Cattle Co., App.	233	370
Pacific Gas & Electric Co.; Martin v., Sup.	234	321
Pacific States Corporation v. Superior Court of California in and for Los Angeles County, App.	236	938
Paden; People v., App.	234	920
Panini; Galbraith v., App.	235	66
Parker; City of Oakland v., App.	233	68
Parker v. Colburn, Sup.	236	921
Patterson v. City of Lynwood, App.	236	933
Peak; Republic Truck Sales Corporation v., Sup.	234	881
Pearson; Bognuda v., App.	234	857
Pearson; Gilmore v., App.	235	665
Pendleton; Gates v., App.	236	365
Peninsula Rapid Transit Co. v. Santa Clara Valley Land Co., App.	233	389
People v. Albrexstondare, App.	235	87
People v. Blanchard, App.	235	467
People v. Booth, App.	236	987
People v. Brannon, App.	233	88
People v. Brown, App.	235	72
People v. Buttulia, App.	233	401
People v. City of San Diego, App.	236	377
People v. Clark, App.	233	980
People v. Clark, App.	234	438
People v. Clinton, App.	233	78
People v. Clinton, App.	236	929
People v. Cohen, App.	235	658
People v. Collins, Sup.	233	97
People v. Colombo, App.	233	413
People v. Connelly, Sup.	234	374
People v. Connors, App.	233	362
People v. Craig, Sup.	235	721
People v. Crotty, App.	233	395
People v. Degnen, App.	234	129
People v. Edwards, App.	236	944
People v. Ekstromer, App.	235	69
People v. Ewing, App.	234	917
People v. Frank, App.	236	189
People v. George, App.	236	934
People v. Hendricks, App.	236	214
People v. Higbee, App.	233	79
People v. Higbee, App.	236	929
People v. Holmes, App.	234	332
People v. Huling, App.	234	924
People v. Hunter, App.	235	67
People v. James, App.	235	81

CASES REPORTED

P.

	Vol.	Page
People v. Kelly, App.	234	110
People v. Lanzit, App.	233	816
People v. Mace, App.	234	841
People v. Maciel, App.	234	877
People v. McClennege, Sup.	234	91
People v. Martin, App.	233	85
People v. Miller, App.	234	905
People v. Monterey Fish Products Co., Sup.	234	398
People v. Morani, Sup.	236	135
People v. Murphy, App.	235	51
People v. Murphy, App.	235	53
People v. Nelson, App.	233	406
People v. Nelson, App.	236	208
People v. Norcross, two cases, App.	234	438
People v. One 1924 Studebaker Sport Automobile, App.	234	856
People v. One 1923 Buick Coupe Automobile, Model 23-36, App.	236	198
People v. One 1923 Oakland Sport Automobile, Model 6-44, App.	236	194
People v. Paden, App.	234	920
People v. Perry, Sup.	234	890
People v. Powell, App.	236	311
People v. Rose, App.	236	158
People v. Stevens, App.	235	60
People v. Superior Court of California, in and for San Bernardino County, Department No. 1, App.	234	338
People v. Tibbitts, App.	236	217
People v. Vatek, App.	236	163
People v. Velasquez, App.	233	359
People v. Vernon, App.	235	737
People v. Williams, App.	236	355
People v. Willis, App.	233	812
People v. Yahne, Sup.	235	50
People v. Yates, App.	236	185
Perkins' Estate, In re, Sup.	235	45
Perry; People v., Sup.	234	890
Philpot; Eames v., App.	236	373
Pickering v. Havens, App.	233	346
Pistachio; Stoops v., App.	234	423
Plumas Lumber Co.; Vernon v., App.	234	869
Powell v. Allan, App.	234	339
Powell v. City of Los Angeles, App.	234	345
Powell; People v., App.	236	311
Powers v. Barton, App.	234	435
Quinn; Los Angeles City High School Dist. of Los Angeles v., Sup.	234	313
Quinn; McConnell v., App.	236	200
Railroad Commission of California; Samuel Edwards Associates v., Sup.	235	647
Rau; Armstrong v., App.	236	937
Reardon; Cooper v., App.	236	180
Republic Truck Sales Corporation v. Peak, Sup.	234	881
Richardson; Smith v., App.	236	220
Richardson; Waugaman v., App.	236	207
Riecks; Isert v., Sup.	234	371
Riedy v. Bidwell, App.	233	995
Riley; Brown v., Sup.	236	144
Riley; Snyder v., App.	235	54
Riley; Steehler v., Sup.	233	972
Riley; Title Guarantee & Trust Co. v., Sup.	234	898

CASES REPORTED

P.

	Vol.	Page
Roach v. Drew, App.	236	568
Romani; Caffaro v., App.	233	412
Rose; New York Life Ins. Co. v., App.	233	343
Rose; People v., App.	236	158
Rosener v. Hanlon Dry Dock & Shipbuilding Co., App.	236	183
Rousseau; Joy v., App.	236	972
Royal Indemnity Co. v. Industrial Accident Commission, App.	233	381
Rutledge v. City of Eureka, Sup.	234	82
Ryland v. Appelbaum, App.	233	356
Sacramento County; Harnett v., Sup.	235	445
Salazar; Eberhart v., App.	235	86
Salisbury v. Campe-Rose Co., App.	236	174
Samuel Edwards Associates v. Railroad Commission of California, Sup.	235	647
Sanitary Fruit Co.; Diamond Match Co. v., App.	234	322
Santa Clara Valley Land Co.; Peninsula Rapid Transit Co. v., App.	233	389
Schafer; James v., App.	233	70
Scott, In re, App.	234	128
Scott; Looney v., App.	235	76
Seavey; Franchise Motor Freight Ass'n v., Sup.	235	1000
Security Ins. Co. v. Superior Court of California in and for Marin County, App.	236	335
Seller; Lyle v., App.	233	345
Settle; Stieglitz v., App.	233	350
Shannon v. Calmus, App.	234	107
Sharp; Smith v., App.	233	374
Shea; Craig v., App.	235	660
Sheehan v. All Persons, etc., Sup.	234	1113
Shipley; English v., App.	234	334
Shropshire v. Superior Court of State in and for Riverside County, App.	235	655
Simmons, Ex parte, App.	235	1029
Simons Brick Co. v. Hetzel, App.	236	357
Sinanides; Lombardi v., App.	235	455
Sly v. Superior Court of California in and for Los Angeles County, App.	235	83
Smith v. Massachusetts Bonding & Insurance Co., App.	236	176
Smith v. Richardson, App.	236	220
Smith v. Sharp, App.	233	374
Smith v. Title Insurance & Trust Co., App.	236	953
Smith & Son v. Industrial Accident Commission, App.	236	962
Snyder v. Riley, App.	235	54
Snyder's Estate, In re, App.	235	54
Sosso; Aubel v., App.	236	319
Southern California Bond & Finance Corporation; City Properties Co. v., Sup.	234	1112
Southern California Gas Co.; Marr v., Sup.	233	108
Southern Pac. Co.; Jones v., App.	236	336
Southern Pac. Co.; McDonald v., App.	236	172
Sponable v. Dare, Sup.	235	725
Sportunio, Ex parte, Sup.	235	737
Sprague v. Dolan, App.	233	84
Starkweather v. Eddy, Sup.	235	734
State v. Tagami, Sup.	234	102
State Compensation Ins. Fund v. Industrial Accident Commission of State of California, App.	234	116
Steehler v. Riley, Sup.	233	972
Steehler's Estate, In re, Sup.	233	972
Steineck v. Coleman, App.	236	962

CASES REPORTED

P.

	Vol.	Page
Stevens; People v., App.	235	60
Stewart; Cowsert v., App.	236	940
Stieglitz v. Settle, App.	235	350
Stirling; Farley v., App.	233	810
Stoops v. Pistachio, App.	234	423
Stove v. Superior Court in and for Sacramento County, App.	236	985
Stratton; Evers v., App.	235	656
Stringham; Myers v., Sup.	235	448
Stukey v. Mihara, App.	234	919
Sunset Pub. House v. Cottage Gardens Nurseries, App.	233	402
Superior Court in and for City and County of San Francisco; Arnold v., App.	234	912
Superior Court in and for City and County of San Francisco; Greenberg v., App.	235	92
Superior Court in and for Fresno County; Curran v., App.	236	975
Superior Court in and for Imperial County; Hall v., App.	233	80
Superior Court in and for Los Angeles County; Eckard v., Sup.	234	80
Superior Court in and for Los Angeles County; Wallis v., App.	236	927
Superior Court in and for Sacramento County; Stowe v., App.	236	985
Superior Court in and for Solano County; Corrigan v., App.	236	364
Superior Court of California in and for Alameda County; Davis v., App.	236	151
Superior Court of California in and for City and County of San Francisco; Golden West Credit & Adjustment Co. v., App.	235	738
Superior Court of California in and for Los Angeles County; Brown v., App.	234	409
Superior Court of California in and for Los Angeles County; First Nat. Bank v., App.	234	420
Superior Court of California in and for Los Angeles County; Frankfort v., App.	235	60
Superior Court of California in and for Los Angeles County; Hoopes v., App.	235	739
Superior Court of California in and for Los Angeles County; Hoopes v., App.	235	742
Superior Court of California in and for Los Angeles County; Liberty Bank v., Sup.	235	995
Superior Court of California in and for Los Angeles County; Pacific States Corporation v., App.	236	938
Superior Court of California in and for Los Angeles County; Sly v., App.	235	83
Superior Court of California in and for Marin County; Security Ins. Co. v., App.	236	335
Superior Court of California in and for Orange County; Lieberman v., App.	236	570
Superior Court of California in and for San Bernardino County; Finkle v., App.	234	432
Superior Court of California in and for San Bernardino County, Department No. 1; People v., App.	234	338
Superior Court of Los Angeles County; California Law & Adjustment Co. v. App.	234	408
Superior Court of Los Angeles County; Hamblin v., Sup.	233	337
Superior Court of State in and for Riverside County; Shropshire v., App.	235	655
Swanson; Odson v., App.	233	354
Sykes; Eagan v., App.	236	926
Tagami; State v., Sup.	234	102
Tate; Heard v., App.	235	662
Tibbitts; People v., App.	236	217

CASES REPORTED

	P.	
	Vol.	Page
Title Guarantee & Trust Co. v. Riley, Sup.	234	898
Title Insurance & Trust Co.; Smith v., App.	236	953
Tolley v. Engert, App.	235	651
Tolley v. Engert, App.	235	652
Town of Sebastopol; Woodworth v., App.	236	981
Triest; Koch v., App.	236	930
Triest's Estate, In re, App.	236	930
Trudo; Keown v., App.	234	910
Turgeon v. Barney, App.	233	394
Unit Const. Co. v. Foss, App.	234	903
United Railroads of San Francisco; Atkinson v., App.	234	863
United States Farm & Land Co.; Zolkoske v., App.	236	344
United States Fidelity & Guaranty Co. v. Industrial Accident Commission, Sup.	234	369
Vatek; People v., App.	236	163
Velasquez; People v., App.	233	359
Vernon; People v., App.	235	737
Vernon v. Plumas Lumber Co., App.	234	869
Vicino v. Amador, App.	236	369
Vieira; Fabricius v., App.	233	397
Wachter; O'Gorman v., App.	235	57
Wallis v. Superior Court in and for Los Angeles County, App.	236	927
Walton v. Donohue, App.	233	76
Ward; Ewell v., App.	236	207
Warden; Bussenius v., App.	236	371
Ward-Lewis Lumber Co. v. Mahony, App.	234	417
Warfield-Pratt-Howell Co.; New York Oversea Co. v., App.	234	405
Waugaman v. Richardson, App.	236	207
Webber; Jarvis v., Sup.	236	138
Westphal; Eulless v., App.	235	742
White, Ex parte, Sup.	234	396
White v. Ardzrooni, App.	235	461
Williams v. City of Stockton, Sup.	235	986
Williams v. Coleman, App.	233	397
Williams; Johnson v., Sup.	233	330
Williams; Nightingale v., App.	233	807
Williams; People v., App.	236	355
Willis; Bauer v., Sup.	233	342
Willis; People v., App.	233	812
Woodworth v. Town of Sebastopol, App.	236	981
Wood & Stevens; C. O. Bashaw Co. v., App.	236	346
W. P. Fuller & Co. v. McClure, Sup.	235	731
Wright & Hogan v. Heide, App.	236	219
W. S. Smith & Son v. Industrial Accident Commission, App.	236	962
Yahne; People v., Sup.	235	50
Yanagisawa; Little v., App.	233	357
Yates; People v., App.	236	185
Zahn v. Board of Public Works of City of Los Angeles, Sup.	234	388
Zeller v. Milligan, App.	236	349
Zolkoske v. United States Farm & Land Co., App.	236	344



CALIFORNIA REPORTER

233 PACIFIC REPORTER

70 Cal. App. 295

CITY OF OAKLAND v. PARKER et al.
(Civ. 4932.)

(District Court of Appeal, First District, Division 2, California. Dec. 18, 1924. Hearing Denied by Supreme Court Feb. 16, 1925.)

1. Eminent domain ⇨167(1)—City desiring land for new public street may proceed either under Civil Code of Procedure or under Special Street Opening Act.

A city desiring land for a new public street may proceed either under Code Civ. Proc. §§ 1237-1264 or under the Special Street Opening Act of 1903.

2. Eminent domain ⇨167(2)—When code provisions followed in condemnation proceedings, property owner cannot question necessity thereof or advisability of route chosen.

Where city in acquiring land for new public street followed procedure authorized by Code Civ. Proc. §§ 1237-1264, property owner

cannot question necessity thereof or advisability of route chosen.

3. Eminent domain ☞67—Necessity and route legislative questions and determination by legislative body conclusive.

In all condemnation proceedings brought under Code Civ. Proc. §§ 1237-1264, questions of necessity and route are legislative ones, and determination by legislative body is conclusive.

4. Eminent domain ☞171—That proposed street would benefit one property owner more than another, or that one property owner agreed to pay all expenses, no defense.

That proposed street would benefit one property owner more than another, or that one property owner had agreed to pay all expenses, is no defense to city's right to condemn land for public street.

5. Eminent domain ☞66—Courts cannot interfere with determination of council as to route of proposed street or necessity of condemnation.

Courts cannot interfere with determination of city council as to route of proposed street or necessity for condemnation in acquiring lands under Code Civ. Proc. §§ 1237-1264, for street purposes.

6. Eminent domain ☞136—Measure of damages is actual value of property taken plus damage to property not taken.

The measure of damages to property owner in condemnation is actual value of property taken plus damage, if any, to land not taken; test being fair value in view of purposes to which property is naturally adapted, and not value for special purpose.

7. Evidence ☞113(1)—Refusal to hear evidence as to value land might have, if city opened street in another portion of block, held proper.

In condemnation proceedings by city to acquire land to open new public street, where court heard all evidence as to fair value of property taken, and damage to that not taken, refusal to hear evidence as to what value land might have if street were opened in another portion of block more suitable to property owner's plans for subdividing his tract was proper.

8. Evidence ☞113(1)—Rejection of evidence of value based upon rejected scheme requiring laying out dead end street held proper.

In condemnation proceedings by city to acquire land for public street, evidence of value based on a scheme requiring laying out of a dead end street, which scheme had been rejected by city authorities, held properly rejected as purely speculative.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Condemnation proceeding by the City of Oakland against W. Parker and others. Judgment for plaintiff, and defendant W. M. Greuner appeals. Affirmed.

J. W. Bingaman, of Oakland, for appellant.

Leon E. Gray, City Atty., and Bestor Robinson, Deputy City Atty., both of Oakland, for respondent.

NOURSE, J. The plaintiff sued to condemn a certain strip of land in the city of Oakland to be used for the purpose of a public street. The cause was tried by the court sitting without a jury. Findings and judgment were entered, condemning the land for the purposes mentioned, and the plaintiff paid into court the sum awarded to the defendant W. M. Greuner. From this judgment said defendant prosecutes this appeal upon the judgment roll and a bill of exceptions.

In his opening brief the appellant advances four grounds of attack upon the judgment which we will consider in the order presented:

[1-5] (1) That the appellant was deprived of the opportunity of being heard before the city council for the purpose of showing that the land was really being condemned for a private use. The point is that as an adjoining property owner would be greatly benefited by the opening of the street and paid to the city all the expense of the condemnation proceedings, the use for which the property was taken was a private one. The answer is that, for the purpose of acquiring land for a new public street, a city may proceed under the general laws relating to condemnation of property for public uses (sections 1237-1264, inclusive, Code Civ. Proc.), or under the special Street Opening Act of 1903 (Stats. 1903, p. 376). City of Los Angeles v. Cline, 40 Cal. App. 487, 489, 181 P. 78. When the procedure authorized by the Code of Civil Procedure is followed, the property owner is not entitled to be heard on the question of necessity or advisability of the route chosen. City of Los Angeles v. Leavis, 119 Cal. 164, 165, 51 P. 34; Adamson v. County of Los Angeles, 52 Cal. App. 125, 129, 198 P. 52; County of Los Angeles v. Rindge Co., 53 Cal. App. 166, 170, 200 P. 27. In all cases brought under the general code provisions the questions of necessity and route are purely legislative ones to be determined by the legislative body alone. Wulzen v. Board of Supervisors, 101 Cal. 15, 21, 35 P. 353, 40 Am. St. Rep. 17; County of San Mateo v. Colburn, 130 Cal. 631, 635, 63 P. 78, 621; County of Riverside v. Alberhill, etc., 34 Cal. App. 538, 540, 168 P. 152. Such determination when made by the legislative body is conclusive. See section 1241, Code Civ. Proc. The fact that the proposed street would benefit one property owner more than another is no answer to the city's right to condemn the land and open the street for public use. County of Riverside v. Alberhill, etc., 34 Cal. App. 538, 541, 168 P. 152.

And the same may be said as to appellant's objection that this property owner had agreed to pay all the expenses of the acquisition of the land. *Santa Ana v. Harlin*, 99 Cal. 538, 541, 34 P. 224. In his closing brief the appellant states that the question before the court on this appeal is whether a city may condemn private land for street purposes at the behest of a landowner who agrees to pay the entire cost of the proceeding. But we find running through all the argument that appellant's real position is that, if the city had laid out the street on a different route it would have been of greater benefit to him. As we have seen, the questions of route and necessity are for the council to decide, and when this determination is made the courts may not interfere.

(2) That the code provisions relating to eminent domain proceedings are unconstitutional because they give the plaintiff an option to enforce or abandon the proceedings, thus discriminating against the defendants. Inasmuch as the respondent has not attempted to avail itself of this option, the question is not involved in this appeal. Anything that we should say on the point raised would therefore be mere dicta, and as such it would add nothing to the opinion.

[6, 7] (3) That the court erred in refusing to consider evidence of the fitness of appellant's land for subdivision purposes and the effect of the taking upon his plans for such subdivision. The measure of damages to which a property owner is entitled in condemnation is the market or actual value of the property plus the damage to the land not taken, if any. In estimating this value "the test is, not value for a special purpose, but fair value in view of all purposes to which the property is naturally adapted." 10 Cal. Jur. p. 338. Such uses, however, do not include remote or speculative possibilities (*Yolo Water & Power Co. v. Hudson*, 182 Cal. 48, 53, 186 P. 772), or the value if the property should be devoted to some other particular use (*Sacramento Southern Railroad Co. v. Heilbron*, 156 Cal. 408, 409, 104 P. 979; *Oakland v. Pacific Coast Lumber Co.*, 171 Cal. 392, 400, 153 P. 705). Here the trial court heard all evidence directed to the fair value of the property taken, and to the damage to the portion of the tract not taken. It refused to hear evidence of what value the land might have if the city would open a street in another portion of the block more suitable to appellant's plans for subdividing his tract. In this the court committed no error.

[8] (4) That there is no evidence to support the award of damages made by the trial court. The point is that all the witnesses for the respondent disqualified themselves because of the basis upon which they estimated the value of the property, and that the court was therefore bound by the evidence of appellant's witnesses, all of whom fixed the

value higher than the amount awarded. The respondent answers that the evidence was received without objection, and that the trial court, acting under a stipulation made by the parties, viewed the premises, and thereby gained some knowledge of the value of the property, which must be treated as evidence in support of the findings. In each instance there are respectable authorities which support respondent's answers to the point raised, but it is unnecessary to cite them, because the witnesses called by the respondent fixed the value upon the basis of the fair market value, and disregarded the speculative value which the appellant sought to place upon the property in the event that some other scheme of development of the entire tract was adopted. As it was shown that the city authorities had rejected this scheme because it would require the laying out of a blind or "dead end" street, the trial court properly rejected evidence of value based upon this scheme as purely speculative.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

70 Cal. App. 372

JAMES v. SCHAFER et ux. (Civ. 2866.)

(District Court of Appeal, Third District, California. Dec. 24, 1924.)

1. Fraudulent conveyances ⚡241(2)—Judgment against debtor, though a nonresident, is essential to creditor's action to set aside alleged fraudulent conveyance.

Under Civ. Code, § 3441, it is essential to creditor's action to set aside alleged fraudulent conveyance of debtor's property, that claim against such debtor be reduced to judgment, or so far prosecuted that legal process to which he is entitled is obstructed, and this though debtor be a nonresident against whom personal judgment could not be obtained.

2. Appearance ⚡19(2)—Nonresident's appearance by demurrer in action for legal and equitable relief may sustain personal judgment for legal relief, though complaint insufficient to state cause of action for equitable relief.

In action against nonresident defendant for money had and received, and for cancellation of alleged fraudulent conveyance, defendant's appearance by general demurrer on ground that complaint did not state facts sufficient to constitute cause of action is sufficient to give court jurisdiction to enter personal judgment against him for legal relief sought, though complaint may not state sufficient facts to constitute cause of action for equitable relief sought.

3. Pleading ⚡49—Complaint stating cause of action for either equitable or legal relief is sufficient as against demurrer on ground that it does not state cause of action.

Complaint in suit for both legal and equitable relief is sufficient as against demurrer

on ground that it does not state facts sufficient to constitute a cause of action, if it states a cause of action for either legal or equitable relief.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by A. L. James, as receiver of the First National Bank of Gridley, against J. A. Schafer and Clara E. Schafer, his wife. Judgment for plaintiff, and defendants appeal. Judgment as to J. A. Schafer reversed in part and affirmed in part, and as to Clara E. Schafer reversed.

Carleton Gray, of Oroville, for appellants.
King & King, of Gridley, for respondent.

PLUMMER, J. This action was begun by the plaintiff to obtain a judgment and decree of the court setting aside a certain transfer of real property made, executed, and delivered by the defendant J. A. Schafer to his wife, Clara E. Schafer, on the ground that said transfer was made for the purpose of hindering, delaying, and defrauding creditors, and that no consideration had been paid therefor. The second amended complaint sets forth facts upon which the plaintiff seeks both legal and equitable relief. The legal relief sought is a judgment in the sum of about \$43,000 against the defendant J. A. Schafer for and on account of moneys belonging to the said First National Bank of Gridley, had and received by the defendant J. A. Schafer, and unlawfully converted to his own uses and purposes; the equitable relief sought being the cancellation of the transfer of real property, as before stated. The complaint is in eleven counts, all of them being identical; hence a summary of one will suffice for a clear statement of the whole complaint.

The organization of the First National Bank of Gridley is first set forth, its membership in the Federal Reserve Bank of this district, the ensuing insolvency of the bank, and the appointment of the plaintiff herein as receiver thereof. The complaint then alleged that during the year 1920 the defendant J. A. Schafer, in violation of his trust as president and manager of said bank, entered into a secret partnership with one Mary A. Rinesmith in the cultivation of rice, and for the purpose of financing the same loaned and advanced, out of the funds of said bank, different sums of money (these sums are fully set forth in the complaint); that the said Mary A. Rinesmith at the time said moneys were advanced was insolvent; that the said defendant J. A. Schafer knew thereof; that no security was taken for the repayment of the funds to the bank so loaned, and that the funds so loaned by the defendant J. A. Schafer to the said Mary A. Rinesmith was a total loss, etc.; that thereafter, and on or about the 27th day of December, 1920, and

after the indebtedness hereinabove referred to had been incurred, the said J. A. Schafer, for the purpose of defrauding the plaintiff, and in order to prevent it from collecting said indebtedness, etc., conveyed to his wife, the defendant Clara E. Schafer, three parcels of land; that the deeds conveying said parcels were recorded in official records of Butte county; that said parcels of land were not exempt from execution, and that, after the execution and recording of said deeds, there remained no property standing in the name of said defendant J. A. Schafer, etc., out of which the indebtedness due said plaintiff could be satisfied from, either in whole or in part; that immediately after making and recording said conveyance both of said defendants departed from the state of California, and ever since have been and now are nonresidents of said state; and that both of said defendants reside in Columbus, in the state of Ohio. Further allegations are set forth showing that the act of the defendant Schafer was in violation of the statutes governing members of the Federal Reserve Bank and establishing liability of said defendant for all sums so fraudulently appropriated by him; also the insolvency of said defendant at the time of the transfer. To this second amended complaint the defendants demurred generally to each separate cause of action in identical language except as to the numbering thereof. We quote the first:

"That the first cause of action attempted to be set forth in said second amended complaint does not state facts sufficient to constitute a cause of action."

The court overruled the demurrer interposed by the defendants, the defendants failed to answer, and judgment was entered in favor of the plaintiff, as prayed for by him, and from this judgment the defendants appeal.

[1] It thus appears from the second amended complaint that at the time this action was instituted the plaintiff did not have any judgment against the defendant J. A. Schafer for any of the sums of money alleged to be due from him to the bank of which the plaintiff was the receiver, nor that any suit had been commenced to recover such judgment, nor had any lien, by attachment or otherwise, been acquired by the plaintiff upon the lands and premises, the conveyance of which from the defendant J. A. Schafer to his wife Clara E. Schafer is sought to be set aside. It is purely an action to set aside a conveyance without first having acquired any judgment against either of the defendants, and without having acquired any lien upon the lands and premises alleged to have been fraudulently conveyed. The sole reason for not having proceeded to acquire either a judgment or attachment lien upon the premises is the alleged fact that at the time of the commencement of this action the defend-

ants were both nonresidents of the state of California; and this is urged as an exception to the general rule that a creditor at large without a judgment is not in a position to maintain an action to set aside a conveyance of property made by his debtor. Section 3441 of the Civil Code, defining the right of a creditor, indicates that such right must first have been judicially ascertained. The section reads:

"A creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcement, by legal process, of his right to take the property affected by the transfer or obligation."

In other words, the creditor must have brought himself in that position where the legal process to which he is entitled is obstructed.

Relying upon a paragraph of the opinion written by Commissioner Cooper in the case of *First National Bank v. Eastman*, 144 Cal. 487, 77 P. 1043, 103 Am. St. Rep. 95, 1 Ann. Cas. 626, the respondent alleges that, as both of the defendants in this case were nonresidents, it was unnecessary to acquire any lien upon the premises, the transfer concerning which it was sought to have set aside, and this for the reason that a personal judgment against the defendant J. A. Schafer would be of no avail; that a personal judgment for money against a nonresident does not constitute any lien, and is not, in and of itself, any basis for an execution. This is all true, but the argument which leads to this conclusion also leads to the conclusion that the judgment in the case at bar fixing and determining the amount of the indebtedness from the defendant J. A. Schafer to the bank, of which the plaintiff is the receiver, founded upon constructive services, would stand upon the same basis. The language of the opinion referred to is as follows:

"It is the general rule that a creditor must reduce his claim to a judgment before he can maintain an action of this character. But to this rule there is a well-established exception. Where the defendant is a non-resident, a personal judgment cannot be obtained against him, and therefore the fact of his being a non-resident creates an exception to the rule, and such action can be maintained without the creditor having obtained a judgment."

To support this rule cases are cited from Indiana, Iowa and Missouri.

An examination of that case and the facts upon which it is based shows that the language quoted is not so broad when applied to the facts under consideration, as contended for by the respondent. The complaint in that case sets forth that attachment proceedings had been taken and had, an attachment lien had been acquired, and a judgment entered for the amount claimed, and in the complaint in a cause of action

immediately under consideration the indebtedness was not pleaded, simply the judgment was pleaded as evidencing the indebtedness, and the court, after considering all of the facts, held that was not a sufficient pleading, and, as previously pointed out in the opinion, shows that the judgment would be good only as it partook of a proceeding in rem against the property, as where it says, "The property of the non-resident is seized by the process of attachment, the court may in such suit dispose of the property, but it cannot go further and give a personal judgment, except one which can be enforced as to the seized property against such non-resident. In the suit against Eastman the court might have directed a judgment which would justify the sale of the property to satisfy the plaintiff's claim, * * *" and, further, that "such service may answer in all actions which are substantially proceedings in rem. But, where the entire object of the action is to determine the personal rights and obligations of the defendants—that is, where the suit is merely in personam—constructive service in this form upon a non-resident is ineffectual for any purpose * * *" and, further "in attachment proceedings the published notice may be sufficient to enable the plaintiff to obtain a judgment which he can enforce by sale of the property attached; but for any other purpose such judgment would be ineffectual."

Appreciating the impossibility of obtaining a valid personal judgment against a non-resident in actions of this character, some courts have held that an attachment lien will suffice, in that it gives the court jurisdiction to take the seized property and apply it toward the payment of the debtor's obligation. Thus, in *Heyneman v. Dannenberg*, 6 Cal. 376, 65 Am. Dec. 519, in a case decided before the adoption of section 3441, Civil Code, the Supreme Court said:

"A court of equity will take jurisdiction of a bill for an injunction filed by attaching creditors of an insolvent, to restrain proceedings on execution against the property attached under a judgment against the debtor, in favor of another, alleged to have been obtained by fraud, where all the material allegations of the bill, except fraud, are admitted,"

—and then, considering the question of courts having held the necessity of a previous judgment having been obtained, further said:

"The modern decisions of some of the courts of the United States, seem, however, to have relaxed the severity of the English rule, and in some cases it has been held that a creditor who has acquired a lien under the attachment laws of a state may apply to a court of chancery without first proceeding to judgment."

In *Aigeltinger v. Einstein*, 143 Cal. 609, 77 P. 669, 101 Am. St. Rep. 131, the Supreme Court speaking through Chipman, Commissioner, cites practically all the preceding

cases on this subject, and lays down the rule that "a creditor who has merely levied an attachment upon real property as the property of his debtor, subsequent to the date of an alleged fraudulent conveyance made thereof by the debtor to his wife, cannot prior to the rendition of a judgment against the husband maintain an action in equity to set aside the conveyance." An examination of this case shows that an attachment had been issued, and a lien of that character fixed upon the property sought to be subjected to the payment of the creditor's claims.

In *Lyden v. Spohn-Patrick Co.*, 155 Cal. 177, 100 P. 236, the Supreme Court said:

"No one but a creditor, or one having some interest or estate in the property, can maintain a suit to set aside a fraudulent transfer. It is the general rule that even a creditor cannot do so until after he has established his debt by the recovery of a judgment thereon," citing a number of cases.

"The beginning of an action and the issuance and levy of a writ of attachment therein does not give the plaintiff a status which will enable him to maintain such action. * * * There is an exception to these rules in cases where the debtor is a non-resident and where, consequently, no personal judgment can be obtained against him,"

—overlooking the fact entirely that in the case stated to sustain this last proposition the property was held under an attachment lien.

In *Sewell v. Price*, 164 Cal. 267, 128 P. 409, the Supreme Court, speaking through Justice Sloss, outlined the necessary procedure preceding the maintenance of a creditor's bill as follows:

"Section 3441 of the Civil Code provides that 'a creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcement, by legal process, of his right to take the property affected by the transfer or obligation.' Consequently it is universally held that a creditor is not in a position to attack a transfer for fraud unless he has a specific lien upon the property transferred or has reduced his claim against the debtor to judgment. The rule is thus stated in *Brown v. Campbell*, 100 Cal. 635 (38 Am. St. Rep. 314, 35 P. 433), quoting from *Bump on Fraudulent Conveyances* (2d Ed.) p. 522: 'A creditor cannot be said to be delayed, hindered or defrauded by any conveyance, until some property out of which he has a specific right to be satisfied is withdrawn from his reach by a fraudulent conveyance. Such specific right does not exist until he has bound the property by judgment, or by judgment and execution, as the case may be, and has shown that he is defrauded by the conveyance in consequence of not being able to procure satisfaction of his debt in due course of law.' The bill maintained by a judgment creditor to subject to the payment of his demand property fraudulently transferred by the debtor is not, strictly speaking, an action upon his judgment. It is really an action for equitable relief against

the obstruction caused by a transfer which hinders him in satisfying his claim by the ordinary process of law, that is to say, by an execution. If, then, he puts himself in a position to levy execution, he has done everything necessary to enable him to attack the transfer which hinders his enjoyment of his right."

Again, in *Roberts v. Buckingham*, 172 Cal. 458, 156 P. 1018, the Supreme Court, speaking through Justice Shaw, announces the rule as follows:

"So far as this complaint attempted to state a cause of action to set aside the alleged fraudulent deed it was defective for the reason that it did not show that the plaintiff had established his debt against Buckingham by reducing it to the form of a judgment. Civ. Code, § 3441; *Aigeltinger v. Einstein*, 143 Cal. 609 (101 Am. St. Rep. 131, 77 P. 669); *McMinn v. Whelan*, 27 Cal. 315; *First National Bank v. Eastman*, 144 Cal. 487 (103 Am. St. Rep. 95, 1 Ann. Cas. 626, 77 P. 1043); *Lyden v. Spohn-Patrick Co.*, 155 Cal. 177, 183 (100 P. 236); *Sewell v. Price*, 164 Cal. 265, 270 (128 P. 407). The allegation that Buckingham was a nonresident of the state does not cure the defect. The cases cited establish the proposition that even against a nonresident the creditor must first prosecute his suit so far, at least, as to obtain some specific lien, as by attachment, upon the property."

This case is directly in point, in that it deals with proceedings against a nonresident, and clearly enunciates the rule that the property must be bound by some specific lien, as by attachment, before a creditor's bill will lie.

In 12 California Jurisprudence, p. 1035, § 75, the rule in this particular is thus stated: "Where the debtor is a nonresident, and in consequence no judgment can be obtained against him, the creditor may bring suit without having reduced his claim to judgment but he must have prosecuted his action against the debtor so far as to obtain a specific lien on the debtor's property," citing *Roberts v. Buckingham*, supra, and a number of other cases, and on page 1036 of the same volume, section 76, the authorities are collected showing that either an attachment or judgment lien against the property must first have been established, or obtained, before a creditor's bill to set aside an alleged fraudulent transfer can be maintained.

In 12 Ruling Case Law, p. 629, § 136, the authorities are collected showing a conflict in the rule as to whether an action in the nature of a creditor's bill may be maintained when the property alleged to belong to the creditor is bound only by an attachment lien. The weight of authority would lead to the conclusion that in cases where the defendant is a nonresident an attachment lien would suffice. It is clear, however, from the other authorities which we have cited that the creditor must have established some specific lien upon the property alleged to belong

to the debtor, and withdrawn from execution by some act which obstructs the legal process, to which the creditor has shown himself entitled before the institution of suit to set aside the conveyance.

[2, 3] This conclusion, however, does not lead to an entire reversal of the judgment herein. The complaint, while not stating a cause of action for equitable relief against the defendant J. A. Schafer, does state a cause of action for money had and received, and appropriated by the defendant to his uses and purposes, which belonged to the First National Bank of Gridley, and the said defendant, having appeared by a general demurrer, gave the court jurisdiction to enter against him a personal judgment. The demurrer, as we have seen, is general in form, and simply alleges in relation to each count that it does not state a cause of action. The demurrer does not point out that the complaint does not state a cause of action for equitable relief, nor is there any special demurrer calling the attention to specific defects, nor is there any ground of demurrer alleging or showing misjoinder of parties. It follows therefore that, if the complaints state any cause of action, it is sufficient. In *White v. Lyons*, 42 Cal. 279, it is said:

"If a complaint states facts which entitle the plaintiff to relief, either legal or equitable, it is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action."

See, also, *Hulsman v. Todd*, 96 Cal. 228, 31 P. 39; *Jones v. Iverson*, 131 Cal. 101, 63 P. 135. Other cases might be cited, but, as there is no conflict in the decisions on this point, further citation is unnecessary.

It follows from what has been said that the judgment against both the defendants, in so far as it purports to award equitable relief, must be reversed, and in so far as the money judgment is entered against the defendant J. A. Schafer it must be affirmed. This result, though necessitated by the language of section 3441 of the Civil Code, is not serious, as it leaves the plaintiff with a judgment lien against any property owned by the defendant J. A. Schafer at the time of its rendition, and, if the facts are as alleged in plaintiff's complaint in relation to the fraudulent transfer of the property there described, the foundation is laid for subjecting it to the payment of plaintiff's claims. The judgment, in so far as it awards equitable relief, is hereby reversed, and in so far as it awards judgment for the recovery of the moneys had and received by the defendant J. A. Schafer it is affirmed. The appellant Clara E. Schafer is allowed her costs on appeal.

We concur: FINCH, P. J.; HART, J.

70 Cal. App. 326

LISHER v. FAIRBANKS. (Civ. 4768.)

(District Court of Appeal, First District, Division 1, California. Dec. 22, 1924.)

1. Contracts ⚡198(5)—Road contractor's contract construed as affected subcontractor's right to payment for excavations below grade line.

Road contractor's contract with county, providing for payment at stipulated rate "for all concrete work, including all excavations," held to contemplate payment for excavations made below grade line in placing concrete structures, as affected rights of subcontractor to payment for excavations so made below grade line.

2. Contracts ⚡231(2)—Subcontractor held entitled to recover in accordance with his contract, regardless of principal contractor's rights against county.

Subcontractor for road construction held entitled to recover for excavations made below grade line in placing concrete structures, pursuant to his contract with principal contractor, regardless of principal contractor's right to recover of county for such work.

3. Contracts ⚡232(4)—Subcontractor held entitled to recover of principal contractor on quantum meruit, though written order of county engineer authorizing work not made.

Subcontractor on highway held entitled to recover on quantum meruit for work authorized by county engineer apparently with principal contractor's consent, though no written order from engineer authorizing such work was made.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action by S. G. Lisher against A. J. Fairbanks. Judgment for defendant, and plaintiff appeals. Reversed.

Wallace Rutherford, of Napa, for appellant.

Mannon & Mannon, of Ukiah, for respondent.

KNIGHT, J. Plaintiff as assignee brought this action to recover of and from the defendant, A. J. Fairbanks, the sum of \$2,023.77, for certain road construction work done and performed by plaintiff's assignor, G. L. Lisher. The second amended complaint is in two counts. The first count declares upon a written contract and covers a demand of \$1,979.03, and the second count is upon a quantum meruit for the recovery of \$44.74 for work done on the same road, outside of the written contract. Before the trial was concluded, plaintiff was paid the sum of \$1,454.11 on the amount claimed to be due under the first count, leaving in dispute a balance under that count of \$502.43. Plaintiff was denied relief on both counts, and has appealed.

In September, 1920, the county of Sonoma awarded a contract to respondent for the rebuilding of section "A" of the Healdsburg-Forestville highway, which included the work of grading, filling, removal of oil from roadway, graveling, and concrete work. Subsequently, on April 1, 1921, respondent entered into a separate contract with G. L. Lisher, appellant's assignor, to do the concrete work specified in the county contract. Referring to the first count, the controversy arises over the refusal of respondent to pay for the excavation of 669.9 cubic yards of earth necessarily removed by Lisher below the adopted grade line, in order to construct the concrete drain boxes in conformity with the county plans and specifications.

Respondent's contract with the county was based upon certain unit prices, which, so far as they are important here, were as follows:

"For excavations * * * as may be necessary to bring the surface of the roadway to conform with the adopted grade and cross-section, the sum of eighty-five cents (85 cents) per cubic yard. The yardage to be paid for being only in excavation." For graveling the entire length of the road \$21,315.80. "For all concrete, including all excavations, back-filling, forms, materials, reinforcement, hauling, and labor, the sum of thirty dollars (\$30.00) per cubic yard in place complete. This applies to headwalls, catch basins, small culverts, etc., but does not apply to bridges and larger structures."

The "grading" section of the contract and specifications provided:

"(j) The contract price per cubic yard of excavation shall include loading * * * clearing, ditching, excavations, and removal of oil, rock, and all other work incidental to the grading as shown in paragraph (a) under 'grading.' The contractor shall be paid only for that portion of the excavation and removal of oil which lies above the adopted grade line, and shall not be paid for the excavation and removal of oil which lies below the adopted grade line."

Lisher's contract with Fairbanks, which, as before stated, covered only the concrete structures specified by the county contract, "including boxes and culvert pipe headwalls," was let upon the following unit prices:

"For concrete headwalls \$26 per cubic yard. For all concrete in place \$25 per cubic yard. For excavation for concrete boxes 75 cents per cubic yard."

The quotation of these prices in the contract was followed by this provision:

"All work to be done in accordance with the contract, plans, and specifications of the county of Sonoma, which are referred to and made a part of this contract, and to the satisfaction of the engineer, whose decision will be final in all matters affected by the contract which may be in dispute between the parties hereto."

Respondent's refusal to pay for the excavations in question is based upon the above-quoted limitation clause of the county contract, regarding excavations, and the reference clause of the Lisher contract which makes the county contract a part of the Lisher contract. Respondent in this respect contends, and the trial court held, that in view of these two provisions "unless Fairbanks received payment from the county for excavation claimed by plaintiff that defendant was under no obligation to pay Lisher for such excavation. In other words," says respondent, "the trial court held that because Fairbanks was not paid for excavations below the adopted grade line, Fairbanks need not pay Lisher for excavations below the grade line."

[1, 2] We are unable to acquiesce in that view of the situation. In the first place, the assumption by respondent and by the trial court that the county contract made no provision for the payment to Fairbanks for excavations made below the grade line in placing the concrete structures, and that Fairbanks was not paid therefor, is not borne out by the plain terms of that contract which show clearly that the clause restricting payment in the matter of excavations, which respondent seeks to enforce against appellant, applies exclusively to the grading feature of the contract with which appellant had nothing to do, and has no connection whatever with that section of the contract dealing with the concrete work. The matter of excavations for concrete structures was separately specified in the contract, the payment for which was included in the unit price of \$30 a cubic yard for all concrete work, the contract reading:

"For all concrete work, *including all excavations* * * * the sum of thirty dollars (\$30.00) per cubic yard in place complete."

Furthermore, the evidence shows that the total amount of Lisher's demand against respondent for placing the concrete structures, exclusive of the excavations in question, was, under the unit prices of the Lisher contract, \$10,711.30, and with the cost of the excavations added amounted to \$11,236.22; whereas for the same work respondent's total demand against the county under the county contract, computed according to the unit price stated therein of \$30 a cubic yard "for all concrete work including all excavations," amounted to \$12,777, showing a profit on Lisher's work of \$1,540.78, even though he is required to pay the Lisher excavation demand herein sued upon. But irrespective of the question of whether or not the county contract allowed respondent pay for the particular work in dispute, it is manifest, that so far as Lisher's compensation from respondent was concerned, it was fixed and must be determined by the terms of their own contract. The county contract was un-

questionably made a part of the Lisher contract, but obviously for the sole purpose of specifying the concrete work to be done, its location, and the manner of doing it; otherwise it had no relation whatever to the Lisher contract, particularly regarding the matter of compensation. The pay that each contractor was to receive was fixed by the terms of his own contract and was based upon entirely different units. The county contract specified "all concrete work, including excavations" in one unit at \$30 a cubic yard, while the Lisher contract divided the concrete work into three units as follows: \$26 a cubic yard for headwalls; \$25 a cubic yard for "concrete in place"; and, "for all excavations for concrete boxes 75 cents per cubic yard." It thus appears that there was no limitation or restriction whatever placed in the Lisher contract as to payment for excavations, whether made from below or above the adopted grade line. Appellant is therefore entitled to payment for the full number of cubic yards of earth (669.9) Lisher admittedly excavated. The 176 cubic yards of excavations mentioned in the findings, for which appellant was paid, is shown by the evidence to refer to the work done by Lisher, outside of his contract, in excavating for a ditch, and did not relate to the concrete work.

[3] We are also of the opinion that appellant is entitled to recover the amount claimed to be due under the second count. Part of the work covered by the demand is admittedly due, Fairbanks himself having ordered it, and the remainder, for placing 12 yards of rock under a culvert, was authorized by the county engineer, apparently with respondent's consent, and for aught the record shows respondent received the benefit thereof under his contract with the county. Appellant performed the work for respondent and not for the county, and he seeks to charge the respondent and not the county therefor; consequently a written order from the engineer, authorizing the work, was not necessary the same as it would have been if the county was sought to be held liable.

Judgment reversed.

We concur: TYLER, P. J.; ST. SURE, J.

70 Cal. App. 309

WALTON v. DONOHUE. (Civ. 4961.)

(District Court of Appeal, First District, Division 2, California. Dec. 20, 1924. Hearing Denied by Supreme Court Feb. 16, 1925.)

1. Master and servant §316(1)—Party towing disabled car held independent contractor.

Where defendant did not attempt to state any directions to party offering to tow her disabled car, and he did not consult her nor ask for any directions or consent to be governed

by any if they were given, his relationship to defendant was that of an independent contractor, and not that of an employee for whose acts defendant was liable.

2. Master and servant §330(1)—Burden of showing relation on plaintiff.

In action for death, when car in which decedent was riding was struck by car towing defendant's car, burden of showing relationship existing between defendant and party towing her car was on plaintiff.

3. Master and servant §332(1) — Nonsuit properly granted for lack of proof of relation.

In action for death of plaintiff's decedent when car in which he was riding was struck by a car towing defendant's car, on plaintiff's failure to introduce any proof on count alleging that such party was employed to tow defendant's car, court properly granted a nonsuit as to such count, in view of Code Civ. Proc. § 581, subd. 5.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by Anna B. Walton against Mildred T. Donohue. From an order granting a nonsuit, plaintiff appeals. Affirmed.

Strother P. Walton, of Fresno, for appellant.

Myron Harris and John Jewett Earle, both of Oakland, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover damages for personal injuries which caused the death of the minor child of the plaintiff. She framed her complaint in three counts. At the end of the plaintiff's case the trial court granted a nonsuit as to the second cause of action, and the plaintiff has appealed from that order.

On the 19th of June, 1922, Arthur M. Guenin, as the agent of John Jeel, was driving a truck from Hayward toward Fresno on the state highway in the neighborhood of Livermore. Morgan Walton, a young boy, was a guest riding on the truck with him. Guenin was sitting on the left-hand side of the seat at the steering wheel. Walton was seated on the seat on the right-hand side. At about 7:30 in the evening, at a point three or four miles east of Livermore, they were traveling on a pavement in the middle of the roadway. The pavement was 15 or 16 feet wide. At that point they had been putting patches in the pavement and had erected barricades to protect the patches until they became dry. The barricades were 3½ to 4 feet high. They were painted white. The barricades extended probably an eighth of a mile along the highway. They reached out into the highway probably about 4 feet. As Guenin was passing this territory he could see two cars approaching which he afterwards learned were the Overland and Stutz hereinafter

mentioned. As near as he could tell the two cars were in about the center of the road. They were south of the barricade. Guenin testified:

"I saw those cars coming and of course I expected them to turn in and I kept going east. When I saw they did not, I kept turning out of the road more and more until my inside wheels were two feet on the pavement. I thought there was plenty of room to go by because I am a pretty good judge of distance that way. I saw the car in front hit by the rear car and it hit his car at an angle right across and in front of my left wheel on the left-hand side. It came at an angle across the pavement. My outside wheel being over the side of the bank it threw the steering wheel out of my hand and the truck upset and rolled half over right there."

The witness further testified how, as a result of the accident, Morgan Walton lost his life.

The Stutz car, mentioned by Guenin, was occupied by Mrs. Mildred T. Donohue, who had driven from a point in the neighborhood of Modesto toward Oakland until she reached a point near Altamont on the state highway. At that point her automobile developed troubles, and would not work. Mrs. Pratt, her sister, was with her in the automobile. Mrs. Pratt stopped a passerby and asked that assistance be sent to them. In reply a Mr. Johnstone came over to the machine and asked what the trouble was. Mrs. Donohue told him. She testified:

"He asked me to try and start the car, which I did. It would not go. The engine would go, but as soon as I put on the clutch, lifted the clutch out, it would stop. So he got into his machine and backed it towards my car and took a tow rope and tied our car—that is fastened our car to his. He never offered to tow us. I never spoke to him at all about it. We went some little distance very slowly. I don't think we were going over 8 or 10 miles when the collision occurred. I did not see the collision."

She further testified:

"That she was driving a Stutz machine and that the machine belonged to her and that Mrs. Pratt was her guest. There was no conversation about how much it would cost to get me towed. He said in going that at the garage they would charge me around \$20 for a tow. I said it could not be helped. I did not say, as a matter of fact, it was all right; I did not say that. * * * At the coroner's inquest I did not say that I was fortunate to have the tow. He backed up to a point in front of my machine and connected the rope onto the end of my machine. The rope was about 15 or 18 feet. The distance separating the two machines was about 15 feet. Mr. Johnstone started to tow me; I did not object to his towing me. I did not get a chance, and I would not have known what to do in any event, night was coming on. He did not tow my car away from there against my will. At any rate, he backed up and attached his car to mine and I did not object. I took the wheel of my car. My car was all right with respect to everything except

the clutch; we found out afterwards the master gear was broken. The wheels were all right; the steering was all right; the brakes were all right. It is correct that there was nothing the matter excepting the motor power. The application of the motor power was weak. Mr. Johnstone and I started down east, toward Oakland. After we went a little ways we came toward the portion of the road on the north-hand side which had barricades. Mr. Johnstone and I took and crossed to the south and to the left-hand side of those barricades. He was guiding his car and I was guiding mine. That course took us so that my car was just about the center of the highway, I imagine. It is a fact that the cars had to go on the wrong or left-hand side to pass the barricades—mine and Mr. Johnstone's. I did not see the truck coming up until the collision, because our car was a 1917 model, and low. We were right behind the smaller car. My eyes were on the rope. I was looking ahead low. We went along in that position while on the left-hand side of the highway; I was watching the tow. I was looking ahead at the tow rope, but I was not looking ahead of the truck coming; I could not see that and watch the tow rope. I was not looking further than the tow rope—I could not very well. I was guiding my car on the left-hand side of the highway."

On cross-examination the witness stated:

"My machine, the Stutz, did not run into the Overland automobile at any time. The Overland car was pushed back against our car. It was pushed back by the truck. It was shoved back against my car. We were to the right of the Overland."

W. W. Whitton, the shorthand reporter who reported the proceedings at the coroner's inquest, was called as a witness, produced his notes and testified that at the coroner's inquest the defendant testified:

"I remember on the evening of June 19th, of witnessing an accident in which accident an automobile and a truck collided. I was driving the machine that was being towed. Mr. Johnstone was driving the other machine—was towing it. As we came out to Altamont my machine stopped. The clutch seemed to be grasping and I turned off and stopped right opposite the garage there. The garage was closed. I went across the street and asked, and the man said they had no phone. So this car came along. We stopped them and asked them if they would please send back a man from the garage. He asked what was the matter with the machine. I told him I did not know, but it wouldn't go; the clutch kept grabbing. He asked me to start the engine and he would see. So we started the engine and the machine wouldn't go, so the gentleman stepped in—his wife was driving at the time, and he had her take the other seat. He took the wheel and backed up to our machine and got his tow rope and started to tow us. He told me I was fortunate to have a tow because it would cost me \$20; and I said that was all right and we started out; and there was this barricade along the side of the road, just along the edge of the highway where the lanterns were, and we went quite a distance and when we were be-

ing towed we were going very slowly because he was still in second."

[1-3] Before proceeding further, it should be stated that in the first count of the plaintiff's complaint the plaintiff charged that the defendant—

"was in charge of and was driving a motor vehicle, which said motor vehicle was being towed by a motor vehicle driven by one Johnstone; that defendant did, carelessly and negligently, drive and operate the motor vehicle which she was then so operating, and that as a result of her wrongful act and negligence in so operating said motor vehicle, she did then and there cause the same to collide with the motor vehicle being operated by Johnstone and did cause said motor vehicle operated by said Johnstone to collide with and overturn the motor vehicle in which said Morgan Walton was a passenger. * * *

The second count charged:

"That said Johnstone was employed by defendant for towing of her said motor vehicle and she was responsible for his conduct; that at said time and place said Johnstone did carelessly and negligently drive and operate the motor vehicle which he was driving, and with which he was towing defendant's motor vehicle, and, as a result of said careless and negligent driving and operating of said automobile, said Johnstone did cause the same to collide with and overturn the motor vehicle in which said Morgan Walton was a passenger. * * *

In the third count the plaintiff alleged:

"* * * That at said time and place defendant was in charge of and was driving a motor vehicle, and one Johnstone was in charge of and was driving a motor vehicle; that defendant did carelessly and negligently operate the motor vehicle which she was driving, and Johnstone did carelessly and negligently operate the motor vehicle which he was driving; that the negligence of defendant and Johnstone did concur and said negligence so concurring did cause the automobile driven by defendant to strike the automobile driven by Johnstone, with the result then and there that the automobile driven by Johnstone did collide with and overturn the motor vehicle in which said Morgan Walton was a passenger. * * *

By a comparison of these three counts, it is patent that the effect on the plaintiff's rights of the order appealed from was to take from the jury a consideration of the question as to whether, under the evidence introduced, Johnstone was an employee of Mrs. Donohue. Both counsel have briefed the case on that theory.

Looking back over the evidence introduced by the plaintiff, it is clear that there was some conflict in the evidence as to whether, under the facts, Johnstone was acting gratuitously, for an agreed compensation, or for such compensation as the law would award him, but it is equally clear that there is not a word in the testimony showing or tending to show that Johnstone was acting

as the employee of Mrs. Donohue. On the other hand, it is quite clear that he was an independent contractor, whether gratuitously or for compensation it is not necessary to determine. In *Barton v. Studebaker Corp. of America*, 46 Cal. App. 707, 715, 189 P. 1025, 1028, the court said:

"The real test as to whether a person is an independent contractor or a servant is whether the person alleged to be the master, under his arrangement with the other party, has or has not any authoritative control of the latter with respect to the manner in which the details of the work are to be performed, and therefore, this test or element 'must, in the last analysis, always determine what was the essential nature of the relationship between the person who performed the given work and the person for whom it was performed.' *Labatt on Master and Servant*, § 18, p. 56."

The rule has been stated so many times that we do not deem it necessary to attempt to cite the numerous cases. The difficulty in every case is to ascertain whether the evidence shows or does not show the elements of the rule. In this case it will be seen at a glance that the respondent did not attempt to state any direction or directions to Johnstone, and that Johnstone did not consult her nor ask for any direction or directions, or consent to be governed by any if they were given. The burden of showing the relationship existing between the respondent and Johnstone rested on the appellant. Having failed to introduce the proof on that subject it was clearly correct for the trial court to grant the motion for a nonsuit on the second count. Code Civ. Proc. § 581, subd. 5.

The order granting the motion is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

70 Cal. App. 262

PEOPLE v. CLINTON et al. (Cr. 1199.)

(District Court of Appeal, First District, Division 1, California. Dec. 16, 1924.)

1. Burglary ☞10—Burglary of dwelling in nighttime may constitute burglary in second degree.

Under Pen. Code, § 459, and section 430, as amended by St. 1923, p. 747, defining burglary in first and second degree, burglary of house or building in nighttime may now constitute burglary in second degree, and word "inhabited," in section 460, is applicable to building as well as dwelling house.

2. Indictment and information ☞189(7)—Jury may find defendant guilty of burglary in either first or second degree, where information sufficiently charged burglary, though not alleging building inhabited.

Although an information charging burglary did not allege whether or not building was inhabited, but it sufficiently charged crime of burglary, jury could find defendant guilty of

burglary in either first or second degree, depending upon evidence.

3. Burglary — 41(1)—Evidence held insufficient to sustain conviction of burglary in first degree.

In view of Pen. Code, § 460, as amended by St. 1923, p. 747, evidence that store was burglarized in nighttime, but failing to show that store or any part of it was inhabited, or that defendant was armed, or that any person was assaulted, *held* insufficient to sustain conviction of burglary in first degree.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

James Clinton and others were convicted of burglary of the first degree, and they appeal. Reversed and remanded.

Ernest B. D. Spagnoli, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

ST. SURE, J. Defendants were jointly informed against for the crime of burglary. They were jointly tried, and convicted of burglary of the first degree. Appeal is taken from the judgment of conviction.

The information charged:

That the defendants "willfully and unlawfully did enter the store and room of Forsythe & Simpson in Burlingame, California, with the felonious intent then and there to commit the crime of larceny, all of which was then and there done by said defendants in the nighttime, contrary," etc.

[1-3] The main point of the defendants is that the judgment and verdict are void because defendants were charged with burglary of the second degree, and were found guilty of burglary of the first degree. We do not agree with this contention. Burglary is defined in sections 459 and 460, Penal Code. Section 459 provides that:

"Every person who enters any house, room, * * * or other building, * * * with intent to commit grand or petit larceny or any felony is guilty of burglary."

Section 460, as amended in 1923 (St. 1923, p. 747), provides that:

"1. Every burglary of an inhabited dwelling house or building committed in the nighttime, and every burglary, whether in the daytime or nighttime, committed by a person armed with a deadly weapon, or who while in the commission of such burglary arms himself with a deadly weapon, or who while in the commission of such burglary assaults any person, is burglary of the first degree.

"2. All other kinds of burglary are of the second degree."

Before amendment section 460 provided that:

"Every burglary committed in the nighttime is burglary of the first degree, and every bur-

glary committed in the daytime is burglary of the second degree."

Since the amendment, time alone does not fix the degree. We think that the word "inhabited" contained in section 460, as now constituted, is applicable to and descriptive of "building" as well as "dwelling house." It thus appears that some burglaries of a dwelling house or building in the nighttime may now, be burglaries of the second degree. The information before us does not allege whether or not the building was inhabited, but sufficiently charges the crime of burglary, under which it was competent for the jury to find the defendants guilty of burglary in either degree. *People v. Barnhart*, 59 Cal. 381, 383. This, of course, would depend upon the evidence adduced at the trial. In the instant case the evidence showed that a haberdasher's store was burglarized in the nighttime. But the record is barren of evidence showing, or tending to show, that the store entered was either an inhabited dwelling house or an inhabited building, or part either of an inhabited dwelling house or inhabited building. And there is nothing in the record showing that either of the defendants was armed with deadly weapons, or that any person was assaulted during the commission of the burglary. The jury returned the following verdict: "We, the jury, find the defendants guilty of burglary of the first degree."

We think it is quite clear that the evidence is wholly insufficient to support the verdict, and that, therefore, the judgment must be reversed and cause remanded for a new trial. It is so ordered.

We concur: TYLER, P. J.; KNIGHT, J.

70 Cal. App. 788

PEOPLE of the State of California, Plaintiff and Respondent, v. Merritt HIGBEE, Defendant and Appellant. (Cr. 1201.)

(District Court of Appeal, First District, Division 1, California. Dec. 16, 1924.)

Appeal by defendant from a judgment of the Superior Court of San Mateo County; George H. Buck, Judge, of conviction of burglary. Reversed.

Ernest B. D. Spagnoli, of San Francisco, for appellant.

U. S. Webb, Atty Gen., and Wm. F. Cleary, Deputy Atty Gen., for the People.

ST. SURE, J. Defendant appeals from a judgment of conviction, had upon an information wherein he is charged with the commission of the crime of burglary. This case may be characterized as a companion case to *People v. Clinton et al.*, Crim. No. 1199, 233 P. 78, this day decided by this court. The language contained in the charging part of the information is identical, and the facts adduced

at the trial are substantially the same. The same points are urged for reversal here as were urged there.

Upon the authority of *People v. Clinton et al.*, the judgment is reversed, and cause remanded for a new trial.

We concur: TYLER, P. J.; KNIGHT, J.

70 Cal. App. 393

HALL v. SUPERIOR COURT IN AND FOR IMPERIAL COUNTY et al. (three cases).
(Civ. 4801, 4809, 4810.) *

(District Court of Appeal, Second District, Division 2, California. Dec. 27, 1924.)

1. Prohibition ☞20—Party petitioning for writ must show right to it.

A party petitioning for writ of prohibition must show by his petition that he is entitled to the writ prayed for.

2. Prohibition ☞5(1)—Party seeking writ must show pending matter in respondent court which it threatens to pass upon.

Party seeking writ of prohibition must show existence of pending matter in respondent court which it threatens to pass upon.

3. Prohibition ☞13—Petitioner held not entitled to writ to prevent hearing of motions for new trial when time for hearing had passed.

Petitioner is not entitled to writ of prohibition to prevent disqualified judges from hearing motions for new trial, where such motions have been denied by operation of Code Civ. Proc. § 660, limiting time in which court may pass on motion for new trial.

4. Prohibition ☞1—Writ will not issue to prevent action upon possible proceedings.

The writ of prohibition will not issue to prevent action on proceedings the birth of which may be prophesied by imagination or hope.

5. Prohibition ☞34—Appellate court will not indulge in assumptions in support of petition for writ.

The appellate court will not assume in support of petition for writ of prohibition to prevent hearing by disqualified judges of motions for new trial which have been automatically denied by lapse of time that petitioner will make other motions suggested by her, or that if she does make them the judges will threaten to pass on them.

6. Prohibition ☞20—Petition held not to show ground for issuance either of writ of mandate or of review.

Petition for writ of prohibition to prevent disqualified judges from hearing motions held not to show ground for issuance either of writ of mandate or of review.

Three applications for writs of prohibition by Maude Hall against the Superior Court in and for Imperial County and others. Alternative writ vacated, and peremptory writ denied.

Jesse George, of San Diego, for petitioner. Leon R. Yankwich and Luther Brown, both of Los Angeles, and J. Stewart Ross, Robt. B. Whitelaw, and Chas. L. Brown, all of El Centro, for respondents.

WORKS, J. These three proceedings, identical in character except as to one circumstance hereafter to be mentioned, are under stipulation to be determined together. A statement of a part of the allegations of the petition in one of them, No. 4801, will serve as a basis upon which disposition may be made of all.

The petition contains averments that on May 17, 1917, petitioner commenced an action against respondent Imperial Water Company No. 5 in respondent court, which action is still pending, and which has proceeded to findings and judgment, and that the action was brought for the purpose of enjoining respondent water company from permitting water from its canals to escape, seep, and percolate upon, under, and through certain lands of petitioner, to abate the canal, or the operation thereof in its present condition, as a nuisance, and to recover damages caused to petitioner's land by said percolation and seepage. The petition further alleges that the water carried in said canals, and which escapes therefrom into petitioner's lands, has at all times since May 1, 1916, been diverted and taken from its natural course in the Colorado river by respondent Imperial irrigation district for the purpose of using the same in the state of California, in the improvement and irrigation of the lands of respondent irrigation district, and that it became and was the duty of respondent irrigation district since May 1, 1916, and still is its duty, to control the waters so diverted and to prevent them from escaping into the lands of petitioner to her damage or prejudice; that since about May 1, 1916, respondent irrigation district has permitted and caused the said waters to pass into and to flow through the said canals of said water company, and to escape therefrom into the lands of petitioner, well knowing at all times since May 1, 1916, that said water was so escaping, and at all times passed and caused to be passed into said canals an amount of water in excess of the amount actually furnished the lands irrigated from said canals to cover the loss from seepage into petitioner's lands; that petitioner's lands had never been within respondent irrigation district at the time she commenced said action, and at the time it was tried; and that she was ignorant of the fact that said water was diverted from the Colorado river and caused to escape from said canals by respondent irrigation district, and that respondent irrigation district was a joint tortfeasor with respondent water company, until

early in July, 1924. It is further averred in the petition that before the trial and decision of said action, and on or about November 1, 1922, respondent water company sold to respondent irrigation district all of its property, including said canals; that since said sale and on or about November 1, 1922, respondent irrigation district took possession of all of said property so sold, including said canals, and has ever since November 1, 1922, operated said canals and continued, and yet continues to cause said water to pass by seepage into petitioner's lands, and to keep and maintain said canals as a nuisance to petitioner in all respects as before said sale; that respondent water company is about to disincorporate; and that because thereof any judgment obtained by petitioner against said company in said action will be ineffective and valueless, and will afford petitioner no relief whatever, unless respondent irrigation district is made a party defendant in said action, and judgment be had against it. The petition also alleges that petitioner served upon respondent water company, as defendant in said action, and filed with respondent court a notice of motion to be permitted to file therein an amended and supplemental complaint, setting forth the allegations above stated, and showing the connection of respondent irrigation district with the diversion of said water, the purchase and possession of said property and canals, and the permitting said water to escape into petitioner's lands, and making respondent irrigation district a party defendant in said action, praying that it be brought in as such defendant, and that judgment be had against it, enjoining it from operating said canals in their present condition as a nuisance and for damages; that said motion was set for hearing before respondent court on July 25, 1924; that the same was heard on that day by one of respondent judges, against the objection of petitioner, and was by him on July 26, 1924, overruled and denied. The petition then sets up allegations intended to show that each of the judges of respondent court is disqualified to try said action, or to conduct any proceedings therein because of financial interest in the affairs and property of respondent irrigation district. The petition further alleges that on August 28, 1923, and after a trial of said action, one of the judges of respondent court caused to be entered in the minutes of the court his decision in said action, denying petitioner's prayer for an injunction, but awarding her judgment for damages in the sum of \$900, and that thereafter findings and judgment carrying the decision into effect were signed and filed; that thereafter petitioner filed with respondent court her notice of intention to move for a new trial of said action; that thereafter and on or about July 9, 1924, she served and filed in said action her written objections to either of the judges

of respondent court sitting or acting further therein, or hearing or deciding her motion for a new trial thereof, or hearing or deciding her motion for leave to file an amended and supplemental complaint therein; that on July 25 and 26, 1924, one of the judges of respondent court heard said objections, and on July 26, 1924, denied and overruled the same; that petitioner's motion for a new trial of said action has been set for hearing on August 15, 1924, and that, unless restrained and prohibited by this court, one of the judges of respondent court will then hear and decide the same. The petition then alleges particular facts intended to show that each of the judges of respondent court is disqualified by financial interest to hear or decide said motion for a new trial. The petitions in each of the three proceedings are identical in legal effect, except that no notice of intention to move for a new trial has been filed in the action which is the basis for the petition in No. 4810. In each of the proceedings an alternative writ of prohibition, upon prayer therefor, was issued, restraining respondent court and respondent judges from taking further steps in the respective actions, and the three matters are now before us for a determination of the question whether peremptory writs shall issue.

The briefs before us are voluminous; a large portion of them being devoted to a discussion of the question whether respondent judges are disqualified in the actions pending in respondent court, and to a discussion of the validity of the past action of one of the judges in denying leave to file an amended and supplemental complaint. Other questions of which we shall not specifically state the nature are also debated vigorously. It is unnecessary to decide any of the points stated, either specifically or generally, in this paragraph, as other questions, which we shall now briefly discuss precede them in a consideration of the proceedings—questions which close the door upon all others which are presented and argued.

[1-3] Petitioner seeks to prohibit each of the judges of respondent court from hearing or deciding her motion for a new trial of two of the cases pending before the court. Section 660 of the Code of Civil Procedure provides:

"The power of the court to pass on motion for new trial shall expire within two months after the verdict of the jury or service on the moving party of notice of the entry of the judgment. If such motion is not determined within said two months, the effect shall be a denial of the motion without further order of the court."

The petition here does not show whether or not a notice of entry of the judgment in the causes pending in respondent court was ever given, but it does allege that notices of in-

tention to move for a new trial were served and filed. In this state of the petition we shall assume that notice of the entry of judgment was given before the filing of the notices of intention, for the burden is clearly upon petitioner to show by her petition a right to the writ for which she asks. In other words, it is incumbent upon her to show that some matter is actually pending in respondent court which that court threatens to pass upon. Under the assumption just made the dates which we have stated above clearly show that respondent court long ago lost its jurisdiction to dispose of the motions for a new trial, and that the motions have long since been denied by operation of section 660. In this regard, therefore, there is no threatened action of respondent court upon which the writ of prohibition may operate.

[4, 5] There appears to be no proceeding or matter pending in respondent court in any of the actions which are the subject, respectively, of the petitions before us, over which the court threatens to exercise, or over which it could exercise jurisdiction. None of the petitions shows us that any matters are pending which under the law lead up to the perfecting of appeals or to the making of a record on appeal, such, for instance, as the settling of a bill of exceptions or the certifying of a reporter's transcript of the evidence under what is known as the alternative method of appeal. In fact, it is said in petitioner's closing brief:

"The petitioner has yet the right to move in the court below to have the judgments set aside as void for matters not appearing on their face; a hearing must be had upon such motion, and, from the decision thereon, an appeal lies, and if an appeal is taken the record must be made up, approved and certified; all of which calls for judicial action. * * * This is a remedy open to us and the only remedy left, if our motion for a new trial must be deemed denied and our right of appeal from the judgments gone. And, unless a peremptory writ is issued herein, we will have to present such a motion before the disqualified judges, who have already declared that they are not disqualified. Manifestly we would have to come here again for a writ to prohibit them from hearing such a motion unless they are prohibited from any further action by peremptory writ now."

This argument furnishes no reason for the issuance of the writ sought in these proceedings. We cannot assume, as a support for the present applications, that petitioner will make the motion suggested by her, or that, if she does make it, respondent judges will threaten to pass upon it. The writ of prohibition will not issue to prevent action upon proceedings the birth of which may be prophesied by imagination or hope.

[6] Petitioner asks us to exercise our undoubted jurisdiction to issue any writ to which a petition may show that a petitioner

is entitled, if he shall in his prayer ask for the wrong writ. We do not deem it necessary to state why, in our opinion, her petitions fail to show grounds for the issuance of either the writ of mandate or the writ of review. It is manifest to us that petitioner fails to show a right to either remedy.

In each of these proceedings the alternative writ of prohibition is vacated and a peremptory writ is denied.

We concur: FINLAYSON, P. J.; CRAIG, J.

70 Cal. App. 368

JONES v. BUCK, Judge, et al. (Civ. 2934.)

(District Court of Appeal, Third District, California. Dec. 24, 1924.)

1. Appeal and error $\S$ 82(1)—Order relieving appellants' tardiness in presenting bill of exceptions appealable.

Order, after final judgment for plaintiff, made under Code Civ. Proc. $\S$ 473, relieving defendant from its failure to present its bill of exceptions within allotted time, is an appealable order under section 963.

2. Appeal and error $\S$ 441—Purported settling of bill of exceptions after appeal from order relieving default of appellant invalid.

Order purporting to settle bill of exceptions is invalid, where it is entered after notice of appeal from previous order relieving appellant from his failure to file bill of exceptions within time.

Petition for writ of review by Ruth Jones against Hon. George F. Buck, Judge of the Superior Court of the State of California, in and for the County of San Joaquin, and others, to annul an order settling a bill of exceptions. Writ granted.

Cooley & Gallagher, of San Francisco, for petitioner.

Levinsky & Jones, of Stockton, for respondent.

PLUMMER, J. This is a petition for a writ of review whereby the petitioner seeks the judgment of this court setting aside and annulling a certain order made and entered by the superior court of the county of San Joaquin, Hon. George F. Buck, presiding, on the 16th day of February, 1924, in an action then pending before said court, entitled "Ruth Jones, Plaintiff, v. Southern Pacific Company, a Corporation, et al., Defendants, No. 16266."

[1] The pleadings show the following facts: On the 8th day of November, 1923, a judgment was entered in said superior court in favor of the plaintiff in an action entitled, "Ruth Jones, Plaintiff, v. Southern Pacific Company, a Corporation, et al., Defendants;" that the respondent, Southern Pacific

Company, thereafter gave notice of its appeal, and the time within which it should have prepared and served its proposed bill of exceptions lapsed prior to the 14th day of January, 1924; that on January 14, 1924, the said superior court, upon application therefor by the respondent, Southern Pacific Company, made and entered its order relieving the defendant, Southern Pacific Company, in said action from its default and failure to present its bill of exceptions within the time allowed by law, and then and there permitted the defendant in said action, respondent in this, Southern Pacific Company, to file its said bill of exceptions; that thereafter, and on the 24th day of January, 1924, the petitioner herein (the plaintiff in said action against the Southern Pacific Company) duly served and filed in said court in said cause her notice of appeal, whereby it appealed from the order of said superior court so made and entered on the 14th day of January, 1924, to the Supreme Court of the state of California; that thereafter, and after said appeal by the plaintiff in said action (the petitioner in this), the said superior court, on the 16th day of February, 1924, made and entered in said cause its order settling said bill of exceptions presented by the Southern Pacific Company, the defendant in said action, and the respondent in this, said order being as follows:

"The within and foregoing bill of exceptions is hereby settled and allowed as a bill of exceptions of the defendant, Southern Pacific Company, a corporation, on its appeal from the judgment made, given and entered in the above-entitled action. Dated this 16th day of February, 1924. [Signed] George F. Buck, Judge of the Superior Court of the State of California, in and for the county of San Joaquin."

It is the validity of this last order that is called in question herein. The facts which we have stated show that it was made some days after the petitioner in this proceeding, the plaintiff in the action in which the order was made, had appealed from the order of the said superior court setting aside the default of the defendant in said action, the respondent in this, upon proceedings based on section 473 of the Code of Civil Procedure, and therefore made and entered at a date when such matters were no longer within the jurisdiction of the trial court. The order just referred to was an order after final judgment, and, under the terms and provisions of section 963 of the Code of Civil Procedure, is an appealable order.

[2] The questions presented by the petition herein are effectually disposed of by the following cases: *Jackson v. Dolan*, 58 Cal. App. 372, 208 P. 315, and *Wolcott v. Hudner*, 44 Cal. App. Dec. 544, 228 P. 46. In *Jackson v. Dolan*, supra, in considering the effect of an appeal from an order granting a new trial, the law is thus stated:

"An appeal from an order granting a new trial has the effect of removing from the jurisdiction of the trial court the subject matter of the judgment or order appealed from, including all questions going to the validity or correctness of such judgment or order, and the trial court thereafter is without authority to vacate or set aside that order."

In *Wolcott v. Hudner*, supra, a writ of mandate was sought to compel the trial court to perform the very act, the validity of which is questioned in this case, and the following was the holding of the court in that case, quoting from the syllabus:

"An order granting relief under section 473 of the Code of Civil Procedure, from the effect of the failure of an appellant to give the clerk timely notice of his intention to appeal and of his request for a reporter's transcript is not one of the orders mentioned in sections 942-945 of the Code of Civil Procedure, and an appeal from such order had the effect of staying all proceedings below upon the * * * order appealed from."

Basing our judgment upon this case, it must be held that upon the filing of her notice of appeal from the order made by the superior court, in the case then pending in said court, wherein the petitioner was plaintiff and the respondent defendant, on the 14th day of February, 1924, relieving the defendant from its default, the trial court thereafter had no jurisdiction to proceed further in the matter of settling the bill of exceptions tendered by the respondent in this proceeding, the defendant in said action, and that any order thereafter made purporting so to do must be adjudged of no validity. Upon the hearing hereof, the respondent requested that the decision of this matter be delayed until the appeal from the order made and entered by the superior court, relieving the defendant from its default, could be presented, but we do not see how such proceedings would in anywise expedite the final determination of the cause entitled *Ruth Jones, Plaintiff, v. Southern Pacific Company, a Corporation, et al.*, herein referred to, for the reason that though this court might determine that the default of the defendant was properly set aside, the settling of the bill of exceptions, however, would necessarily, under the authorities which we have cited, have to be adjudged void, and the final hearing of the cause then continued until a bill of exceptions could be legally presented.

It follows that the writ of review must be granted and the order of the trial court, made and entered on the 16th day of February, 1924, hereinbefore set forth, purporting to settle the bill of exceptions in the cause referred to, must be and is hereby annulled.

We concur: FINCH, P. J.; HART, J.

70 Cal. App. 330

SPRAGUE et al. v. DOLAN. (Civ. 4901.)

(District Court of Appeal, First District, Division 2, California. Dec. 22, 1924. Hearing Denied by Supreme Court Feb. 19, 1925.)

1. Brokers — §54—Commissions not payable for failure of client to offer performance.

Brokers held not entitled to commissions, where no sale was actually made and where client did not offer performance within time and manner provided by Civ. Code, §§ 1485-1497, though one of brokers phoned principal's wife that client had agreed to buy lease, and though client testified that he was ready, willing, and able to purchase.

2. Brokers — §54—Services required to render commissions payable where sale is not made stated.

Broker, to earn commissions where no sale is actually made, must obtain valid contract of purchase upon terms fixed with person ready, willing, and able to purchase or must bring vendor and such purchaser together.

3. Brokers — §54—Readiness to purchase provable only by offer made to vendor.

Readiness and willingness of purchaser, entitling broker to commissions, can only be shown by offer by him to vendor and offer made to broker alone is insufficient.

Appeal from Superior Court, City and County of San Francisco; Claude F. Purkitt, Judge.

Action by A. Sprague and another against J. L. Dolan. Judgment for plaintiffs, and defendant appeals. Reversed.

Goldman, Nye & Surr, of San Francisco, for appellant.

Gerald C. Halsey and Frederic T. Leo, both of San Francisco, for respondents.

STURTEVANT, J. The plaintiffs commenced an action to recover a judgment for commissions alleged to have been earned as brokers in making a sale of an apartment house for the defendant. The case was tried by the trial court sitting without a jury. Judgment went for the plaintiffs as prayed, and the defendant has appealed under section 953a of the Code of Civil Procedure.

Prior to March 30, 1923, the defendant held a lease on an apartment house at number 2402 California street in San Francisco. The furnishings therein were owned by him. The lease had nearly expired and had but a short time to run. Under these circumstances the plaintiffs applied to the defendant for authority to negotiate a sale of the defendant's interests. After some bartering, an authorization was executed in writing giving the authority for the period of five days from March 30, 1923. March 30, 1923, was Friday and the last day under the terms of

the contract therefore was Wednesday, April 4, 1923. The price named in the authorization was \$11,000, and the commission agreed upon was 5 per cent. The client of the plaintiffs was Mr. La Lanne. Mrs. Sprague took him to see the property on March 30, 1923. He made an examination of the whole. Then followed bartering as to the price to be paid. Mr. La Lanne wanted the property at \$10,000. The defendant would not consent to modify the price above mentioned, \$11,000. No written contract was ever executed between the owner and the purchaser. Mr. La Lanne never told the defendant nor the defendant's wife that he would pay \$11,000, never tendered that sum, never applied for transfer papers, and never directly held any communication with the defendant or his wife, except as above mentioned. Mrs. Sprague testified that La Lanne stated to her that he would pay the \$11,000, and that she telephoned that fact to Mrs. Dolan on Monday, April 2, 1923.

On the trial of the case the plaintiff called as a witness Mr. La Lanne. He testified that he was ready and willing and financially able to pay \$11,000; that he did not sign any contract for \$11,000, but he just agreed that he would pay \$11,000, because Mr. Dolan at one time was ready to sell for \$10,000, and it wasn't up to the witness to offer \$11,000 when the owner was ready to sell it for ten.

[1-3] The respondent contends that the foregoing facts made a sufficient showing that the plaintiffs had obtained a purchaser ready, able, and willing to make the purchase on the terms agreed upon in their written authorization. In this behalf they call attention to another fact that was developed in the evidence. On Saturday, March 31, 1923, some one communicated with the defendant, asking the defendant if he would entertain the proposition of purchasing the new lease which had just been executed. Thereafter the defendant continued to pursue the subject-matter of that communication and later he did purchase the new lease. When that purchase was made does not appear, but the record discloses that on Monday, April 2, 1923, Mrs. Sprague had heard of the attempt that was being made to sell to the defendant the new lease, and that when she called on the defendant she contented herself with informing him that La Lanne had agreed to pay \$11,000, and that if the defendant bought the new lease that she would hold the defendant for her commission. In this connection Mrs. Sprague testified that she had seen the assignment of a new lease to Mr. and Mrs. Dolan, and that her attorney, Mr. Halsey, had called that fact to the attention of the Dolans. Thereupon the respondents contended that the owners neglected to accept the offer of La Lanne, because they had pur-

chased the new lease and not because La Lanne had declined to pay \$11,000. We are unable to follow the respondents in this contention. Mr. Dolan continuously testified that he was at all times willing to accept \$11,000 for his interest. The matter of the purchase of the new lease was a false issue. Perhaps it was an altogether advantageous transaction to sell furnishings that had become worn and damaged and later refurnish the house upon the commencement of the new lease. However, be this as it may, the purchaser never made his offer of performance within the time, method, or manner provided by law (Civ. Code, §§ 1485-1497), nor was there any showing of prevention of performance.

Before the respondents were entitled to recover in a case where no sale was actually made, it was incumbent on them to prove that they found a purchaser ready, willing, and able to buy the property on the terms fixed, and either that they procured from that person a valid contract binding him to purchase the property upon those terms, or that they brought the vendor and the proposed purchaser together so that the vendor might have secured such a binding contract. Moreover, the readiness and willingness of a person to purchase the property can be shown only by an offer on his part to purchase; and unless he has actually entered into a contract binding him to purchase, or has offered to the vendor, and not merely to the broker, to enter into such contract, he cannot be considered a purchaser. *Mattingly v. Pennie*, 105 Cal. 514, 519, 39 P. 200, 45 Am. St. Rep. 87. The rule stated in that case has been cited with approval in many cases. *Mott v. Minor*, 11 Cal. App. 774, 780, 106 P. 244; *Massie v. Chatom*, 163 Cal. 772, 776, 127 P. 56; *Hicks v. Christeson*, 174 Cal. 712, 717, 164 P. 395; *McCoy v. Zahn Corporation*, 183 Cal. 191, 196, 191 P. 20.

It follows that the evidence was insufficient to support the findings, and the judgment is therefore reversed.

We concur: LANGDON, P. J.;
NOURSE, J.

70 Cal. App. 271

PEOPLE v. MARTIN. (Cr. 1104.)

(District Court of Appeal, First District, Division 2, California. Dec. 17, 1924. Hearing Denied by Supreme Court Feb. 12, 1925.)

1. Criminal law § 395—Refusal to suppress evidence taken without search warrant held not erroneous.

In prosecution for violation of State Poison Act, court did not err in refusing to suppress certain evidence claimed to be property of defendant, taken from him at the time of his arrest without a search warrant.

2. Criminal law § 1083—Jurisdiction of motion to suppress evidence held not lost by trial court.

In prosecution for violation of State Poison Act, trial court did not lose jurisdiction to further consider motion by defendant to suppress the evidence because district attorney stated in open court that people appealed from trial court's grant of such motion, where additional affidavits were subsequently filed, and trial court's announcement was not final.

3. Criminal law § 582—Continuance not ground for complaint by fugitive from justice.

Defendant could not complain that hearing on his demurrer was continued from time to time, where during those times he was a fugitive from justice.

4. Criminal law § 1134(10)—Forfeiture of bail not reviewable on appeal from conviction.

Error was not predicable on court's action in ordering defendant's bail to be forfeited for nonappearance, since, if error, it was in regard to matters not involved in case on trial in such a manner as to be error that could be reviewed on an appeal of a judgment of conviction.

5. Indictment and information § 114—Information pleading two prior convictions held not defective.

Information, in prosecution for violation of State Poison Act, pleading two prior convictions, and not disclosing that Pen. Code, § 969, was not followed, held not defective.

6. Criminal law § 1130(2)—Assignment of error to refusal to instruct on plea of former acquittal held insufficient.

Assignment of error, based on court's refusal to give instruction on plea of former acquittal, cannot be considered, where counsel does not refer to any evidence showing former acquittal of charge on trial.

7. Indictment and information § 144—Trial court's action on motion to dismiss discretionary.

Trial court's action on motion to dismiss a criminal prosecution, under Pen. Code, § 1385, is discretionary.

8. Jury § 66(1)—Error not shown, because names of all jurors not in jury box when case called for trial.

Error was not shown, because, when criminal case was called for trial, names of all jurors on panel were not in jury box, where no challenge to panel was interposed, and defendant's objection was only that all list of jurors be in box before any name was called of any juror.

9. Criminal law § 829(1)—Refusal of instructions already given does not constitute error.

Refusal to give requested instructions does not constitute error, where they are fully and completely covered by instructions given by court.

10. Criminal law — 1130(2)—Assignments of error to instructions held insufficient.

Error was not predicable on giving of instructions, where it was not pointed out in what respect they were erroneous, nor were assignments of error supported by authority.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

John Martin was convicted of violating an act regulating the sale of poisons, and he appeals. Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

STURTEVANT, J. The defendant was convicted of a felony, to wit, the violation of an act to regulate the sale of poisons in the state of California. St. 1907, p. 124. He made a motion for a new trial, the motion was denied, and he has appealed from the judgment and order.

[1] The information was filed on the 21st day of March, A. D. 1921. On the 22d of April, 1921, the defendant filed affidavits and therein asked for an order setting aside the information and an order restoring to him certain things claimed to be his property. In the affidavits the defendant set forth certain facts tending to support the claim that about the time of his arrest the properties mentioned were taken from him by certain officers who had not thereunto been duly authorized by virtue of a search warrant first had and obtained. Having asserted such facts, the defendant thereupon based the claim that his constitutional rights had been invaded; that he had not been legally committed by a magistrate; and that the articles of property could not legally be used against him in evidence on the trial of the case in the superior court. In his brief the appellant treats the whole matter under points 1, 2, 3, 4, and 5. His attack raises a question as to a rule of evidence and, secondly, a question as to a rule of practice. As to the properties being used in evidence against the defendant, the question is no longer an open one in the state of California. In the case of *People v. Mayen*, 188 Cal. 237, commencing at page 251 (205 P. 441) the court said:

"The right of one whose goods have been unlawfully seized to recover their possession, and that, irrespective of its effect in depriving the state of their use in evidence, is not disputed; but the contention, which we think is maintained by the great weight of authority, is that the proceeding for such recovery is independent of the criminal proceeding in which it is sought to use such articles as evidence. Even conceding the right to demand such recovery by motion before the court in which

such criminal action is pending, as is apparently the rule in the federal courts, and as recognized in some of the state decisions (*People v. Kinney*, 185 N. Y. S. 645; *State v. Peterson*, 27 Wyo. 185 [13 A. L. R. 1284, 194 P. 342]), upon what theory can it be held that such proceeding is an incident of the trial, in such a sense that the ruling thereon goes up on appeal as part of the record and subject to review by the appellate court? It seems to us rather an independent proceeding to enforce a civil right in no way involved in the criminal case. The right of the defendant is not to exclude the incriminating documents from evidence, but to recover the possession of articles which were wrongfully taken from him. That right exists entirely apart from any proposed use of the property by the state or its agents."

It seems clear, therefore, that the trial court did not err in refusing to suppress the evidence.

[2] When the motion was made, it was presented in part, and then numerous other hearings were had, and numerous continuances were had. With much patience the trial court listened to argument from both sides and allowed both counsel the privilege at different times of introducing affidavits, to the end that the respective contentions of the parties should be fully before the court. At one time, May 18, 1921, the trial court made a statement to the effect that the motion was granted and thereafter the district attorney stated in open court that the people appealed. The appellant now contends that, from the moment the district attorney stated in open court that the people appealed, the trial court lost all jurisdiction to further consider the motion to set aside the information. These matters, however, must be considered in the light of the whole record, and there is an abundance of evidence in the record to show that the announcement made by the trial court was not by that court intended to be a final disposition of the motion, and, furthermore, that the district attorney waived and intended to waive his oral notice of appeal, and that such course was known to and accepted by the defendant. True it is that at certain times the defendant asserted his contention in the trial court in the same way that he has asserted it in this court. True it is that the district attorney did not formally state that his notice of appeal was inadvertently given, nor attempt, except in the manner hereinafter stated, to withdraw the same, but it is equally true that, without any reservation of rights on the part of either of the litigants, they proceeded to argue the motion on questions of law and on questions of fact and continued to do so on various days until the 4th day of June, 1921, at which time the trial court made a formal order vacating the order theretofore made by it setting aside the information. As stated, the

oral notice of appeal was given on May 18th, but on May 20th the appellant served and filed additional affidavits, and on that date and on other dates the defendant's attorney did, without objection on his part, appear in the trial court, and argue in extenso the merits of his principal motion.

[3] The defendant filed a demurrer. It was set for hearing August 23, 1921. On the date last mentioned the defendant was not present in court and the trial court ordered a bench warrant issued to bring him before the court. At the same time the hearing on the demurrer was continued to August 27, 1921. Thereafter the hearing was again continued from time to time. During all those times the defendant was a fugitive from justice. He now complains of the continuances as errors. The point is without merit.

[4] On September 6th, the defendant not having appeared in person, the court ordered defendant's bail forfeited. The appellant assigns the order as an error. Whether it was or not, the error was in regard to matters not involved in the case on trial in such a manner as to be an error that can be reviewed on an appeal from a judgment of conviction, or the defendant's appeal from the motion denying him a new trial.

[5] The information pleaded two prior convictions. The appellant does not point out to us that the pleading in any way violated section 969 of the Penal Code. An examination of the information does not disclose that the provisions of that section were not followed. We think the pleading was not defective.

[6] The defendant entered a plea of not guilty, of former jeopardy, of former acquittal, and of former conviction of the same offense. After the evidence had been closed, and after the trial court had finished instructing the jury, the defendant's attorney asked the trial court to give an instruction on the matter of the plea of former acquittal. The court did not do so and its refusal is assigned as error. However, counsel does not call to our attention any evidence showing, or tending to show, that he ever had a former acquittal of the charge on trial.

[7] On October 23, 1922, the defendant's counsel made a motion to dismiss the action under section 1385 of the Penal Code, and in support of the motion counsel tendered and read in evidence his own affidavit. The court denied the motion. The action of the trial court on such a motion is discretionary. Nothing is shown to us indicating that in

this particular case the trial court abused its discretion in refusing to grant the motion.

[8] When the case was called for trial, the names of all of the jurors on the panel were not in the jury box. No challenge to the panel was interposed, but just before the names were drawn out of the box the attorney for the appellant, in open court, stated that he would ask "that all the list of the jurors be in the box before any name is called of any juror. * * *" Notwithstanding that remark, the trial court proceeded, and the clerk drew out 12 names, and the trial proceeded. The defendant has shown no authority sustaining the practice followed by him, neither has he shown any fact showing any error, or that the error, if any, was prejudicial.

[9] The defendant asked and the trial court refused to give certain instructions. Those rulings are covered by points 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, and 33. Each and every one of the instructions so referred to and so refused was fully and completely covered by other instructions given by the court. Excepting to assign such refusals as error, the defendant has not in any way shown or attempted to show any error on the part of the trial court in refusing to give any one of said instructions.

[10] Under points 34, 35, and 36 the defendant assigns the giving of certain instructions as error. However, he does not point out in what respect any of the instructions was erroneous, nor does he give, or attempt to give, any authority supporting him on these assignments. His mode of treatment in briefing is identically the same as in his attack on the order refusing his motion for a new trial. If counsel is unable to locate the error, he need not expect the court to do so for his client. In *People v. McLean*, 135 Cal. 306, at page 309, 67 P. 770, 771, the court said:

"It is due to this court from the members of the bar to point out clearly and concisely the rulings complained of as erroneous and the reasons why they are so, with reference to authorities, if any. In case counsel will not take the trouble to do so, we shall deem the matter as of not sufficient importance to merit notice in an opinion. *People v. Woon Tuck Wo*, 120 Cal. 297."

We find no error in the record.

The judgment and order are both affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

70 Cal. App. 225

PEOPLE v. BRANNON. (Cr. 1121.)

(District Court of Appeal, Second District, Division 2, California. Dec. 13, 1924.

Hearing Denied by Supreme Court
Feb. 9, 1925.)

1. Criminal law $\S$ 195(1)—Constitutional and statutory provisions against double jeopardy refer to crime or "offense" as distinguished from the act or transaction in which offense was committed.

Under Const. art. 1, § 13, providing that a person shall not be twice placed in jeopardy for the same offense, it is the identity of the offense or crime charged, and not of the act, which determines whether a subsequent prosecution is double jeopardy; the word "offense" under this provision and under Pen. Code, § 1017, subd. 3, meaning crime, not the act or transaction in which the crime was committed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Offense.]

2. Criminal law $\S$ 196—Test as to "former jeopardy," stated.

Where the plea of former jeopardy is urged, there is not an identity of offense because evidence adduced on the second charge would be sufficient to convict the prisoner on the first charge, but the true test is: Could the defendant have been convicted upon the first indictment upon proof of the facts alleged in the record of the second indictment?

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jeopardy (In Criminal Law).]

3. Criminal law $\S$ 200(8)—Conviction or acquittal on former charge immaterial as affecting plea of former jeopardy, the pleas of "autrefois convict" and "autrefois acquit" being in legal effect the same.

Where two or more persons are injured by a single criminal act, there are as many separate and distinct offenses as there were persons injured by the unlawful act, and as affecting the plea of former jeopardy it matters not whether a trial for one of such offenses resulted in a conviction or acquittal; there being no difference between pleas of "autrefois convict" and "autrefois acquit."

[Ed. Note.—For other definitions, see Words and Phrases, Autrefois Acquit; Autrefois Convict.]

4. Criminal law $\S$ 200(8)—Acquittal of assault with intent to kill wife held not to bar prosecution for murder of bystander killed in the attempted assault.

Defendant, who in attempting to kill his wife shot and killed another person, cannot successfully plead his acquittal of assault to kill wife in bar of a subsequent prosecution for murder of the person he killed, under Pen. Code, § 654, declaring that acts or omissions punishable under different provisions of the act can be punished only under one, particularly in view of section 954, authorizing conviction of two or more different offenses connected in their commission.

5. Criminal law $\S$ 1167(5)—Refusal to receive plea of former jeopardy not prejudicial where facts on which predicated did not constitute such jeopardy.

No prejudicial error was committed by the trial court in refusing to receive a plea of former jeopardy where, had such plea been received, the facts on which it was predicated would not have shown former jeopardy.

6. Criminal law $\S$ 1130(2)—Failure to specify in briefs reasons why appellant deems rulings on instructions erroneous held to obviate necessity of review.

Suggestions of error as to the giving of instructions in a murder trial do not require review, where appellant's counsel not only neglects to clearly and concisely point out the rulings complained of as erroneous, but fails to state in his brief the reasons why he deems them erroneous.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Barney Brannon was convicted of murder in the first degree, and he appeals. Affirmed.

S. S. Hahn and Wm. M. Morse, Jr., both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. Defendant was convicted of murder in the first degree and was sentenced to imprisonment for the term of his natural life. From the judgment and an order refusing him a new trial he appeals. His principal point is that he was formerly acquitted of the same offense but that he was denied an opportunity to plead such former acquittal.

The facts necessary to an understanding of appellant's chief contention are these: By an indictment containing two counts defendant was charged, in count 1, with an assault with a deadly weapon upon his wife, Helen Brannon, with intent to commit murder, and in count 2 with the murder of one Margaret Cronin. To both counts defendant interposed the plea of "not guilty." He thereupon moved for a separate trial upon each count. His motion was granted, and the district attorney elected to try him first upon count one. That trial resulted in a verdict of acquittal. On the day set for his trial on the second count defendant moved the court for permission to withdraw his plea of "not guilty" to that count and to enter a plea of once in jeopardy and former acquittal. The motion was made with reasonable diligence after the verdict of acquittal on the first count. The court denied the motion, and thereupon defendant offered as an additional plea that of former acquittal. This offer the court refused to accept. The court thereupon proceeded with the trial of

the murder charge set forth in the second count, with the result that defendant was convicted of the murder of Mrs. Cronin.

Margaret Cronin was killed by a bullet discharged from defendant's pistol. But one shot was fired. The scene of the homicide was a room in the city of Los Angeles. The only persons present at the time of the shooting were the defendant, his wife, and the deceased. According to defendant's version of the circumstances attending the killing, the pistol was accidentally discharged during a friendly scuffle and while Mrs. Cronin, with her hand in defendant's pocket, had hold of the weapon. The prosecution introduced evidence which tended to support the theory that defendant went to the room intending to kill his wife, and that unlawfully, with malice aforethought and with intent to slay Mrs. Brannon, he deliberately fired the shot at his wife, but that the bullet struck Mrs. Cronin instead, killing her. This theory is borne out by a letter, introduced by the prosecution, which was written by defendant and addressed to his wife shortly before he went to the scene of the homicide. Indeed, the jury, at the people's request, was specifically instructed that where a person deliberately, and with premeditated malice, attempts to kill one person but by mistake or inadvertence kills another instead, the law transfers the intent from the object of his assault and the homicide so committed is murder. This instruction unquestionably embodies the theory upon which the case was presented to the jury by the district attorney.

From the foregoing it will be seen that, although defendant originally pleaded "not guilty," he moved for permission to interpose the plea of former acquittal as soon as practicable after the advent of those facts which he claims constituted a former acquittal on the murder charge; also, that, according to the prosecution's theory of the homicide, there was but one act, i. e., one shot, and there likewise was but one intent and one volition. Thus there is squarely presented to us the question whether, if the killing occurred according to the people's theory of the case, defendant's acquittal on the first count was or was not an acquittal of the "same offense" for which he was subsequently tried and convicted.

[1] The prohibition of the Constitution is against putting a person twice in jeopardy for the "same offense." Article 1, § 13. See, also, Pen. Code, § 1017, subd. 3. It is the identity of the offense, and not of the act, which is referred to in the constitutional guaranty against putting a person twice in jeopardy. The Supreme Court of Ohio, in an opinion of exceptional vigor and rugged forcefulness, repudiates the tendency of some courts to construe the words "same offense" as meaning the same act or transac-

tion. "The constitutional provision," says that court in *State v. Rose*, 89 Ohio St. 383, 106 N. E. 50, L. R. A. 1915A, p. 256, "uses the word 'offense.' Layman and lawyer alike understand the word 'offense' to here mean simply a crime. * * * The words 'same offense' mean same offense, not the same transaction, not the same acts, not the same circumstances or same situation. * * * It is not enough that some single element of the offense charged may have a single element of some other offense as to which the defendant had theretofore been in jeopardy, but the constitutional provision requires that it shall be the 'same offense.' * * * Numerous decisions can be cited to sustain the contention of the defendant as to his former jeopardy. Some of these decisions may be accounted for by a difference in the constitutional provisions, but more of them are accounted for by the fact that the courts have usurped the power of the lawmaker and the constitution maker and have added something to or subtracted something from the plain provisions of the laws and Constitution. * * * Courts too frequently fall into the very common error of assuming to interpret everything in the line of legal language. The utter folly and wholesale abuse of construing words that need no construction and of interpreting language that needs no interpretation has led to much of the judicial confusion and most of the irreconcilable diversity of court decisions. There can be no stability about law until there be certainty about law, and when the constitution maker or statute maker uses a plain phrase, a simple sentence and a workaday word, with a clear, simple and unmistakable meaning, it is almost criminal in a court to scramble what is simple and confuse what is clear, under the mask of its right to construe."

No question has given rise to more difficulty or conflict than that which presents itself when two or more persons are injured in person or in property by a single act. Upon this question there are two divergent lines of authority. According to one line of cases, if one act injures two or more persons there is but one offense. This doctrine has been espoused by the courts of Connecticut, Georgia, Illinois, Indiana, Iowa, Missouri, New York, Texas, Vermont, and England. In the other line of cases the contrary view is adopted, and in them it is held that if, for example, an assault be committed upon two or more persons by the one discharge of a firearm, the assault, although committed by but one single act, is in law a separate crime as to each of the persons assaulted, and a prosecution for the crime committed as to one of the persons so assaulted is no bar to a subsequent prosecution for the assault upon the others. The states in which the latter view has been adopted

include California and also Arkansas, Kentucky, North Carolina, South Carolina, and Virginia. The jurisdictions which respectively fall within these two divergent lines of authority are given by the learned author of Van Fleet's Former Adjudication, who, in volume 2, § 622, of that work, says:

"If several persons are injured in person or property by the same act, it is held in Connecticut, Georgia, Illinois, Iowa, Missouri, New York, Ohio, Texas, Vermont and England that there is but one offense; but the contrary is ruled in Arkansas, California, Kentucky, New York (probably intended for North Carolina), South Carolina and Virginia; while in Massachusetts it is decided that the state may elect to prosecute for one or for several offenses."

The view adopted by the first-mentioned line of cases is well illustrated by the ruling of the Texas court in *Spanell v. State*, 83 Tex. Cr. R. 423, 203 S. W. 357, 2 A. L. R. 593—a case upon which appellant places much reliance. There it is said that if two persons be killed by the same act, as, for example, by the single discharge of a firearm or by one stroke of a knife or other similar weapon, and there is but one intent and one volition, there is but one crime; and if the defendant be convicted or acquitted for the killing of one of the persons, he cannot be convicted for the killing of the other.

[2] The doctrine enunciated by the other line of cases is illustrated by the decision of our own Supreme Court in *People v. Majors*, 65 Cal. 138, 3 P. 597, 52 Am. Rep. 295, where the court, after an exhaustive review of the authorities, lays down what we understand to be the established rule in this state. There the defendant had counseled and advised another to rob a certain man at his home; the emissary took with him a confederate; they found unexpectedly a friend at the home of the man to be robbed. In the attempt to carry out the robbery both the man to be robbed and his friend were killed at the same time. The defendant was convicted of murder in the case of the man who was to have been robbed, and to the indictment in the case of the friend he pleaded former conviction. The court overruled the plea, saying:

"* * * We have attempted to show that the better rule, and that established by the great weight of respectable authority, is that the murder of two persons, *even by the same act*, constitutes two offenses, for each of which a separate prosecution will lie, and that a conviction or acquittal in one case does not bar a prosecution in the other." (Italics ours.)

See, also, *People v. Alibez*, 49 Cal. 452.

In *State v. Nash*, 86 N. C. 650, 41 Am. Rep. 472, the court says:

"A battery is violence done to the person of another, and though there be but a single act

of violence committed, yet if its consequences affect two or more persons, there must be a corresponding number of distinct offenses perpetrated."

In *State v. Thurston*, 12 McM. (S. C.) 382, the defendant was charged in three separate indictments which having stolen at the same time cotton belonging to three separate individuals. The act, the intent, and the volition were one and the same. The court held (quoting from the syllabus):

"That the cotton so stolen by the defendant belonged to three different individuals, and he was very properly indicted in three cases, and a conviction in one case was no bar to a conviction in the two others. The stealing of the goods of different persons is always a distinct larceny."

For an exhaustive review of the decisions bearing upon this question, see *State v. Corbitt*, 117 S. C. 356, 109 S. E. 133, 20 A. L. R. 328, where it was held that if the killing of several men by shots fired in rapid succession may be regarded as but a single act, nevertheless the result may constitute more than one offense, so that an acquittal on a trial for killing one will not prevent a prosecution for killing another. In that case the court, after quoting the constitutional provision, says:

"Note that the identity of the offense, and not of the act, is referred to. Hence, in order to claim the benefit of this protection it must be made to appear that the latter indictment contains a charge of the same offense of which the defendant may have previously been acquitted or convicted. From a common sense layman's view there could be no hesitation in saying that the first indictment charges the murder of Bryan Salley, one distinct crime; the second, of Julian Cooper, another distinct crime. But we are expected to throw to the winds this chart and compass, and be guided by a strained technicality of the law. The law does not compel this conclusion."

Several tests have been suggested by the courts whereby to determine when the offenses charged in two indictments are the same in "fact and law"—the same "act and crime." The test most frequently employed is that stated by Mr. Justice Buller in *Rex v. Vandercomb*, 2 Leach, C. C. 708, in the following language:

"Unless the first indictment were such as the prisoner might have been convicted upon it by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second."

In a criticism of this statement of the test, Mr. Freeman, in a note to *People v. McDaniels*, 137 Cal. 192, 69 P. 1006, 59 L. R. A. 578, 92 Am. St. Rep. 106, says:

"There are, however, cases in which proof of the facts alleged in the second indictment would not convict under the first indictment, while proof of the facts alleged in the first in-

dictment would convict under the second charge. If, in such a case, the test, as it is usually stated, is followed, we have the manifest absurdity of two indictments which may or may not charge the 'same' offense accordingly as one is charged before or after the other."

The test as stated in *Rex v. Vandercomb* does not mean that there is an identity of offense simply because the proof as brought out in the evidence on the second charge will suffice to convict the prisoner on the first charge. The correct meaning of that test is stated by the North Carolina court in *State v. Nash*, supra, where it is said:

"The true test is as stated in *Rex v. Vandercomb*: Could the defendant have been convicted upon the first indictment upon proof of the facts, not as brought forward in evidence, but, *as alleged* in the record of the second?" (Italics ours.)

Bishop, in his work on Criminal Law (volume 1, § 1051), quoted by our Supreme Court in *People v. Majors*, supra, speaking of the identity of offenses, says:

"They are not the same * * * when the two indictments are so diverse as to preclude the same evidence from sustaining both."

If this test be applied to the facts of the instant case, then clearly the two offenses with which appellant was charged are not the same. For, manifestly, if appellant had been tried first upon the charge of murdering Mrs. Cronin, he could not have been convicted merely upon proof that he shot at his wife with intent to murder her. Proof that he killed Mrs. Cronin would also be required. Therefore an acquittal or conviction on the murder charge could not have been successfully pleaded by defendant in bar to the charge of assault upon his wife. In *Winn v. State*, 82 Wis. 571, 52 N. W. 775—a case which bears a striking analogy to the instant case, except that there the murder charge was the first to be prosecuted—the defendant attempted to kill another, and in the struggle to disarm him a third person was accidentally shot and killed. The defendant, it seems, had an altercation with one Defoy in a saloon, and was assaulted by him; he went home, secured a pistol, and returned; Defoy was on the sidewalk with others, including one Coates; the defendant snapped his pistol at Defoy, and in the struggle to disarm him the weapon was discharged, killing Coates. In its statement of the facts the court said that "the revolver was either accidentally discharged, or it was intentionally fired by Winn at Defoy"—the person whom defendant intended to slay. In holding that an acquittal on the charge of murdering Coates was no bar to a prosecution for assault upon Defoy with intent to kill, the court says:

"The special plea in bar of this prosecution sufficiently avers that the charge of the murder of Coates in the first information, and the charge of an assault with intent to murder Defoy in the present information, are predicated upon one and the same act of Winn. It is correctly argued in the plea, as it was at the bar, that if he committed the alleged felonious assault upon Defoy, and in doing so killed Coates, although unintentionally, he is guilty of murder. But the jury acquitted him of the crime of murder, and from that fact the inference is plausibly drawn that the jury must necessarily have negatived the alleged felonious assault upon Defoy, for otherwise they would have convicted Winn of the murder charge. It was very earnestly and ingeniously contended in argument by the learned counsel for Winn that in substance and legal effect such acquittal is an acquittal of the charge of felonious assault in the present information, and that by compelling the accused to trial therefor he was put twice in jeopardy of punishment for the same offense, in violation of the constitutional and statutory declaration of rights in that behalf."

The court goes on to say:

"We adopt as the law on this subject the rule laid down by Chief Justice Shaw in *Comm. v. Roby*, 12 Pick. 496. The rule is that the offenses charged in two indictments are not identical unless they concur both in law and in fact, and in that the plea of *autrefois acquit* or *convict* is bad if the offenses charged in the two indictments be distinct in law, no matter how closely they are connected in fact. In order to determine whether there is a concurrence in law, that is, whether a conviction or acquittal on one indictment is a good bar to a prosecution on another, the true inquiry is whether the first indictment was such that the accused might have been convicted under it by proof of the facts alleged in the other indictment. If he could not, the conviction or acquittal under the first indictment is no bar. The result of an application of this test to the present inquiry is obvious. Winn could not have been convicted [or acquitted] of the murder of Coates merely upon proof that he made a felonious assault upon Defoy. Proof that he killed Coates would also be required. Hence an acquittal on the information charging the murder of Coates is no bar to this information for a felonious assault on Defoy, and the special plea was properly overruled."

So, here, appellant, on a trial for the murder of Mrs. Cronin, could not have been acquitted or convicted merely upon proof that he had made a felonious assault upon Mrs. Brannon.

The reasoning of the court in this Wisconsin case justifies the conclusion that an acquittal of appellant upon count 2, charging him with the murder of Mrs. Cronin, had the charge in that count been the first to be brought on for trial, would not have been a bar to a prosecution upon count one, charging him with an assault upon his wife with intent to commit murder. But if an acquittal of appellant upon the murder charge would have been no bar to a prosecution of the assault charge, then, conversely, the ac-

quittal on the assault charge cannot be a bar to this prosecution of the murder charge; for if it were, then, as was said by Mr. Freeman in his note to *People v. McDaniels*, supra, we would have the manifest absurdity of two counts which may or may not charge the "same" offense accordingly as one is tried before or after the other.

Vaughan v. Commonwealth, 2 Va. Cas. 273, is a case more directly in point. There the defendant, a woman, was indicted for shooting Sally Walker, the infant daughter of Jenny Walker. She was also indicted for shooting the mother. Having been acquitted on the charge of shooting the daughter, defendant entered a plea of autrefois acquit to the indictment charging her with the shooting of the mother. On her appeal from the sentence rendered after her conviction on the latter charge, defendant claimed that the evidence disclosed that she fired the shot at the mother with intent to disfigure her, and that the shot hit both the mother and the daughter Sally. It was held that the acquittal of defendant on the charge of shooting Sally Walker was no bar to a prosecution on the charge of shooting the mother.

[3] It is probable that had appellant been convicted of the charge of assault upon his wife, instead of having been acquitted of that charge, we would have heard nothing of the plea of once in jeopardy when the murder charge came on for trial; for in that event appellant doubtless would have recognized the established doctrine in this state that where two or more are injured in their persons, though it be by a single act, yet, since the consequences affect, separately, each person injured, there is a corresponding number of distinct offenses. But it matters not whether the trial of appellant on the assault charge resulted in a conviction or an acquittal, for there is no difference between the two pleas of autrefois convict and autrefois acquit. If one of these pleas would be available under a given state of facts the other would be also; and, conversely, if one would not be available neither would the other.

Many of the decisions cited by appellant are cases where the prosecution attempted to split up one crime and prosecute it in several parts. Those cases are not applicable here. It, of course, is true that if two or more offenses arise as one result from a single act, and one of them includes within itself all the others, as murder includes manslaughter, then, if the defendant has been in jeopardy for the offense which includes the others, he has been in jeopardy as to all of the offenses; and this is often true where he has been put in jeopardy for even the lowest of the offenses. In such cases more than one offense cannot be carved out of the same unlawful act. But that is not this case. Here,

if appellant shot at his wife intending to kill her but instead killed Mrs. Cronin, the act had two results, each of which was an offense of violence against the person of a separate individual. The two offenses, though resulting from the same act, were separate and distinct crimes, neither being included within the other. See *Commonwealth v. Browning*, 146 Ky. 770, 143 S. W. 407.

[4] Appellant calls our attention to section 654 of the Penal Code wherein it is declared that—

"An act or omission which is made punishable in different ways by different provisions, of this [act] may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other."

concisely the rulings complained of as erro-

We do not think this section has the broad sweep which appellant claims for it. We do not think it is applicable where, as here, the one act has two results each of which is an act of violence against the person of a separate individual. This section of the Penal Code has been in existence ever since the adoption of the Codes in 1872. It never has been amended. It existed in its present form at the time of the commission of the offenses which were considered by our Supreme Court in the *Majors Case*; and yet in that case the court, on page 146, after declaring that "the two crimes (the murder of Renowden and the murder of McIntyre), although committed at one time and by the same act, are entirely different in their elements, and the evidence required to convict in the one case very different from that essential to a conviction in the other," goes on to say that a separate prosecution would lie for each offense, and that a conviction or acquittal in one case would not bar a prosecution in the other. Indeed, it is now provided by our Penal Code (section 954, as amended in 1915) that, under separate counts of the same indictment or information, the defendant may be charged with "two or more different offenses connected together in their commission," and that "the defendant may be convicted of any number of the offenses (so) charged."

[5] Our conclusion from the foregoing is that appellant suffered no prejudice by reason of the court's refusal to permit him to plead former acquittal or once in jeopardy.

[6] It is suggested that the court erred in giving certain instructions and likewise in refusing certain instructions requested by appellant; but since he has not seen fit to state any reasons for the suggestion, the point is not so presented that it may now be considered. It is due to this court from counsel not only to point out clearly and

neous, but to state in his brief the reasons why he deems them erroneous. 8 Cal. Jur. 546.

The judgment and the order denying a new trial are affirmed.

We concur: WORKS, J.; CRAIG, J.

70 Cal. App. 265

HUGHES v. DE MUND. (Civ. 4905.)

(District Court of Appeal, Second District, Division 2, California. Dec. 16, 1924.)

1. New trial $\S$ 116(1)—Statute relating to motion for new trial held applicable to motion preceding final, and not interlocutory, judgment.

Code Civ. Proc. § 659, providing for motion for new trial before judgment, presupposes making of ultimate findings as basis for final judgment, and does not apply to interlocutory judgments, review of all judgments or orders not final being regulated by section 936.

2. Appeal and error $\S$ 80(4) — Decree for partnership accounting held not final nor appealable.

Decree that plaintiff is entitled to interlocutory judgment dissolving partnership and to accounting, final judgment to be entered in accordance with facts found on accounting, held not final nor appealable.

3. Appeal and error $\S$ 110, 870(6)—Order dismissing motion for new trial held not appealable.

Order dismissing motion for new trial was in effect order denying motion, and was not appealable, but was reviewable on appeal from final judgment.

4. Appeal and error $\S$ 655(2)—Bill of exceptions held not subject to motion to dismiss or strike.

Bill of exceptions is not subject to motion to dismiss or strike, because appeal is from unappealable order.

5. Appeal and error $\S$ 782—Appeal from unappealable order dismissed.

Appeal from order which is not appealable does not give appellate court jurisdiction, and must be dismissed.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Suit by Thomas A. Hughes against Mary C. De Mund. On plaintiff's motion to dismiss bill of exceptions on appeal from order dismissing motion for new trial. Appeal dismissed.

See, also, 233 P. 94.

A. I. McCormick and Rush & McCormick, all of Los Angeles, for appellant.

Goodwin & Morgrage and D. E. O'Brien, all of Los Angeles, for respondent.

CRAIG, J. This is an appeal from an order of the superior court dismissing a mo-

tion for new trial, and the respondent moves this court to dismiss the appellant's bill of exceptions upon the ground that there is no appeal from such order.

[1] The respondent filed suit praying dissolution of an alleged partnership between the parties, and an accounting, and upon the trial the lower court found that a partnership existed, and that it owned certain real estate, and that a mortgage executed between the partners was invalid; an interlocutory decree was made and entered, reciting the facts found, directing an accounting, and stating that "upon such accounting being had the court will make and cause to be entered its final decree in this matter." Said interlocutory decree was entered February 2, 1924, and on February 13, 1924, appellant served and filed a notice of intention to move for new trial; on March 13, 1924, appellant served notice that she would move the court on March 19th for a new trial; such motion was continued until April 3d, and on this latter date, before the motion was heard, respondent moved that the motion for new trial be dismissed upon the ground that the same was premature, that no accounting had been taken, and that the superior court was without jurisdiction to act upon appellant's motion. The motion for dismissal was granted, and appellant contends, first, that the judgment which was entered is not interlocutory, but final, in its nature. However, she insists that it is not material to the determination of the present appeal whether the judgment is interlocutory or final; that in either event she is entitled to have her motion for new trial presented and heard upon its merits. In this behalf it is asserted that section 659, Code of Civil Procedure, clearly provides for the making of a motion for new trial before the entry of judgment. This is true, but the judgment which that section contemplates as one which a motion for new trial may precede is a final judgment. That section and those preceding and following it, having to do with new trials presuppose that the action has been prosecuted to a point where ultimate findings have been made as the basis for a final judgment. Title 13, of part 2 of the Code of Civil Procedure regulates the method of review of all other judgments or orders than those which are made final. Sec. 936, Code Civ. Proc.

[2] In the case at bar the trial court found as conclusions of law that:

"Plaintiff is entitled to an interlocutory judgment dissolving said partnership, and decreeing that an accounting of the said partnership business be had between plaintiff and defendant, and that upon such accounting being had a final judgment in this action be entered in accordance with the facts found upon such accounting."

It was held in *Clement v. Duncan*, 191 Cal. 209, 215 P. 1025, that "under all the author-

ities such a decree is not final," and that it is not appealable.

[3] The order dismissing the motion for a new trial was in effect an order denying the motion (*Galbraith v. Lowe*, 142 Cal. 295, 299, 75 P. 831), and it has repeatedly been held that there is no right of appeal from an order denying a motion for new trial, but that such order is reviewable upon an appeal from final judgment (*Jones v. Baxter*, 51 Cal. App. 589, 197 P. 361; *Roberts v. Colyear*, 179 Cal. 669, 180 P. 937).

[4] However, it is difficult to perceive why respondent should have moved to dismiss the bill of exceptions settled by the trial court, instead of making a motion to dismiss the appeal. No attempt is made to question the regularity of any step in the appellate procedure which resulted in bringing the matter before this court for review; in particular, no claim is made that the bill of exceptions was not regularly settled and filed on appeal. Throughout this proceeding respondent therefore admits that the appeal itself was properly perfected, but alleges, as reasons why the bill of exceptions should be dismissed, that the decree entered by the superior court was an interlocutory one and that the order denying the motion for new trial was not an appealable order. The bill of exceptions is no more subject to a motion to dismiss or to strike than would be the notice of appeal, the judgment roll, or the undertaking. It would be a useless proceeding to strike from the record any one of these, and yet leave the appeal pending.

[5] But, since it appears that the order from which the appeal has been taken is not an appealable one, this court has no jurisdiction of the subject-matter thereof, and under such circumstances the appeal will be dismissed. *Tingley v. Otis*, 141 Cal. 71, 74 P. 448; *People v. Oakland Water Front Co.*, 118 Cal. 234, 50 P. 305; *Reymert v. Smith*, 5 Cal. App. 380, 90 P. 470; *Bienenfeld v. Fresno Milling Co.*, 82 Cal. 425, 22 P. 1113.

The appeal is dismissed.

We concur: FINLAYSON, P. J.;
WORKS, J.

195 Cal. 242

HUGHES v. DE MUND. (L. A. 8386.)

(Supreme Court of California. Dec. 31, 1924.)

1 Appeal and error 679—Respondent held to have made prima facie showing requiring dismissal of appeal.

Affidavit of counsel and certificate of clerk showing that appellant had not filed notice to prepare transcript, nor prepared nor served any proposed draft of bill of exceptions, and that no bill of exceptions had ever been certified or settled within time required by Code Civ. Proc. §§ 650, 953a, in view of sections

659, 660, 1054, held prima facie sufficient to entitle respondent to dismissal of appeal.

2. Appeal and error 607(1) — Exceptions, bill of 41(5)—Filing notice of appeal held to start time to propose bill of exceptions or file notice requesting transcript running.

Filing notice of appeal is equivalent to notice of entry of judgment, for purpose of starting time to propose bill of exceptions, or file notice requesting transcript, running, under Code Civ. Proc. §§ 650, 953a.

3. Appeal and error 607(1) — Exceptions, bill of 41(5)—Appellant deemed to have notice of denial of motion for new trial by expiration of statutory period.

Where motion for new trial is automatically denied by force of Code Civ. Proc. §§ 659, 660, appellant is deemed to have notice thereof as of date of expiration of statutory period.

4. Appeal and error 607(1) — Exceptions, bill of 41(5)—Appeal from order dismissing motion for new trial does not suspend time for filing transcript on appeal from judgment.

Time for preparation of record on appeal, under Code Civ. Proc. §§ 650, 953a, started running on dismissal of appellant's motion for new trial, and was not ipso facto suspended by appeal therefrom, even if ground of motion was insufficiency of evidence, and order dismissing motion was appealable, in view of sections 939, 956, 963.

In Bank.

Appeal from Superior Court, Los Angeles County; J. O. Moncur, Judge.

Suit by Thomas A. Hughes against Mary C. De Mund. On plaintiff's motion to dismiss defendant's appeal. Appeal dismissed. See, also, 233 P. 93.

A. I. McCormick and Rush & McCormick, all of Los Angeles, for appellant.

Goodwin & Morgrage and D. E. O'Brien, all of Los Angeles, for respondent.

PER CURIAM. [1] Respondent moved to dismiss the appeal on the ground that no transcript of the record or appellant's points and authorities has been filed within the time allowed by law, and the time for preparation thereof has expired, supporting his motion by a certificate of the clerk of the superior court, and by an affidavit of counsel. Appellant makes no showing contravening that submitted by respondent in support of his motion, but stands upon the contention that the showing made by respondent is not sufficient under rule 6 of this court to entitle him to a dismissal, in that it fails to negative every conceivable set of circumstances under which appellant might be free from default herein. Respondent's supporting papers do comply literally with every express requirement of rule 6. The certificate of the clerk shows that the action

was brought for the dissolution of partnership and for an accounting between the partners; that an interlocutory decree was entered February 2, 1924, decreeing that a partnership existed; that it was the owner of certain specified lots; that an accounting be had; and that upon such accounting being had the court would make and cause to be entered its final decree in the matter; that defendant filed a notice of appeal from said decree April 2, 1924; that she has not filed a notice to said clerk to prepare a transcript, nor has she filed or given an undertaking for costs in preparing such transcript, nor did she arrange personally with the reporter or clerk for his compensation in the preparation thereof; that no transcript has been prepared or filed. The supplemental affidavit of counsel shows that defendant has not prepared nor served nor presented to the judge who heard the case any proposed draft of a bill of exceptions, nor has any bill of exceptions ever been certified or settled. This showing appears upon its face to be prima facie sufficient to entitle respondent to a dismissal of the appeal. Appellant's time to propose a bill of exceptions or file notice requesting a transcript expired ten days after notice of entry of judgment, "or if a proceeding on motion for new trial be pending, within ten days after notice of decision denying said motion or other determination thereof." Code Civ. Proc. §§ 650, 953a.

[2] No notice of the entry of judgment is shown to have been given, but the filing by defendant of a notice of appeal on April 2 was the equivalent thereof for the purpose of starting this time running. *Figliera v. Dewhirst*, 32 Cal. App. 245, 162 P. 655; *Mallory v. See*, 129 Cal. 356, 359, 61 P. 1123; *Timmons v. Coonley*, 39 Cal. App. 35, 179 P. 429. If motion for new trial were made, the notice of intention must have been filed within ten days thereafter, to wit, April 12. Code Civ. Proc. § 659. The court had no power to extend this time. Amendment of 1915 to Code Civ. Proc. § 659. The power of the court to pass upon such motion for new trial would expire within two months after notice of the entry of the judgment which, for the purposes of this case, would be June 12, and "if such motion is not determined within said two months, the effect shall be a denial of the motion without further order of the court." Code Civ. Proc. § 660.

[3] Where a motion for new trial is automatically denied by force of the statute, the appellant is deemed to have notice thereof as of the date of the expiration of the statutory period. *Bernschein v. Whitaker*, 175 Cal. 130, 165 P. 523; *McArthur v. Paxton*, 39 Cal. App. 608, 179 P. 521. Thus the time for serving proposed bill of exceptions or filing request for transcript on appeal would expire June 22. This time could not be ex-

tended by the court more than 30 days, or until July 22. Code Civ. Proc. 1054; *Cameron v. Arcata, etc.*, R. R. Co., 129 Cal. 279, 282, 61 P. 955. Thus, upon the face of the record as presented upon this motion, it would appear that appellant has been in default herein since July 22.

[4] At the hearing of the motion, counsel for appellant, to support his contention as to the insufficiency of the showing made in support of the motion, made substantially the following statement of facts, which were not controverted by counsel for respondent, and may be regarded as tacitly conceded herein: That defendant and appellant served and filed within time a notice of intention to move for new trial; that while the same was pending, and before it had been heard by the court, and before the time had elapsed for such hearing, under Code of Civil Procedure, § 660, respondent moved to dismiss the motion for new trial upon the ground that it was premature in that the interlocutory decree at which it was aimed was not a final judgment; that this motion was heard by the court, and appellant's motion for a new trial was dismissed by the court three weeks prior to the expiration of the statutory two months within which the court had power to grant the motion; that thereafter and within time defendant and appellant herein took and perfected an appeal from the order dismissing her motion for new trial, which appeal is now pending in the District Court of Appeal. Appellant's contention is that by virtue of these circumstances her motion for new trial is still pending and undetermined, and that therefore her time has not yet begun to run for the proposal of a bill of exceptions or the filing of a request for transcript to be used upon this appeal. She contends further that, under the rule of *People v. Lauman*, 59 Cal. App. 144, 210 P. 421, if, upon the appeal from the order dismissing the motion for new trial, the same is reversed, that upon the going down of the remittitur therefrom the trial court will have three weeks thereafter within which to act upon, and within which it may lawfully grant the motion for a new trial.

We cannot adopt this line of reasoning. Prior to 1915 a separate appeal would lie, either from an order granting, or from an order refusing, a new trial, but, by a series of amendments adopted in that year, appeals from orders refusing a new trial were abolished, as were appeals from orders granting a new trial, except in the single case of an action or proceeding tried by a jury where such trial by jury is a matter of right. 2 Cal. Juris., pp. 173 et seq.; Code Civ. Proc. § 963. At the same time it was provided that there may be reviewed upon an appeal from the judgment, not merely an order denying a new trial, but "any order on motion for a new trial." Code Civ. Proc. § 956. Prior to these amendments it was held that

an appeal would lie from an order dismissing a motion for a new trial. McDonald v. McConkey, 57 Cal. 325. While this decision was placed upon the ground that the order in question was a special order after final judgment, it was also in accord with the view that an order dismissing a motion for new trial is equivalent to an order denying the same, which was then expressly appealable. Voll v. Hollis, 60 Cal. 569; W. Davis & Son v. Hurgren & Anderson, 125 Cal. 48, 50, 57 P. 684; Winchester v. Black, 134 Cal. 125, 66 P. 197; Credits Commutation Co. v. Superior Court, 140 Cal. 82, 73 P. 1009; Bryan v. Tevis, 177 Cal. 627, 171 P. 433. An order denying a new trial is just as much a "special order made after final judgment" as is an order dismissing a motion for new trial. Yet there is no room for doubt that the amendments of 1915 took away the right of appeal from the former (2 Cal. Juris., 174, and cases cited), and it would seem that it was the intent of the Legislature in and by those amendments to abolish also the right of appeal from an order dismissing a motion for new trial. The purpose of the Legislature evidently was to obviate the delays incident to the prosecution of two separate appeals in a single action, in so far as proceedings for new trial are concerned, and to provide that such proceedings should be reviewable upon the appeal taken from the judgment.

In the amendment to Code of Civil Procedure, § 939, prescribing the time within which an appeal may be taken, it was provided that "if proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, or *other termination* in the trial court of the proceedings upon such motion." In section 956 it was provided that "the court may also, on such appeal review *any order* on motion for a new trial." In section 953a it was provided that "said notice must be filed within ten days after notice of entry of the judgment, order or decree, or if a proceeding on motion for new trial be pending, within ten days after notice of decision denying said motion, or of *other termination* thereof." In section 650 it was provided that "if proceedings on motion for a new trial be pending, within ten days after notice of decision deny-

ing said motion, or *other determination thereof* * * *." (The emphasis in the foregoing quotations is ours.) The iteration and reiteration of such phraseology makes plain the legislative intent that the limitations there prescribed should start running, not merely upon the formal denial of a motion for new trial, but upon the happening of any event which has the legal effect of terminating the proceedings therefor in the court below. So, also, the language of section 956 makes it plain that there may be reviewed upon an appeal from a judgment not only an order denying a new trial, but any order upon motion therefor, which necessarily must include an order dismissing such a motion. To adopt appellant's contention herein would be to hold that she need not even begin proceedings for the preparation of a record upon this appeal until after her appeal from the order dismissing her motion for new trial shall have been finally determined, and the remittitur thereon issued and filed in the court below. This would amount to a nullification to this extent of the legislative purpose so clearly evidenced in the amendments of 1915. It may be assumed for the purpose hereof that one of the grounds of the motion for a new trial was insufficiency of the evidence, and that the order dismissing it was, therefore, appealable, as was assumed in Grimes v. Lamar, 60 Cal. App. 623, 213 P. 270. Nevertheless, the taking of an appeal therefrom would not ipso facto extend the time for filing transcript upon appeal from the judgment. Williams v. Williams, 176 Cal. 230, 168 P. 19; Bryan v. Tevis, *supra*. We are constrained to conclude that upon appellant's statement of the facts her time for the preparation of a record upon this appeal was started running by the dismissal of her motion for a new trial, and was not suspended by the taking of an appeal therefrom, and upon the record as presented by respondent in support of his motion, it started not later in any event than July 22. In either view of the situation she is in default, and the motion must be granted.

We have not considered the question whether the interlocutory decree herein is an appealable judgment, as that question has not been raised or discussed by counsel.

The motion is granted, and the appeal is dismissed.

195 Cal. 325

PEOPLE v. COLLINS. (Cr. 2692.)

(Supreme Court of California. Jan. 24, 1925.)

1. Criminal law §598(1)—Refusal of continuance for absence of witness for want of due diligence held not abuse of discretion.

Where defendant knew eight days before departure of witness that witness was about to leave state, and procured subpoena to be issued, but did not inform sheriff of contemplated departure, so that sheriff in ignorance thereof made no special effort to obtain service, refusal of continuance for absence of witness on ground that defendant had not used due diligence *held* not abuse of discretion.

2. Criminal law §586, 1151—Application for continuance addressed to sound discretion of court.

An application for a continuance is addressed to the sound discretion of the trial court, and its ruling will not be reviewed except for the most cogent reasons.

3. Criminal law §1151—Action on application for continuance not disturbed, if court exercised reasonable and not arbitrary discretion.

Where lower court exercises a reasonable and not an arbitrary discretion in ruling on application for a continuance, its action will not be disturbed.

4. Criminal law §598(2, 7)—Absent witness not ground for continuance unless "due diligence" has been used.

The absence of a witness is no cause for continuance, unless "due diligence" has been used to procure his attendance, and due diligence has not been used, unless the proper legal means have been resorted to for purpose of compelling attendance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Diligence.]

5. Criminal law §598(2)—Due diligence in procuring service of subpoena necessary.

A defendant, to be entitled to a continuance because of absence of witness, must have used due diligence, not only to procure issuance of subpoena, but also in seeing that process is served.

6. Criminal law §603(9)—Refusal to grant continuance not abuse of discretion, where supporting affidavits do not show where witness is, or that testimony can be obtained within reasonable time.

Where supporting affidavits do not show where desired witness is, and that his testimony can be obtained within a reasonable time, refusal to grant continuance is not abuse of discretion.

7. Criminal law §603(8)—Affidavit for continuance should state that facts to which absent witness will testify cannot otherwise be proved.

To obtain continuance, affidavit should state that facts expected to be proved by ab-

sent material witness cannot otherwise be proved.

8. Criminal law §596(1)—Refusal of continuance for absence of witness not prejudicial, where substance of expected testimony given by other witness.

It is not prejudicially erroneous to refuse a continuance because of absence of witness, if substance of testimony expected to be elicited from him has been given by other witness.

9. Criminal law §596(1)—Refusal of continuance for absence of witness whose testimony would be merely cumulative held not abuse of discretion.

In manslaughter prosecution following death of person struck by defendant's automobile, refusal of continuance for absence of witness who would testify that defendant was not intoxicated *held* not abuse of discretion, in view of other testimony tending to prove sobriety.

10. Criminal law §870—Verdict finding the defendant guilty as charged, but reciting facts in recommending leniency, held not a special verdict.

In manslaughter prosecution, verdict finding the defendant "guilty as charged," and stating in separate paragraph recommending leniency that verdict was based on the unlawful operation of a motor vehicle, *held* not an imperfect special verdict within Pen. Code, §§ 1152-1156, 1161, since the general verdict did not depend for its efficacy on the second paragraph.

11. Criminal law §870—Verdict not special, if finding is consistent with verdict of guilty or of not guilty; "special verdict."

If the finding of the jury be consistent with a verdict of guilty or of not guilty, it does not constitute a "special verdict," within Pen. Code, §§ 1152-1156, 1161.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Special Verdict.]

12. Criminal law §886—Words recommending leniency constitute no part of verdict.

Words recommending mercy or leniency contained in verdict constitute no part of verdict, and may be rejected as surplusage.

13. Homicide §238—Evidence held to prove defendant intoxicated at time of accident.

In prosecution for manslaughter following death of person struck by defendant's automobile, evidence *held* to prove that defendant was in a state of voluntary intoxication at the time of the accident.

14. Homicide §235—Evidence held to prove that automobile driver, being prosecuted for manslaughter, was driving on wrong side of road.

In prosecution for manslaughter following death of person struck by defendant's automobile, evidence *held* to prove that defendant was driving on wrong side of highway when approaching other motor vehicle at time of accident.

15. Homicide ☞235, 238—Evidence held to prove intoxicated condition of defendant and operation of automobile on wrong side of highway proximate cause of death.

In prosecution for manslaughter following death of person struck by defendant's automobile, evidence held to prove that defendant's intoxicated condition and driving on wrong side of highway at time of accident were proximate cause of death of other person.

16. Homicide ☞62—Defendant who killed motorcycle driver while driving automobile while intoxicated and on wrong side of road could be convicted of manslaughter.

Automobile driver who killed motorcycle driver while driving automobile while intoxicated, in violation of Vehicle Act, § 17, as amended by St. 1919, p. 214, § 11, and on wrong side of highway in violation of Vehicle Act, § 20, subds. a, b, as amended by St. 1919, p. 215, § 12, could be convicted of manslaughter under Pen. Code, § 192, notwithstanding Pen. Code, § 367e, creating a separate offense.

17. Homicide ☞180—Evidence as to other accident held admissible in prosecution for manslaughter to show intoxication.

In prosecution for manslaughter following death of person struck by defendant's automobile, evidence as to other accident seven miles from scene of fatal accident and about an hour afterward held admissible to prove that defendant was intoxicated; remoteness going to its weight and not its admissibility, under Code Civ. Proc. § 1870, subd. 15.

18. Homicide ☞340(2)—Instruction that contributory negligence of deceased would not excuse crime held harmless.

In prosecution for manslaughter following death of person struck by defendant's automobile, in which there was no evidence as to contributory negligence of the deceased, instruction that, if defendant's manner of driving automobile was proximate cause of death, contributory negligence of deceased would not excuse crime held harmless.

19. Criminal law ☞1038(3)—Instruction failing to define terms held not reversible error, in absence of request for instructions defining terms.

In prosecution for manslaughter following death of a person struck by defendant's automobile, failure to define "negligence," "measure of care," and "proximate cause" in instruction as to contributory negligence of deceased held not ground for reversal, in absence of request for instructions defining them.

20. Homicide 341—Failure to instruct that defendant was under no obligation to accompany deceased after accident held harmless.

In prosecution for manslaughter following death of person struck by defendant's automobile, failure to instruct that defendant was under no legal duty to accompany the deceased from the scene of the accident held harmless.

21. Criminal law ☞1119(4)—Misconduct of counsel in argument held not reviewable, in absence of report of statements.

Alleged misconduct of counsel in argument to jury cannot be considered, in absence of stenographic report of statements or attempt by defendant to present some other record thereof.

In Bank.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

D. E. Collins was convicted of manslaughter, and from a judgment of conviction and from an order denying his motion for a new trial, he appeals. Affirmed.

W. N. Conley, Philip Conley, and Lindsay & Conley, all of Fresno, and Bradley & Bradley, of Visalia, for appellant.

U. S. Webb, Atty. Gen., Erwin W. Widney, Deputy Atty. Gen., and Fred C. Scott, Dist. Atty., and Leroy McCormick, Deputy Dist. Atty., both of Visalia, for the People.

LAWLOR, J. At 10:30 p. m. on February 26, 1923, on the state highway about seven miles in a northwesterly direction from Tulare, the defendant, D. E. Collins, driving an automobile, ran into and collided with a motorcycle being operated by Lewis Hawks, which collision resulted in the death of the said Lewis Hawks.

The defendant was charged by the district attorney of Tulare county with the crime of felony, to wit, manslaughter. Upon arraignment the defendant pleaded not guilty, and on the trial the verdict of the jury was rendered in these words:

"We, the jury, find the defendant guilty as charged in the information.

"John G. Anderson, Foreman.

"As this verdict is based on the unlawful operation of a motor vehicle, to wit, driving on the wrong side of the highway, when approaching another motor vehicle, we the jury, recommend leniency.

"John G. Anderson, Foreman."

Following the trial counsel for the defendant interposed a motion "for an order entering a judgment of dismissal of defendant, and cited section 1155 of the Penal Code in support of said motion," which motion was subsequently denied. A motion for a new trial on the grounds specified in section 1181 of the Penal Code was interposed and denied. "Thereupon counsel for the defendant gave notice of his intention to appeal from the order of court denying the motion for new trial." A motion to admit the defendant to probation was then made and denied, whereupon testimony was taken under section 1192a of the Penal Code. The defendant was then sentenced to the penitentiary. "Thereupon counsel for defendant gave notice of his intention to appeal."

Several points are urged as grounds for the reversal of the judgment of conviction and the order denying appellant's motion for a new trial.

I. Appellant's first point is that "defendant was denied his constitutional right to a fair trial by the action of the court in refusing to grant a continuance upon timely application to permit him to produce the testimony of Reverend Stephen O'Keefe, which testimony would have clearly established defendant's sobriety on the evening of the accident, and hence defendant's innocence of the charge." In this connection appellant contends that due diligence was shown to serve the witness with process, and that the failure to allow the continuance "amounted to a gross abuse of discretion," citing *People v. Plyler*, 121 Cal. 160, 53 P. 553; *People v. Diaz*, 6 Cal. 248; *People v. McCrory*, 41 Cal. 458; *People v. Lee*, 2 Cal. Unrep. 569, 8 P. 685; *Graham v. State*, 50 Ark. 161, 167, 6 S. W. 721; *Newton v. State*, 21 Fla. 53, 70; *People v. Wallach*, 62 Cal. App. 385, 217 P. 81.

The appellant was arraigned on March 26, 1923, and on that same day the court set the trial for Tuesday, June 12, 1923. On June 1, 1923, counsel for appellant moved for an order continuing the trial on the ground that a material witness for appellant had moved out of the jurisdiction of the court. C. L. Bradley, one of the attorneys for appellant, filed a supporting affidavit which averred that Father O'Keefe is a material and necessary witness; that his presence cannot be secured nor his evidence obtained before June 12, 1923; that, if the trial is postponed, the presence of said witness can be secured or his testimony obtained; that this witness will testify that appellant was not under the influence of intoxicating liquor; that he was with appellant throughout the day of the accident, and that when he left Tulare appellant was in possession of his normal faculties; that due diligence to secure the attendance of this witness was used; that the subpoena was caused to be issued on May 12, 1923, and on that day placed in the hands of the sheriff of the county of Tulare, with instructions and the witness' address; that the sheriff informed the affiant that the witness had left the state of California, and is now in Ireland visiting his parents; that he took his departure before service could be had upon him; and that affiant is informed and believes that this witness will be without the jurisdiction of the court for a period of about two or three months.

Following argument on the motion to continue the trial the motion was denied. Again on June 12, 1923, the day set for the trial, counsel for appellant made another motion for continuance, and filed four supporting affidavits; the court also heard the testimony of John Hazen, a deputy sheriff of the county of Tulare. The affidavit of the appellant was

similar to the affidavit of C. L. Bradley, and further averred that for a period of eight days subsequent to May 12, 1923, the date of the issuance of the subpoena, Father O'Keefe was within the jurisdiction of the court; that said witness will testify that he was in the company of appellant from 5 p. m. on February 25th to 10 p. m. on February 26th, the day of the accident; that appellant was sober all of this time; that appellant is unable to procure any other witness who will testify to these facts; that it is "extremely uncertain when the Rev. Stephen O'Keefe will return to the state of California," but that he is at the present time residing at Trieneragh, County Kerry, Ireland; that an application for an order to take his deposition accompanies the affidavit; and that appellant had no reason to believe that the said witness would depart from the state of California.

The affidavit of W. M. Conley, one of the attorneys for appellant, averred the above facts, and stated further that on May 12, 1923, he was informed that there was a likelihood of said witness departing from the state of California; that a subpoena was caused to be issued immediately; that it was placed in the hands of the sheriff for service; that said witness was within the jurisdiction of the court on May 20, 1923; that said witness is a pastor of the Roman Catholic Church at Tulare, and is under the jurisdiction of the bishop of Los Angeles, and the affiant had no reason to believe that he contemplated leaving prior to the trial; and that due diligence has been exercised whenever a subpoena is taken out and placed in the hands of the sheriff for service at a period of 30 days preceding the trial. On June 12, 1923, the affidavit of C. L. Bradley was again placed before the court and another of the appellant, in which he asked that a commission be issued directed to some person in Ireland to examine the witness upon prepared interrogatories.

John Hazen, the deputy sheriff of the county of Tulare, testified that the subpoena was placed in his hands on May 12, 1923, with the information that the witness was the pastor of the Catholic Church at Tulare; that he went to the parsonage the next day and asked for Father O'Keefe; that the lady who answered the doorbell said he was not there; that she did not know "for certain" when he would be back; that she thought he was in the south part of the state, and would probably be back about Thursday or Friday of the next week; that he went again the following Friday morning, May 18, 1923, and another priest came to the door; that he asked him where Father O'Keefe was, and "he said he thought he was with his people. 'Well,' he says, 'I don't think you can get any service on him.' I says, 'He is not in this county today, then?' 'No,' he says, 'he is not in this county'"; that he reported the result to the

attorneys for the appellant; that the next week he gave the subpoena to a Mr. Smith to serve; that three days later he returned and was informed the witness was not in this state; and that he informed the attorneys for appellant about June 1, 1923, that he could not obtain service on the witness.

After argument the appellant's motion was denied by the court on the ground that due diligence had not been shown in the attempt to serve the witness.

The appellant contends that—

"Notwithstanding this showing of necessity * * * the trial court forced the defendant to go to trial immediately when the very basis of the charge of the people was that the defendant was drunk at the time of the accident. This denial of the right to testimony which would have established his innocence was fatal to the defendant, and the conviction which followed can be attributed solely to the fact that defendant was not accorded a fair chance to prove by the said witness that he was sober throughout the day of the accident and at the time of the collision."

[1] It does not appear to us that the trial court abused its discretion in refusing to grant a continuance. The record shows that appellant had from March 26, 1923, the day he was arraigned and the case set for trial, until June 12, 1923, the date of the trial, in which to secure his witnesses. It does appear that until May 12, 1923, he was not aware the desired witness would not be available, when his attorney was informed that he was about to leave. From May 12, 1923, until June 12, 1923, was sufficient time in which to secure service, and, although it does appear the said witness left about May 20, 1923, still he had eight days within which to secure service. Sheriff Hazen had not, evidently, been informed of the priest's contemplated departure, because he made no special effort to obtain service, and made only two trips to the parsonage before May 20, 1923. The facts of *People v. Plyler*, 121 Cal. 160, 53 P. 553, relied upon by appellant, are distinguishable from those at bar. In that case, in granting a new trial, the court held it was error to refuse an order for a continuance based on the ground of the illness of the defendant's wife, whose testimony would tend to entirely exonerate him, and that "she was the only person by whom he could prove any of these facts." The wife in that instance was under subpoena, but was taken ill two or three days before the trial, and, according to the certificates of two physicians who examined the witness, her attendance in court would be dangerous to her life. It was stated in the affidavit of the defendant that in a month she would have recovered her health and be able to appear and testify. This court, citing *People v. McCrory*, supra; *People v. Dodge*, 28 Cal. 445, and *People v. Brown*, 46 Cal. 103, held that the delay was

not unreasonable. The other cases cited by appellant are not in point here.

[2-6] "It is a settled rule of practice that an application for a continuance is addressed to the sound discretion of the trial court, and its ruling will not be reviewed except for the most cogent reasons. The trial court is apprised of all the circumstances of the case and the previous proceedings, and is therefore better able to decide upon the propriety of granting the application than an appellate court; and, when it exercises a reasonable and not an arbitrary discretion, its action will not be disturbed." 5 Cal. Jur. 968. The absence of a witness is no cause for a continuance, unless due diligence has been used by the party to procure his attendance at the trial, and due diligence means that the proper legal means must have been resorted to for the purpose of compelling the attendance of the witness. But, even if a subpoena is issued to compel attendance, still it must appear that due diligence has been used in seeing that such process is served. *Jacks v. Buell*, 47 Cal. 162; *People v. Quincy*, 8 Cal. 89; *Frank v. Brady*, 8 Cal. 47; *People v. Sliger*, 17 Cal. App. 464, 120 P. 40; *Hawley v. Los Angeles Creamery Co.*, 16 Cal. App. 50, 116 P. 84. And, furthermore, although a subpoena has issued, if no effort to secure the testimony has been made within a reasonable time, there is not a sufficient showing of diligence. *Tompkins v. Montgomery*, 123 Cal. 219, 55 P. 997. And, if the supporting affidavits do not show where the desired witness is and that his testimony can be obtained within a reasonable time, it is not an abuse of discretion in the court to refuse to grant a continuance. *Harper v. Lamping*, 33 Cal. 641; *Watson v. Columbia Basin Development Co.*, 22 Cal. App. 556, 135 P. 511. Under the above authorities it is proper to hold that the appellant did not use due diligence in obtaining service of the subpoena, knowing at least from May 12, 1923, that the desired witness was contemplating departure from the state. It is averred in one affidavit that he will be absent two or three months and in another that "it is extremely uncertain when he will return." Upon this showing the court could have found that the witness would not return within a reasonable time, or that the length of his absence could not be estimated.

[7, 8] In the second place, in order to obtain a continuance, the affidavit should state that the facts expected to be proved by the absent material witness cannot be otherwise proved. It is therefore "not prejudicially erroneous to refuse a continuance on account of the absence of a witness, if the substance of the testimony expected to be elicited from him has been given by another witness." 5 Cal. Jur. 993.

The fact sought to be proved by Father O'Keefe was that from 5 o'clock p. m. on

February 25th to 10 p. m. on February 26th, the appellant was sober and was not under the influence of intoxicating liquor. Three other witnesses testified as to the sobriety of appellant during the greater part of this time.

The appellant, testifying in his own behalf, stated that between the hours of 8 o'clock on the evening of February 26th and 1 o'clock on the afternoon of February 27th he was not at any time under the influence of intoxicating liquor, and, further, that he had never seen the bottle which was picked up by the side of the road at the scene of the second accident and introduced into evidence as Exhibit 5 before it was shown to him in the courtroom at the trial.

Mrs. Kathleen Carroll, the housekeeper for Father O'Keefe at the parish house in Tulare, testified that on the evening of February 26th the appellant was at the parish house for dinner; that no liquor was served that she saw; that after the dinner was served she went into the kitchen; that she did not see the appellant drink anything while he was at the parish house and that he did not appear to be under the influence of liquor; that before the appellant left he went into the kitchen and bid her goodbye, and she did not notice anything peculiar in his actions; and that he was sober when he came at 6 o'clock and when he left.

Mrs. Elizabeth McNamara, who lived at a Mr. Spaulding's home in Visalia, testified that she first met the appellant in San Francisco; that she saw him on the evening of February 26th; that he came out to see her on insurance business about half past 8; that they went to the parish home in Tulare, and arrived about half past 9; that they remained about an hour, and she was in the company of the appellant the whole time; that he was not under the influence of intoxicating liquor and did not appear to be; that he was sober all the time; that she sat by him all evening, and, if he had been drinking, she could have detected liquor on his breath; that he left her at 10:30; that the appellant was driving his own car; and that it operated "perfectly all right" while she was driving with him.

[9] It is clear, therefore that the testimony of the absent witness would be merely cumulative, and that the court did not under the circumstances shown abuse its discretion in refusing to grant the continuance.

II. Appellant's second point is that the verdict of the jury does not support the judgment, for the reason that the verdict was an imperfect special verdict and is "insufficient in form to warrant a judgment of conviction thereon, since all of the ultimate facts upon which guilt could be predicated are not found by the jury."

Section 1152, Penal Code, is as follows:

"A special verdict is that by which the jury find the facts only, leaving the judgment to

the court. It must present the conclusions of fact as established by the evidence, and not the evidence to prove them, and these conclusions of fact must be so presented as that nothing remains to the court but to draw conclusions of law upon them."

Section 1153 provides how special verdicts shall be rendered; section 1154 provides that they need not be in any particular form; section 1155 provides in part:

"The court must give judgment upon the special verdict as follows: 1. If the plea is not guilty, and the facts prove the defendant guilty of the offense charged in the indictment, * * * or of any other offense of which he could be convicted under that indictment, judgment must be given accordingly. But if otherwise, judgment of acquittal must be given."

Section 1156 provides that when special verdicts are defective a new trial shall be ordered, and section 1161 provides that, if the jury render a verdict which is neither general nor special, the court may direct them to reconsider, and it cannot be recorded until it is rendered in some form from which it can be clearly understood that the intent of the jury is to either render a general or special verdict.

[10-12] The first paragraph of what is asserted to be a special verdict is unquestionably a general verdict finding the appellant guilty as charged in the information, and does not depend for its efficacy as such upon the second paragraph. It is not an imperfect special verdict upon which the court should have pronounced a judgment of acquittal. If the finding of the jury be consistent with a verdict of guilty or of not guilty, it does not constitute a special verdict as that term is used in the statute. The verdict herein was unequivocal in meaning, for it found the appellant guilty as charged in the information. Plainly, the second paragraph is merely a recommendation for leniency, and apparently is based on the circumstance that the appellant was driving on the wrong side of the highway when approaching another car coming in the opposite direction. Evidently in the minds of the jury this mitigated the offense. It cannot be regarded as a special finding in any way qualifying the complete general verdict which preceded it. In *State v. Schweitzer*, 18 Idaho, 609, 111 P. 130, the verdict was "guilty of selling by short weights as charged in the complaint." The court held the words "of selling by short weights" are to be treated as surplusage, and the verdict was upheld. If a verdict contains words recommending mercy or leniency, it is well settled that they constitute no part of the verdict and may be rejected as surplusage. 8 Cal. Jur. 407. In *People v. Mitchell*, 61 Cal. App. 569, 215 P. 117, it is said:

"Counsel for defendant also objects to the form of the verdict which was rendered by the jury. It was as follows: 'We, the jury

impaneled to try the above-entitled cause, find the defendant guilty as charged in the information and recommend to the court that his sentence be not over five years.' Section 1151 of the Penal Code provides that 'a general verdict upon a plea of not guilty is either "guilty" or "not guilty."' The effect of defendant's contention is that the recommendation of the jury annexed to the verdict, that the sentence be not over five years, is not mere surplusage, but is a condition which renders the verdict nugatory. In the case of *People v. Holmes*, 118 Cal. 444 (50 P. 675), it appears that a verdict was returned which, among other irregularities, prayed 'the extreme mercy of the court in its sentence and punishment.' The verdict was upheld on the ground that it should have a reasonable construction and be given effect according to its manifest intention. And see *People v. Cornell*, 29 Cal. App. 430 (155 P. 1026), in which the California authorities bearing upon the subject are reviewed. In *People v. Bowman*, 24 Cal. App. 781 (142 P. 495), where one of the verdicts returned by the jury was, 'We, the jury find the defendant guilty of the crime charged and leave to the mercy of the court,' it was held that such a verdict was not rendered invalid by reason of the concluding clause. The only matter to be considered here is the effect which the verdict, if any, produced by the recommendation as to the sentence to be imposed on defendant. A verdict is to be construed like any other instrument, and the rule is that, taking the verdict in its entirety, if the meaning intended to be conveyed may be clearly ascertained by common understanding, the verdict is sufficient, notwithstanding any surplusage or that there may be included therein irregularities in spelling or awkward or incorrect expressions from a grammatical standpoint. From the language used in the verdict in the instant case there is no difficulty in ascertaining the fact that the jury found the defendant guilty as charged in the information."

The language in the first paragraph that appellant is guilty of the crime of manslaughter as charged in the information is complete and unequivocal, and the intention of the jury to convict the appellant of the offense charged is unmistakably expressed.

III. Appellant's asserted third ground for reversal is that—

"Since the Legislature had prior to said alleged crime specifically eliminated from the definition of manslaughter the killing of another by a person driving an automobile while in an intoxicated condition, and denounced the act of killing by a person while driving an automobile in an intoxicated condition as a separate and distinct felony (section 367e, Pen. Code), the whole prosecution of the defendant under the manslaughter section of the Penal Code, section 192, was improper, the evidence of intoxication adduced was improperly and erroneously admitted, and the court should have instructed the jury to acquit the defendant."

The information charging the crime of manslaughter does not allege that the kill-

ing was due to the intoxication of appellant or to any act done by reason of such intoxication. Nor is it alleged that driving on the wrong side of the road was the cause of the accident. The offense is charged in the conventional form without any specification of the act which caused death. It is simply alleged that appellant "did willfully, unlawfully, and feloniously kill one Lewis Hawks." No reference is made to section 367e, and it is not otherwise attempted to set forth the means by which the death of the deceased was accomplished. The record does not show that the information was demurred to or that a motion in arrest of judgment was made. It is shown that, when judgment was about to be pronounced, a motion to dismiss was made on the ground the verdict was not sufficient within the meaning of section 1155 of the Penal Code. As already indicated, this motion was denied.

Before passing on the contention of appellant we will describe the evidence in the case. The evidence covers the accident on the highway in which the deceased was struck by appellant's Hudson coach and a collision between appellant's car and a truck and trailer belonging to A. E. Fiske, which occurred about an hour later on the highway about two miles north of Goshen. The following testimony relates principally to the claim that the appellant was intoxicated on the occasion in question:

George Scheidt testified that he met appellant at Tulare "just before the accident," on February 26th, on the sidewalk in front of the R. & R. cigar store; that A. L. Berry and a chap named Moss were present; and that appellant "asked me the road to Fresno, and he asked A. L. Berry the road to Fresno—and that is the first time he had been over the road, and he told me to tell Collins the road, because I had been over it before—so I told him the way to go, and he said he wanted to know the right road because he wanted to get to Fresno. Q. And did you note anything, particularly, in respect to his condition at that time, Mr. Scheidt? A. Well, yes, to a certain extent; he wasn't standing up right, teetered a little bit, and I smelled liquor on his breath." On cross-examination it was sought to impeach this witness' testimony by showing that at the coroner's inquest he did not testify that appellant "teetered." The witness explained that at the coroner's inquest he was nervous and could not remember everything because it was the first time he was on the witness stand. He further testified that he and his companions went into the cigar store for about three minutes, and that when they came out appellant had gone; that after the accident in which the deceased was injured he and his companions assisted appellant in getting his car out of the embankment, and that when they then proceeded to Fresno Moss rode with appellant, who went first, then the wit-

ness, driving his own car, and after him A. L. Berry in his car; that appellant pursued "an erratic course, from one side of the road to the other"; that about two miles north of Goshen the car of appellant collided with a Dodge commercial truck which was proceeding south on the west side of the road; that just before the collision appellant was off the highway on his right side and turned upon the highway and into the truck; that after the collision appellant's car went into the fence on the west side of the highway; that a bottle was found on the left side of appellant's car after it had stopped in the fence; that the speed maintained between Tulare and the scene of the accident was twenty-five miles an hour; and that after the first accident the left fender and left headlight on appellant's car were smashed.

A. L. Berry corroborated the testimony of George Scheidt as to the meeting with appellant in front of the cigar store. He testified that he thought appellant was drunk from "the way he acted and the way he talked at that time"; that he smelled whisky on his breath; and that after the first accident he talked to appellant, who said he did not know how the accident happened, and that "he didn't hit nobody." His testimony concerning the second accident corroborates that of George Scheidt. He testified that after the second accident Moss, who was riding with appellant, got out of the car and remarked that he had told appellant not to drive the car so fast because he was not in a condition to drive it that fast. On cross-examination he said he "saw him go backwards and forwards a little bit" in explaining appellant's condition before the deceased was struck. An attempt was made to impeach this witness' testimony by showing that at the coroner's inquest he did not testify that appellant was staggering, and he explained that he was not asked that question. His testimony was that appellant staggered down the road "just like that" (illustrating) after the accident, and at the coroner's inquest he had testified that he did not, at that time, after the accident, observe anything peculiar in appellant's walk. He also testified that appellant was nervous and excited after the accident to the deceased, but was not near the injured man, and made no attempt to have him safely conveyed to a hospital. It appears that at the coroner's inquest he testified appellant was "right by the motorcycle," and that he said "to get him into this car and get him to the hospital."

The witness also testified on cross-examination that the steering gear of appellant's car was stiff, but that he made no examination of the cause; that appellant staggered from his car over to the witness' car after the second accident; that at the A B C Garage in Fresno, where he took appellant after the second accident, appellant told the garageman to get his car, described it, stated

who he was, and that he would pay for it; that after he took him to the hotel he staggered when he got out of the car; and that he did not see him stagger at the garage because he walked ahead of appellant. On redirect examination this witness testified that the gear of appellant's automobile steered "just a little hard, but a man that is used to driving an automobile can drive it any place"; and that the zigzag movements of appellant's car between the first and second accident were not the result of the condition of the steering gear. He further testified that when the second collision occurred with the truck and trailer the tire on the left front wheel of appellant's car blew out.

Charles Bass, who was riding in the truck when it was struck by appellant's car, testified that appellant "was plainly drunk," and he could distinctly smell liquor on his breath; and that appellant told him "about 16 or 17 times he was no bum and wasn't going to run away." On cross-examination he testified that the impact of the Hudson coach bent the axle of the trailer and knocked the hub off.

L. W. Kemp, one of the floor men at the A B C Garage, testified that between 12 and 1 o'clock on the morning of February 27th appellant, accompanied by another man, came into the garage; that he talked to him about 5 or 10 minutes; that he seemed sober, and it did not occur to him that he was intoxicated; that when the Hudson car was taken to the garage it had a tire blown out on the left front wheel, the axle was bent, the bumper torn off, and the left fender was bent.

Thomas E. Collins, a brother of appellant, testified that he had been at the Collins Hotel in Fresno during the day of February 26th; that he left for home about half past 8 or 9 o'clock every night; that he was not at the hotel at the time A. L. Berry testified that he gave appellant \$15 with which to pay George Scheidt, Moss, and himself for their services; that about 10 o'clock the next morning he talked with appellant and that he was sober; that between 12 and 1 o'clock appellant went home with him and stayed there until half past 1; and that during that time he was sober. A. L. Berry had testified that he saw appellant at 1 o'clock and that he was drunk at that time.

Mrs. Ellen Collins, wife of appellant, testified that on the night of the accident she was at the hotel; that at about 12 o'clock her husband came home; that she was awakened; that he was perfectly sober; and that he was sober the next day.

The testimony of the housekeeper at the parish house concerning appellant's sobriety prior to the accident in which deceased was injured has already been mentioned, as well as that of Mrs. Elizabeth McNamara, who was with appellant until about half past 10 on the evening in question.

Two witnesses, W. A. Bean and Henry Avila, testified to the general reputation of appellant for sobriety.

The following testimony relates chiefly to the operation of appellant's car on the wrong side of the road when approaching another motor vehicle.

James Cross testified that on the night of the accident he met a motorcycle with a carrier about three miles and a half out of Hanford; that it had very good lights, and "was going at a very slow clip," about twenty-five or thirty miles an hour, and was on the right side of the road.

Leonard Coburn, a surveyor and engineer, testified concerning a drawing which purported to show the place where the deceased was injured. He identified a portion of the highway and the railroad track which was about four feet above the highway, the fence with the broken wires, a broken fence post, and the spot where the grass had been smashed down and smeared with grease which was about eight feet from the westerly edge of the paved highway, and the two tracks "caused by slipping rubber tires, tires of an automobile, starting from the point here on the highway, and going more in a westerly direction, till it ran onto the railroad embankment perhaps eight inches or a foot. * * * the car had apparently set its brakes and left the marks on the highway." He also testified that about two miles north of the place the deceased was found there was a spot very similar to the one above mentioned where the car had gone off the highway and swerved into the fence and broke it down. This witness identified a bottle, two pieces of iron, which were a hub cap marked "L. A. Trailer Company," which were found next to the fence, south of the car.

Charles Bass testified that he and A. E. Fiske were coming from Stockton in the latter's Dodge truck and trailer on the night of the accident, and "about three miles north of Goshen Junction, and there is a car coming zigzagging along the road, and, if I recall well, with one light"; that it slanted across the highway and ran into the running board of the Dodge car, hit the trailer, circled, and hit the fence; and that he took the number of the car and the name of appellant on the registration certificate.

Charles Crum testified that on the night of February 26th he and his nephew were proceeding south from Fresno to Tulare, and, seeing "lights shining over towards the railroad," he decided to stop, and saw a motorcycle with a side car on the west side of the highway facing northwest and about five or six feet off the highway; that he saw the deceased, George Scheidt, and A. L. Berry, who asked him to take deceased to Tulare to the hospital; that he sat in the back seat with the deceased, holding him in his arms; that the deceased said to hurry, "I am dying," he

says, 'I can't live'; that he repeated this several times before they reached the hospital; that the deceased said "he tried to get out of this man's way, but he kept on coming towards him, and he said he couldn't get out of reach of him"; and that he was on the right-hand side of the road going south at the time he was struck.

Marvin Crum, a nephew of the last witness, who was present at the time, corroborated a part of the foregoing testimony, but said he did not hear the declarations of the deceased, as he was driving the car.

W. F. Seaman testified that on the night in question he met Charles and Marvin Crum with the deceased, and they took him to the hospital; that he was very badly injured and called for the doctor; that in the presence of the nurse and Charles Crum the deceased said "he was coming south to Tulare on his motorcycle, driving just as far on the edge of the west side of the highway as he could drive, and this big car came along, and deliberately, he said, well, he said it deliberately shot square across the highway on an angle like that, and struck his motorcycle, and he had no chance of getting out of the way. Those were the words that Mr. Hawks used."

Mrs. Lillian McCarthy, sister-in-law of deceased, testified that she saw him at the San Joaquin Hospital in Tulare; that the wife of deceased and a Miss Hickey were there also, and, that she "asked him if he could tell me what happened, and he said, 'Yes.' He said he was hit by an automobile, and I said, 'Were your lights all right?' He said, 'Yes.' And, I said, I asked him if he was on his own side of the road, and he said, 'Yes'; he said, 'He came right straight for me, and I couldn't get out of his way'; and I said to him, 'did he render you any assistance in any way?' and he said 'No.'"

[13-15] In aid of the discussion we have set forth the evidence somewhat in detail, and it is abundantly clear from the summary thereof that it is sufficient as matter of law to establish at least two propositions of fact—(1) That the appellant was in a state of voluntary intoxication at the time of the accident; and (2) that he was driving the car on the wrong side of the highway when approaching another motor vehicle—and that one or both of these propositions was the proximate cause of the death of the deceased. It was attempted to show some contradictions and inconsistencies in the testimony, but it was within the province of the jury to harmonize as far as possible the evidence as a whole in resolving it into facts. On appeal all conflicts must be resolved on the side of the judgment. It is not disputed that appellant was driving on the wrong side of the highway, and it is well within the record to declare that, while the jury in its appeal for leniency stated that the verdict is based on

the unlawful operation of the automobile on the wrong side of the highway, this is not to be taken as the equivalent of an implied finding that appellant was not intoxicated when his car inflicted injuries which caused the death of the deceased.

We will now consider the application of the evidence to the law involved. The charge is manslaughter. Section 192 of the Penal Code provides:

"Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds: 1. Voluntary—upon a sudden quarrel or heat of passion. 2. Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

Under this definition two elements enter into voluntary manslaughter: (a) When it is committed upon a sudden quarrel or in the heat of passion. Involuntary manslaughter may be committed (b) in the commission of an unlawful act not amounting to felony, or (c) in the commission of a lawful act which might produce death in an unlawful manner, or without due caution and circumspection.

Appellant, as we have seen, contends that section 367e has created a new felony which has taken the place of involuntary manslaughter, and that the charge should have been prosecuted thereunder.

The theory of the prosecution was that the appellant was guilty of intoxication and of driving on the wrong side of the highway, and we will therefore set forth the pertinent provisions of the law as it stood at the time of the accident.

Section 367d of the Penal Code provides:

"Any person operating or driving an automobile, motorcycle or other motor vehicle who becomes or is intoxicated while so engaged in operating or driving such automobile, motorcycle or other motor vehicle shall be guilty of a misdemeanor."

Section 367e of the Penal Code reads:

"Any person operating or driving an automobile, motorcycle or other motor vehicle who becomes or is intoxicated while so engaged in operating or driving such automobile, motorcycle or other motor vehicle, and who by reason of such intoxication does any act, or neglects any duty imposed by law, which act or neglect of duty causes the death of, or bodily injury to, any person, shall be punishable by imprisonment in the state's prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding \$500, or by both such fine and imprisonment." (Stats. 1911, p. 288.)

The Vehicle Act declares:

"Sec. 17. No person who is under the influence of intoxicating liquor * * * shall operate or drive a motor or other vehicle on any public highway within this state. Any person violating the provisions of this section

shall be punished by imprisonment in the county jail for not less than six months nor more than one year or by imprisonment in the state prison for not less than one or more than three years or by a fine of not less than five hundred dollars nor more than five thousand dollars." (Stats. 1919, p. 214.)

"Sec. 20. (a) The driver or operator of any vehicle in or upon any public highway shall drive or operate such vehicle in a careful manner with due regard for the safety and convenience of pedestrians and of all other vehicles or traffic upon such highway, and wherever practicable shall travel on the right-hand side of such highway. Two vehicles which are passing each other in opposite directions shall have the right of way, and no other vehicle to the rear of either of such two vehicles shall pass or attempt to pass such two vehicles. On all occasions the driver or operator of any vehicle in or upon any public highway shall travel upon the right half of such highway unless the road ahead on the left-hand side is clear and unobstructed for at least one hundred yards ahead and in all cases while crossing an intersecting highway. * * *

"(b) Vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other one-half the road as nearly as possible." (Stats. 1919, p. 215.)

"Sec. 32. (a) Excepting as in this act otherwise provided, or where a different penalty is expressly fixed by this act, any person violating any of its provisions * * * shall be guilty of a misdemeanor, and upon conviction thereof, unless in this act otherwise provided, shall be punished by a fine not exceeding five hundred dollars or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment." (Stats. 1919, p. 225.)

No change was made in the foregoing provisions by the Legislature of 1921, but in 1923 the "California Vehicle Act" (Stats. 1923, p. 517) was enacted, recasting the law, making a number of modifications, and creating several new crimes punishable as felonies and a number of additional misdemeanors. To illustrate the character of changes, section 112 (Id., p. 553) thereof makes the punishment for conviction of driving while under the influence of intoxicating liquor imprisonment in the county jail for not less than 90 days nor more than 1 year, or by imprisonment in the state prison for not less than 1 nor more than 3 years, or by a fine of not less than \$200 nor more than \$5,000. Section 112 is an amendment of section 17 of the "Vehicle Act" of 1919. Section 121 (Id., p. 557) provides that any person who knowingly and willfully drives any vehicle upon a public highway, either without due caution and circumspection, or in such manner as to endanger the life, limb, or property of any person, shall be guilty of reckless driving and upon conviction shall be punished by imprisonment in the county jail for a period of not less than 5 days nor more than 90 days or by a fine of not less than \$25 nor more than \$250, or by both such fine and imprisonment. Section 141 is new,

and makes it a felony to fail to stop in case of collision; the punishment being imprisonment not exceeding 5 years in the state prison or not exceeding 1 year in the county jail. Section 28 of the 1919 act made the punishment for driving a car without the owner's consent imprisonment in the state prison for not less than 1 year nor more than 5 years. Section 146 of the 1923 act adds certain acts to the crime prescribed in the 1919 act and provides that a violation thereof shall be deemed a felony, which under section 18 and 18a of the Penal Code the minimum punishment would be 6 months and the maximum 5 years in the state prison. For additional misdemeanors by the act of 1923 see sections 135(c), 147, 148, 149, 150, and 153(b).

The crime charged against the appellant was alleged to have been committed on February 26, 1923, and the foregoing statutes of that year did not go into effect until August 31 following. They are not therefore applicable to this prosecution, but we have referred to them merely to show the tendency to prescribe additional crimes for the unlawful operation of vehicles which in cases of death resulting from a violation of the "California Vehicle Act" may be intended to form a basis of prosecution for either murder or manslaughter.

We will next consider appellant's contention that the adoption of section 367e superseded the statute of involuntary manslaughter. No ground appears to us for holding that the adoption of section 367e had the legal effect claimed. For instance, it makes a neglect of duty which merely results in bodily injury the same crime as when such neglect results in death, and, of course, mere bodily injury would not justify a charge of manslaughter. To hold that the legal effect of section 367e is to withdraw from the crime of involuntary manslaughter all prosecutions where death is caused by intoxication is to impute to the Legislature an intention to eliminate from that offense prosecutions for perhaps the most prolific source of fatal accidents, and thereby reduce the maximum punishment for such offenders by one-half. That is not the tendency of recent legislation. Thus, section 367d, adopted in 1911, which we have quoted, prescribed a misdemeanor punishment for any person who is or becomes intoxicated while engaged in operating or driving such vehicles; but sections 17 of the 1919 act and 112 of the 1923 act make driving in such intoxicated condition a felony. Judging from the increased number of felonies prescribed by the Legislature for violations of the Motor Vehicle Law, subsequent to section 367e, it is more likely that in adopting such provisions it was intended to create a more drastic law for cases of death or bodily injury due to intoxication. It may have been intended to make such acts in proper cases the basis of

a prosecution for either murder or manslaughter. In cases where either felonious or misdemeanor punishment may be imposed for the same criminal act the charge may be prosecuted as a felony. In *People v. War*, 20 Cal. 117, the defendant was indicted for a felonious assault in the use of a deadly weapon with the intent to indict upon the person of another a bodily injury. The punishment prescribed for the said offense was either by confinement in the state prison or the payment of a fine. Upon the grounds hereinafter stated a demurrer was interposed by the defendant and sustained. From the judgment entered thereon the state appealed. In criminal actions the Supreme Court at that time had appellate jurisdiction in cases of felony only, and, the indictment not having characterized the criminal act as a felony, it was urged by the defendant on appeal that it is not sufficient to show that, if prosecuted farther, the offense might have amounted to a felony; that it must be a felony at the time the appeal is taken, and that the indictment does not show whether defendant is accused of a felony or a misdemeanor. In reversing the judgment and directing the court below to give judgment for the state on the demurrer, with leave for the defendant to plead to the indictment, the court said:

"The discretion given as to the punishment certainly does not make the same act two offenses, and it would be a singular consequence if the fixing alternative punishments belonging to the different classes of crimes should prevent a criminal act from being indictable as any crime. We think, however, there is no uncertainty as to the grade of the crime charged. 'A felony is a public offense, punishable by death or by imprisonment in a state prison. Every other public offense is a misdemeanor.' (Act to regulate proceedings in criminal cases, §§ 4, 5.) Under these definitions, any offense which may be or is liable to be punished by death or imprisonment in the state prison, is a felony. Any offense which is not liable to such punishment—that is, for which that grade of punishment cannot under any circumstances be inflicted—is a misdemeanor. Although the offense charged in this indictment may, in the discretion of the court in any particular case, be only punished by a fine, yet the offense is one which is punishable, which is liable to be punished, by imprisonment in the state prison, and hence it must be prosecuted with the forms and solemnities of a crime of the grade of a felony."

This is also true of a case of death resulting from a violation of section 17 of the Vehicle Act, for that section also provides for felonious punishment, although the extent thereof varies from that prescribed by section 367e. However, if felonious punishment is not imposed, the crime for all purposes shall be deemed a misdemeanor. Section 17, Pen. Code.

It would follow that under section 17 of the Vehicle Act and section 367e of the Pen-

al Code, as those provisions stood in 1919, manslaughter was properly charged against appellant, and we will now proceed to consider whether under the evidence and the legal tests we have applied appellant is guilty of that offense.

To constitute involuntary manslaughter death may be due either to the commission of an unlawful act not amounting to a felony or to the commission of a lawful act which might produce death in an unlawful manner, or without due caution and circumspection. We have said that the evidence would support a finding that appellant at the time of the injury was driving on the wrong side of the highway. This, as we have shown, is an unlawful act constituting a misdemeanor, thus bringing the case within the first sentence of subdivision 2, § 192.

As previously stated, the evidence is sufficient to sustain a finding that appellant was in a state of voluntary intoxication when the collision occurred. This would be an unlawful act amounting to a felony.

With regard to the next element in involuntary manslaughter—the commission of a lawful act in an unlawful manner or without due caution and circumspection—the driving of the automobile on the highway was a lawful act, but the jury might have found that it was operated in an unlawful manner, either by having been driven on the wrong side of the highway or by appellant being in a state of voluntary intoxication, or by both. If the jury had so found, the death of the deceased might have been traced either to the commission of a misdemeanor, driving on the wrong side, or a felony—being in a state of voluntary intoxication.

Under the circumstances it will serve no purpose to consider the remaining element, without due caution and circumspection.

[16] We conclude that appellant was properly prosecuted for manslaughter; that a violation of section 367e may be prosecuted either as a distinct crime of felony or be made the basis of a prosecution for manslaughter; that the evidence would support a finding that appellant was driving on the wrong side of the highway, and that he was in a state of voluntary intoxication; and that either act would support the verdict.

IV. The fourth ground of appeal is that "the court erred in permitting the introduction of other testimony during the course of the trial, which errors were extremely prejudicial to the rights of the defendant." Appellant contends that the testimony of the second accident was improperly admitted for two reasons: (1) Because the facts relating to the second accident did not in any way form a part of the *res gestæ*; and (2) because the relation by the witnesses of the facts concerning the second accident constituted evidence of a separate and distinct offense, to wit, reckless driving, as defined in the Vehicle Act, and that it tended to preju-

dice the minds of the jurors against the appellant.

[17] We have sufficiently set forth the testimony relating to the second accident. The evidence thereof, of course, does not tend to prove that the appellant was driving on the wrong side of the highway at the time he collided with the motorcycle, but it does tend to prove that appellant was carelessly operating his automobile during the journey from the scene of the first accident to the second. With regard to appellant's objection to the admission of this testimony that it tended to prove the commission of another offense—reckless driving—than that on which he was charged, it may be remarked that "reckless driving" was not made a crime until after the offense at bar was committed. The exceptions to the rule that evidence of other crimes is not admissible are well recognized, but appellant contends that "the evidence improperly introduced by the prosecution in this case does not fall under any of the exceptions to the general rule.

* * * And certainly the second collision in this case cannot be claimed to be any part of the *res gestæ*, happening at a place seven miles from the scene of the fatal accident, and about an hour thereafter, and with equal certainty it can be said that the fact of a second collision 'does not tend logically, naturally and by reasonable inference' to establish any fact material to the proof of the alleged crime." Respondent points out that the evidence of the second accident was not offered as a part of the *res gestæ*—it "was offered for the express purpose of showing that the defendant was in an intoxicated condition. Incidentally, and in the course of proving the defendant's intoxicated condition, evidence of the second accident was inseparable from and a logical part of the testimony offered to establish this intoxicated condition, that is, the proving of the second accident was merely an incident in the proving of defendant's intoxicated condition." The intoxication of appellant was an issue in the case, and it was therefore proper to prove that he was intoxicated at the time and evidence of his condition both before and after the accident was relevant if it tended to show his condition when the deceased was struck, even though "it may tend to prejudice the defendant in the minds of the jurors by inducing the belief that he had been the perpetrator of another crime." *People v. Nakis*, 184 Cal. 105, 114, 193 P. 92, 96. It is required that the period of time be such "that the condition may be reasonably supposed to be continuous." 1 *Wigmore on Evidence* (2d Ed.) § 235. The second accident occurred an hour after the first, and it was for the jury to determine whether his condition on the second occasion was a continuation of that on the first. The remoteness of the testimony would go to the weight and not to its admissibility. Section 1870,

subd. 15, Code Civ. Proc.; 10 Cal. Jur. 798. We perceive no error in the ruling.

V. The fifth ground of appeal is that the court erred in instructing the jury as to matters of law. From the following instruction appellant contends "the jury might well infer that because the accident itself happened, the defendant was not driving his automobile with 'due regard for the safety and convenience of pedestrians.'"

"If you find that the defendant was willfully and unlawfully driving an automobile upon a public highway in a manner not then and there careful, and without due regard for the safety and convenience of pedestrians, and all other vehicles upon such highway, and that said unlawful act by him was the proximate cause of the death of said Lewis Hawks, then I instruct you that the said defendant is responsible under the criminal law, regardless of whether or not the said Lewis Hawks' failure to use due care for his own safety contributed to his death."

[18-20] It was apparently intended by the entire instruction to convey the idea that, if appellant violated the law, the contributory negligence of the deceased, if any, would not excuse the crime. There was no evidence that the deceased did not use ordinary care, and his dying declaration would indicate he was entirely free from blame. In any event we do not think appellant was prejudiced by the closing sentence. Appellant also contends that the technical words of "negligence," "measure of care," or "proximate cause" are not defined in this instruction. These are terms used in civil suits, and, moreover, appellant did not propose or request that such definitions be given. The other instructions to the jury included one to the effect that, if the injury caused death, then the wound "is to be regarded as the cause of death." The appellant contends that the jury should have been instructed that he "was under no legal duty to accompany the deceased * * * from the scene of the accident to the city of Tulare." It is shown by the evidence that appellant saw that the deceased was put in the care of proper persons, and it did not seem to be necessary that he should go to the hospital with the others. It does not appear that he refused to render any aid. It is claimed that counsel for the prosecution mentioned the failure of appellant to accompany the party to the hospital. Assuming that the proposed instruction contained a statement of a legal principle, we are unable to see how the failure to give it injured appellant.

[21] VI. Under this assignment of error the appellant contends that the district attorney was guilty of prejudicial misconduct in making "numerous improper statements and arguments" to which exception was made at the time. It appears that the ste-

nographer who reported the trial did not take down in shorthand any of the argument of the district attorney, and it is asserted that for this reason the appellant is not able to present the facts concerning the misconduct. It does not appear that appellant otherwise attempted to present a record covering the alleged misconduct, and in the absence of such a record we are unable to pass on the merits of the point.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: RICHARDS, J.; SEAWELL, J.; WASTE, J.; SHENK, J.

LENNON, J. I concur in the judgment of affirmance.

195 Cal. 352

MARR v. SOUTHERN CALIFORNIA GAS CO. et al. (L. A. 8185.)

(Supreme Court of California. Jan. 28, 1925.)

Judges ¶51(4)—Judge's denial to charge of bias in motion after judgment to disqualify him for bias held sufficient to warrant denial of motion.

Where rulings and remarks relied on in motion after judgment to disqualify judge from hearing motion for new trial were not irreconcilable with the conclusion that the judge was entirely unbiased and impartial, judge's affidavit in opposition to motion "that he has not now any bias or prejudice against the plaintiff in said cause, and never has had any bias or prejudice against the said plaintiff," held sufficient denial to warrant overruling of motion.

In Bank.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Winifred F. Marr against the Southern California Gas Company and others. From an order after judgment denying plaintiff's motion to disqualify judge from hearing motion for new trial, plaintiff appeals. Affirmed.

Winifred F. Marr, in pro. per.

Thos. J. Reynolds, Musick, Burr & Pinney, O'Melveny, Milliken, Tuller & Macneil, Paul E. Schwab, and Edward T. Bishop, all of Los Angeles, J. H. O'Connor, of Hynes, and Ray L. Morrow and Leslie R. Tarr, both of Glendale, for respondents.

PER CURIAM. This is an appeal from an order after judgment denying appellant's motion to disqualify the trial judge from hearing and acting upon her motion for new trial on the ground of bias and prejudice, under Code of Civil Procedure, section 170, subdivision 4. The affidavit in support of the motion consists principally of recitals of rulings made, and things said, by the trial judge in the course of the trial. In the con-

cluding paragraph thereof affiant states that "by reason of the facts and circumstances herein in this affidavit set forth, affiant states that on and according to her information and belief, that she cannot have a fair and impartial hearing of said motion for new trial, or a fair and impartial trial of said action," before the judge who had tried the case, "by reason of the bias and prejudice of said judge." The allegation of bias and prejudice is thus apparently limited to such bias and prejudice as is indicated by the facts and circumstances set forth in the affidavit. We do not think that any of these facts and circumstances, or any group of them, or all of them together, are irreconcilable with the conclusion that the trial judge was entirely unbiased and impartial. They do perhaps indicate that he at times became irritated and out of patience because of the fact that appellant, who is not an attorney, was attempting to try her own case which, as stated by him, involved difficult and technical propositions of law. In response to the motion the trial judge made and filed an affidavit wherein he deposed, "that he has not now any bias or prejudice against the plaintiff in said cause, and never has had any bias or prejudice against the said plaintiff." We are of the opinion that this was an entirely sufficient denial under the circumstances of this particular case.

The order is affirmed.

there were, it could not be reviewed except by reference to findings themselves, which were not in brief or supplement thereto.

2. Appeal and error ⚡757(1) — Appellate court not required to search transcript for error.

Appellate court is not required to search typewritten transcript for error or deficiency therein.

3. Appeal and error ⚡766—Appellate court not required to look at typewritten transcript for matters not set forth in printed brief or supplements thereto.

Under Code Civ. Proc. § 953c, as amended by St. 1919, p. 261, and St. 1923, p. 748, appellate court is not required to look at typewritten transcript for matters not set forth in printed briefs or supplements thereto, and, if appellant fails to print in briefs or supplements sufficient of record to justify a reversal of judgment, same should be affirmed because record fails to show error.

4. Trial ⚡392(4)—Trial judge required only to file findings of fact responsive to issue of ultimate facts framed by pleadings.

Only duty resting on trial judge in response to interrogatories is to make and file findings of fact which shall be adequately responsive to issue of ultimate facts framed by pleadings.

5. Wills ⚡334—Trial court held not required to find whether fiduciary relation existed between testatrix and proponent.

In will contest, trial court was not required to find specifically whether a fiduciary relation existed between testatrix and proponent, since such finding was no more than a probative or evidentiary fact.

6. Appeal and error ⚡996—Inference of one fact from others must be made by trial court.

Inference of one fact from others, unless such fact is a necessary conclusion from those others, must be made by trial court.

7. Appeal and error ⚡931(1) — Inference made by trial court from probative facts assumed to uphold rather than defeat its judgment.

Where probative facts found by trial court are such as might authorize different inference therefrom, it will be assumed on appeal that inference made by trial court was one that will uphold rather than defeat its judgment.

8. Wills ⚡215—Execution of will in violation of contract affords no ground for denial of probate.

That a will is executed in violation of a contract which called for a different testamentary disposition affords no ground for denial of probate thereof.

9. Courts ⚡198—Remedy for wrong arising out of violation of contract as to making will cannot be litigated in probate court.

Remedy for a wrong arising out of violation of contract as to making of a will cannot be litigated in probate court, but must be pursued in a court of law or equity.

195 Cal. 354

**In re BERRY'S ESTATE.
JOHNSON et al. v. WILLIAMS.
(L. A. 8204.)**

(Supreme Court of California. Feb. 4, 1925.)

1. Appeal and error ⚡757(5), 758(3)—Proper to affirm judgment without further consideration of appeal for insufficiency of evidence to sustain findings, where insufficiency not specified.

Appellate court could properly affirm judgment without further consideration of appeal, where gist of appellants' contention that evidence was insufficient to sustain findings of fact was not stated in their brief, and there was no specification of insufficiency of evidence to support findings of ultimate facts, and, if

10. Appeal and error — 1011(1) — Court's finding on conflicting evidence is conclusive.

Trial court's finding on conflicting evidence is conclusive.

11. Trusts — 283(1) — Beneficiary entitled to rescind contract by which trustee gains an inequitable advantage.

If a contract is entered into between a trustee and his beneficiary, through which trustee gains an inequitable advantage, either by inadequacy of consideration or otherwise, beneficiary is entitled to rescind contract subject to limitation imposed by law governing application of remedy.

12. Trusts — 283(1) — Contract by which trustee gains inequitable advantage over beneficiary is voidable at election of beneficiary.

Contract by which trustee gains an inequitable advantage over beneficiary, either by inadequacy of consideration or otherwise, is not void, but voidable, at election of beneficiary.

13. Courts — 198 — Remedy of heirs to rescind contract in behalf of testatrix required to be pursued in equity.

If heirs of testatrix after her death were entitled to remedy of rescission of contract regarding disposition of her property by will, remedy was required to be pursued in court of equity and not in probate.

14. Wills — 58(2) — Finding that agreement by which testatrix disposed of her property by will was not unfair sustained.

Evidence held to sustain finding that agreement by which testatrix disposed of her property by will was in no sense unfair or inequitable.

15. Evidence — 588 — Trial court justified in giving credit to testimony not inherently incredible, and corroborated by other evidence.

Trial court is fully justified in giving credit to testimony, where it is not inherently incredible nor improbable, and is in large part corroborated by other evidence.

In Bank.

Appeal from Superior Court, Los Angeles County; George H. Thomas, Judge.

In the matter of the estate of Rockie Berry, deceased. Petition by C. H. Johnson and others to revoke the probate of the last will of Rockie Berry, deceased, opposed by Olive Williams, executrix. Judgment denying petition for revocation and contestants appeal. Affirmed.

U. W. Breeden, of Los Angeles, for appellants.

Lloyd O. Miller, of Los Angeles, for respondent.

MYERS, C. J. This is an appeal by contestants from a judgment denying their petition to revoke the probate of the last will of the deceased. It is difficult, if not impossible, to ascertain from an examination of appellants' opening brief what specific ques-

tions of law are presented for adjudication upon this appeal. The record upon appeal consists of typewritten clerk's transcript and reporter's transcript prepared pursuant to sections 953a et seq., Code of Civil Procedure. The brief contains no statement of facts, no statement of the issues, none of the allegations of the pleadings, no statement of the facts found (except as to the so-called special findings to be mentioned presently), or of the conclusions of law. Appended to the brief is a printed supplement which contains excerpts from the testimony of a number of witnesses and copies of certain exhibits. Included therein under the heading "Suggestions of points and special findings thereon" is set forth what appears to be a series of questions and answers, 50 in number. These are in no way identified, nor is their presence in the supplement in any way explained in the brief. It cannot be ascertained therefrom whether they are taken from some portion of the record of the trial court or derived from some other source. They are from time to time referred to in the brief by number as "special findings." We are, however, informed by counsel for respondent in his brief that at the conclusion of the trial below the trial judge announced his decision against the contestants and ordered judgment in favor of the defendant; that counsel for the defendant thereafter prepared proposed findings and conclusions of law, and served and filed the same, and thereupon counsel for contestants served upon the trial judge "Suggestions for points and request for findings hereon," 50 in number. These suggestions and requests without exception related to probative and evidentiary facts as distinguished from ultimate facts. The trial judge prepared his own findings of fact and conclusions of law, fully and adequately responsive to all of the issues framed by the pleadings. Having done this, he was under no obligation or duty whatsoever to give any consideration to or take any action upon appellants' "Suggestions for points and request for findings," but nevertheless he did, with remarkable patience and industry, prepare written answers to each of the 50 questions, and added them to the findings of fact which he had prepared, giving to each a number corresponding to the question propounded by appellants, to which the same was an answer. These answers are referred to by counsel as "special findings."

[1-3] The nature of appellants' contentions upon this appeal can best be arrived at by a process of elimination. There is no suggestion in their brief of any defect or deficiency in the pleadings, or that the court failed to find upon any issue framed thereby, or that any finding of fact is irrelevant to the issues, or that the findings fail to sup-

port the judgment, or that any error was committed at the trial, or that any conclusion of law is erroneous. We are thus brought to the conclusion that the gist of appellants' contention is that the evidence is insufficient to sustain the findings of fact, but no such contention is anywhere stated in their brief (except with respect to the so-called "special findings"). There is no specification of such insufficiency of the evidence to support the findings of ultimate facts, and if there were, it could not be reviewed except by reference to the findings themselves, which are nowhere to be found, either in appellants' brief or in the supplement thereto. A proper course to be followed by this court under such circumstances would be to affirm the judgment without further consideration of the appeal. The appellate court is not required to assume the vexatious burden of searching the typewritten transcript for error or for deficiencies therein. *Scott v. Hollywood Park Co.*, 176 Cal. 680, 169 P. 379; *Marcucci v. Vowinkel*, 164 Cal. 693, 180 P. 430; *Eddy v. Stowe*, 43 Cal. App. 789, 185 P. 1024; *Pasadena Realty Co. v. Clune*, 34 Cal. App. 33, 166 P. 1025. When the Code was amended in 1907 to provide for a new and alternative method for the preparation of record to be used upon appeal and permitting the use thereof of a typewritten clerk's transcript and reporter's transcript in lieu of the printed judgment roll and bill of exceptions theretofore required (Code Civ. Proc. § 953a et seq.), it was provided therein that—

"In filing briefs on said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." Code Civ. Proc. § 953c.

Under this provision of the law it was repeatedly held and reiterated in some scores of cases that the appellate court is not required to look at the typewritten transcript for matters which are not set forth in the printed briefs or supplements thereto, and that, if the appellant failed to print in his brief or supplement sufficient of the record to justify a reversal of the judgment, the same should be affirmed on the ground that the record failed to show error. 2 Cal. Jur. 644 to 647, and cases cited. In 1919 (St. 1919, p. 261) this section was amended by adding thereto a proviso that—

"No appeal shall be dismissed nor shall any appeal be decided adversely to any party for failure to print in his brief the portion of the record or any part thereof in support of his points. * * *

The purpose and effect of this amendment was to relieve litigants from the natural and logical consequence of their failure to comply with the statutory mandate to print in their briefs the portions of the record re-

lied upon and to impose upon the appellate court the burden of investigating and determining what portions of the record ought to be printed as a basis for reviewing the contentions urged by the respective parties. 2 Cal. Jur. 647 to 650, and cases cited. In 1923 (St. 1923, p. 748) section 953c was again amended by striking out therefrom the proviso which had been added in 1919, leaving the section substantially as it had been from 1907 to 1919. The purpose and effect of this amendment was undoubtedly to return to the rule of law which had obtained during the period last mentioned and to reinstate the rule of decision which was then applied thereto. The result is not only that it was the plain duty of appellants to print in their brief or in the supplement thereto all portions of the record necessary to be considered by this court before arriving at a conclusion that the judgment should be reversed, but also that, because of their failure so to do, this court would be fully justified in affirming the judgment appealed from without further consideration of the record. Appellants seem to believe that they have performed their duty fully in this respect when they have printed the portions of the evidence upon which they rely. They overlook the fact that, in order to determine whether or not the evidence is sufficient to sustain a given finding, we must have before us not only the evidence but also the finding. If we had the finding before us, and should conclude that the evidence was insufficient to support it, we still could not determine whether or not such finding was essential to support the judgment, unless we had before us the pleadings or at least an accurate statement of the issues framed thereby. Appellants state in their reply brief in evident good faith that they have endeavored to fully comply with the requirements of the statute in respect to the printing of the record, and believe that they have done so, but that, if other portions of the record be deemed necessary for the consideration of the appeal upon its merits, they stand ready to print the same. We are disposed, therefore, to proceed with the consideration of this appeal upon its merits, making such examinations of the typewritten transcripts as are necessary to that end. It may be doubted, however, that we would be justified in reversing a judgment upon a ground not disclosed by an inspection of appellants' printed brief and supplement, and the existence of which can be ascertained only by an examination of the typewritten transcript. *Pearson v. Parsons*, 173 Cal. 331, 336, 340, 159 P. 1171.

[4-7] An examination of the pleadings discloses that there were four grounds of contest herein; namely, unsoundness of mind, informality of the execution of the will, fraud, and undue influence. Appellants state

in their reply brief that they have abandoned the first two grounds for the purposes of this appeal, leaving only questions relating to fraud and undue influence to be considered herein. Appellants' brief is wholly devoted to attacks upon the so-called "special findings." Twenty of these are attacked upon the ground that they are not supported by the evidence. Without unduly prolonging this opinion, it must suffice to say that we find in the record evidence which is legally sufficient to support each of the special findings so attacked. This matter, however, is wholly inconsequential. The 20 special findings so attacked, or, for that matter, all 50 of the special findings, might be eliminated from the record without in any way affecting the validity of the judgment. The general findings which were prepared by the trial judge are most comprehensive. They cover thoroughly the entire field of the case, are adequately responsive to all of the issues framed by the pleadings, and fully support the judgment rendered.

Others of the special findings are attacked upon the ground that they are not responsive to the interrogatories submitted to the trial judge by counsel for appellants. This is immaterial for the reason that the trial judge owed no duty to respond to any of those interrogatories. Appellants seem to think that, if the trial judge failed to make a special finding responsive to any of the interrogatories submitted by them, he committed error therein. That conclusion is rested upon what was said by this court in *Hidden v. Jordan*, 28 Cal. 301, 304; *Miller v. Steen*, 30 Cal. 403, 89 Am. Dec. 124; and *Porter v. Woodward*, 57 Cal. 535, but what was there said was based upon a particular statute enacted in 1861 (Stats. 1861, p. 589), the substance of which was carried into the Code in 1872 as section 635 of the Code of Civil Procedure, and was repealed in 1876. The only duty resting upon the trial judge in this behalf is to make and file findings of fact which shall be adequately responsive to the issues of ultimate fact which are framed by the pleadings. Appellants are in error in assuming that the question whether or not there was a fiduciary relation existing between the testatrix and the respondent is a question of ultimate fact upon which the trial court was required to specifically find. It was no more than a probative or evidentiary fact. The existence of such relation would be a circumstance relevant to the issue of ultimate fact whether the will was the product of fraud and to the issue of ultimate fact whether the will was the product of undue influence. A finding either way upon the question of the existence of such fiduciary relation would not of itself be determinative either way as to either of these questions of ultimate fact. The inference of one fact from others, unless such

fact is a necessary conclusion from those others, must be made by the trial court, and where probative facts are found by it, if they are such as might authorize different inferences therefrom, it will be assumed upon appeal that the inference made by the trial court was one that will uphold rather than defeat its judgment. *Breeze v. Brooks*, 97 Cal. 72, 31 P. 742, 22 L. R. A. 257; *Gould v. Eaton*, 111 Cal. 639, 644, 44 P. 319, 52 Am. St. Rep. 201; *Nevills v. Moore Mining Co.*, 135 Cal. 561, 566, 67 P. 1054.

[8-10] Appellants assert that the will in question is the product of an agreement between testatrix and respondent under the terms of which respondent was to convey to testatrix certain property in Oklahoma and to live with and care for testatrix while she lived, in consideration of which testatrix was to devise to respondent the property in Los Angeles, which was in fact devised to respondent in the will. Appellants assert that this contract was breached by respondent in that she failed to convey to the testatrix some of the property so agreed to be conveyed to her. They conclude from this that the will should be denied probate. No authority is cited to support this conclusion. We pointed out in a recent case that the fact that a will is executed in violation of a contract which called for a different testamentary disposition affords no ground for the denial of the probate thereof. The remedy for a wrong arising out of the violation of a contract in respect of the making of a will cannot be litigated in a probate court, but must be pursued in a court of law or a court of equity. *Estate of Rolls* (Cal. Sup.) 226 P. 608. There is, however, no basis herein for the assumption that the contract was breached by the respondent. The trial court found that the respondent fully kept and performed all of her promises and agreements with the testatrix. The evidence fully sustains this finding. The fact that there is also evidence which might have sustained a contrary finding merely presents the familiar situation of a conflict of evidence as to which the finding of the trial court is conclusive.

Appellants next contend that the agreement above mentioned was the product of fraud, both actual and constructive, practiced upon the testatrix by the respondent. We need not pause to inquire whether if this be so the will itself must be deemed to be the product of such fraud, because the trial court found that no fraud or deception was practiced by or in behalf of the respondent. This finding is amply supported by the evidence, even if we accept appellants' contention that a confidential relationship was shown to exist between the testatrix and the respondent, and that the effect thereof was to impose the burden of proof upon the latter.

[11-14] The court found, in response to special interrogatories, that the value of the property devised to respondent was \$12,000, and that the value of the real property conveyed by respondent to testatrix was \$2,400. Appellants assert that this shows a gross inadequacy of consideration, and they argue that, inasmuch as a confidential relationship existed between testatrix and respondent, it follows that the contract was fraudulent as a matter of law. It is undoubtedly true that, if a contract is entered into between a trustee and his beneficiary through which the former gains an equitable advantage, either by reason of inadequacy of consideration or otherwise, the latter is entitled to rescind the contract, subject to the limitations imposed by the law governing the application of this remedy. Such contract, however, is not void, but is voidable at the election of the beneficiary. Appellants seem to assume that they are entitled in this proceeding to invoke the remedy of rescission which the testatrix might have invoked had she lived, and that they are entitled to have this remedy effectuated by means of a revocation of the probate of the will. Whether or not after the death of the testatrix her heir or a group of her heirs may be entitled to accomplish a rescission in her behalf need not now be determined. It is plain that such remedy, if it be available, must be pursued in a court of equity, not in a court of probate. *Estate of Rolls, supra*. The trial court found that the agreement between the testatrix and respondent was in no sense unfair or inequitable. This finding is supported by two considerations which the appellants have ignored. An important element of the consideration was the promise of respondent to live with and care for the testatrix during the remainder of the latter's life, which promise was fully kept and performed. The testatrix was suffering in an advanced stage of tuberculosis, was physically helpless, requiring constant care and attention day and night. In addition to giving this care and attention, which was not only most arduous but involved the risk of infection, respondent performed the work and labor of supervising, maintaining, and conducting the lodging house which constituted the sole estate of testatrix. While, as afterward transpired, the testatrix died within less than four weeks after the making of this agreement, none of the parties could then know but that she might continue to live many months or even years thereafter. Furthermore, respondent was the natural object of the bounty of testatrix. She was her

nearest of kin and only surviving sister, and there is evidence to the effect that her relationship to the testatrix was closer, more intimate, and more affectionate than that of any of the other heirs. If the testatrix had devised the greater portion of her estate to respondent without having received any consideration therefor from the latter, such disposition of her estate could not have been regarded as unnatural under the circumstances in evidence. In appraising the consideration it is also to be noted that the agreement was not one for the immediate exchange of property. Under it the respondent conveyed her Oklahoma property to testatrix forthwith, but respondent could not hope to come into the enjoyment of the Los Angeles property belonging to testatrix until after the death of the latter and the administration of her estate.

[15] Appellants' contention that the will is the product of undue influence exercised upon the testatrix by the respondent is in the main based upon the same claimed facts and circumstances which are urged by them in support of their allegations of fraud. To review these in detail herein would prolong this opinion to inordinate length. The trial court found that the respondent never at any time exercised any undue influence over the testatrix and that the will was made by the testatrix of her own free will and accord, wholly uninfluenced by any person whatsoever. The testimony of the respondent alone was legally sufficient to support this finding, if believed by the trial judge, as it evidently was. This testimony was not inherently incredible, it was not even improbable, and it was in large part corroborated by other evidence. The trial court was fully justified in giving credit to it. It may be conceded for the purposes hereof that the respondent occupied a fiduciary relationship toward the testatrix; that she gained an advantage from the will; that she was active in the matter of the execution of the will; and that the burden of proof therefore rested upon her to show the absence of fraud and undue influence. The fact remains that the evidence amply supports the findings of the trial court, which fully negative the allegations of fraud and undue influence. No other error or insufficiency is suggested by appellants.

The judgment is affirmed.

We concur: LAWLOR, J.; WASTE, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; LENNON, J.

195 Cal. 233

**FEDERAL MUT. LIABILITY INS. CO. v.
INDUSTRIAL ACCIDENT COMMISSION
et al. (L. A. 8372.)**

(Supreme Court of California. Jan. 16, 1925.)

Master and servant — 388—Child held entitled to compensation as "dependent" of divorced father.

Where divorce decree awarded custody of infant to mother, and husband failed to pay for child's support as directed, for several years, after which he resumed contributions thereto, held that child was entitled to compensation, as dependent, for father's death; the conclusive presumption of total dependency created by Workmen's Compensation Act, § 14, subd. a(2), as amended by St. 1919, p. 917, § 5, being applicable, notwithstanding that mother, who had remarried and resided in foreign country, also contributed to child's support.

In Bank.

Proceeding under the Workmen's Compensation Act by Charlotte C. Nagel, a minor, by her guardian, for death of her father, opposed by the Federal Mutual Liability Insurance Company, insurer of the Stephens-Adamson Manufacturing Company, employer. To review an order of the Industrial Accident Commission awarding compensation, the insurer petitions for certiorari. Award affirmed.

Willis I. Morrison, of Los Angeles, for petitioner.

W. H. Pillsbury, of San Francisco, for respondents.

RICHARDS, J. The petitioner herein applies for a writ of review whereby it seeks to have a decision and award of the Industrial Accident Commission reviewed and annulled. The petitioner was and is the insurer of Stephens-Adamson Manufacturing Company of Los Angeles, which was, at the time of his death, the employer of one Carl C. Nagel, whose daughter, Charlotte C. Nagel, a minor, was the applicant for and was granted the award. The facts out of which the present application arose are practically undisputed, and are these: Carl C. Nagel and his wife, Nanette Nagel, who had been married in 1907, were living in the state of Colorado in 1916, having at that time a daughter 7 years old. Nanette Nagel in that year sued her husband for divorce, and, after personal service upon the latter, and in due course, obtained a decree of divorce based upon his misconduct, and whereby it was ordered that the sole care, custody, and control of the said minor child should be and was thereby awarded to the plaintiff, her mother, and that the defendant pay the sum of \$25 monthly for the support and maintenance of said minor child until said minor child reached her majority. The plaintiff, after receiving said divorce, continued for some time to re-

side in the state of Colorado with her minor child, but in the year 1920 remarried and removed to Mexico, where she has since resided, placing her minor daughter at the time in the keeping of Mr. and Mrs. Loftus, the uncle and aunt of said minor, who lived in San Diego, and with whom Charlotte has since resided. Her father, Carl C. Nagel, disappeared at or about the time of the divorce, and made no payments upon the obligation for the support of his minor daughter, who was maintained by her mother while living in Colorado, and by her aunt and mother after she came to reside in San Diego, up to the time when in 1923, the father reappeared and began visiting his daughter and contributing to her support. At that time the father was employed by Stephens-Adamson Manufacturing Company in Los Angeles, and so continued to be up to April 5, 1924, when he was killed while in such employ and in the course of his employment. The child at the time her father thus resumed his parental relations and obligations toward her was of the age of about 15 years. She was attending school and the cost of her food, clothing, incidentals and education was approximately \$75 a month. The father from the time he began to visit his daughter began also paying various sums which were applied to her support, and which, according to a fair interpretation of the testimony of Mrs. Loftus, amounted to \$35 or \$40 a month. He also brought or bought her on the occasion of his visits gifts of various kinds, and took her out with him and gave her pleasure. The mother also during this time sent contributions toward the girl's support. While these conditions existed, Nagel was killed while in the employ of the Stephens-Adamson Manufacturing Company on April 5, 1924; and in due course an application for compensation was filed on behalf of his said daughter by her guardian, Mrs. Loftus, an award upon the basis of total dependency being applied for. The Commission, upon the hearing thereon, at which the foregoing facts were adduced, made an award of \$4,900, based upon the conclusive presumption of total dependency under the terms of section 14a of the Workmen's Compensation Act (St. 1919, p. 917), which reads in part as follows:

"Sec. 14 (a) The following shall be conclusively presumed to be wholly dependent for support upon a deceased employee * * *

(2) A child or children under the age of eighteen years, * * * upon the parent with whom he or they are living at the time of the injury of such parent or for whose maintenance such parent was legally liable at the time of injury, there being no surviving dependent parent."

The petitioner herein contends that the facts as above set forth furnish no sufficient basis for the application of the conclusive

presumption of total dependency provided for in the foregoing section of the Workmen's Compensation Act. In making this contention it relies chiefly upon certain decisions of this court touching the legal liability of a father for the support of his minor child of whose custody he has been deprived by a decree of divorce in an action instituted against him by the mother of the child, and who is by the decree therein awarded the custody of said child. These cases are *Matter of McMullin*, 164 Cal. 504, 129 P. 773; *Lewis v. Lewis*, 174 Cal. 336, 163 P. 42; and *Davies v. Fisher*, 34 Cal. App. 137, 166 P. 833. It may be said, however, that, while these several decisions have not been directly overruled in so far as they might be applicable to the particular facts or procedure out of which they arose, they have been materially modified in their application to other facts and circumstances more nearly analogous to the facts of the present proceeding and also in their application to proceedings of this character.

In the case of *Sherer, etc., v. Industrial Accident Commission*, 182 Cal. 488, 188 P. 798, an award had been made to the minor daughter of a deceased employee upon the basis of total dependency. The facts before the Commission showed that the mother of the child had obtained a decree of divorce against her husband, the deceased employee, wherein she had been awarded the custody of the child, and the father had been ordered to pay \$20 a month for its support. The contention was made in that proceeding that the provision in the decree of divorce requiring payment by the father of a specified sum at stated intervals for the support of the child, the custody of which was given to the mother, relieved the father from his legal liability for the support of his child, creating in the place thereof an ordinary debt or obligation. This court held that contention to be without merit; and further held that, when the court in a divorce action had fixed a specified sum for the support of the child, which sum it might vary from time to time in the exercise of a sound discretion, it was competent for the Commission to determine under section 14a (2) of the Workmen's Compensation Act that the father was legally liable for the entire maintenance of the child, particularly where, as in that case, the Commission found that the sum of \$20 per month was fully sufficient for the support of the child while thus in the custody of its mother. It may be noted at this point and in relation to the case at bar that at the time of the entry of the decree of divorce by the Colorado court the minor child of the parties was but 7 years old, and that the implication from the terms of said decree is that the sum of \$25 therein provided for the support of the child was fully sufficient for its support, and hence that the court by the terms of said decree imposed upon the father

full liability for the support of the child, in which event the doctrine of the foregoing case would have full application to the case at bar.

In the case of *Pacific Gold Dredging Co. v. Industrial Accident Commission*, 184 Cal. 462, 194 P. 1, 13 A. L. R. 725, wherein by its decision the Commission had awarded the maximum amount for total dependency to the minor child upon the death of his father, from whom his mother had some years previous obtained a decree of divorce for the father's misconduct, wherein she had been awarded the exclusive custody of the child, but without any award against the father for its support, and had subsequently disappeared, leaving the child in an orphanage, this court held that, while the father might by such decree be temporarily, and, as between himself and the mother, relieved of his legal duty to support the child while it remained in the custody of the mother, his obligation in that regard might be reassumed by his voluntary contributions toward the support of the child, indicating his resumption of his legal and moral responsibility for the support of his dependent child. This court further said:

"We find no authority for holding that, as between parent and child, the father is absolved from his legal duty to provide support to his minor child who has no other source of maintenance, because, on account of his own fault, he has been deprived of the custody of such child. Both a legal and moral obligation rests upon a father to support his minor children. And while, as between himself and third parties, that obligation may be shifted in proceedings of divorce or guardianship, and he may by misconduct forfeit his right to the custody of his child, it may be doubted if by such proceedings, to which he is not a party, a minor can be deprived of his natural right to turn to his father for maintenance, if the substituted source of supply fails. It has been held that such right to look to a father for maintenance cannot be taken from the infant by contract between the parents (*Fernandez v. Aburrea*, 42 Cal. App. 131 [183 Pac. 366]), and it certainly would be a reproach upon the law if a father, by his own misconduct making him an unfit custodian of the child, could absolve himself from legal responsibility for its support. He, at least, may voluntarily resume his legal responsibility."

In the case of *Llewellyn Iron Works v. Industrial Accident Commission*, 191 Cal. 28, 214 P. 846, this court approved the doctrine enunciated in the case last above cited, giving application of its principles to a case wherein there had been a decree of divorce between the father and mother of the child, wherein its custody and control had been awarded to the mother without any provision in the decree for the support of the child by the father. The court held that the attitude and conduct of the father toward the child in buying clothing for it, in making certain payments on account of its support, in hav-

ing the child in his company at week-ends and on other occasions, in engaging the services of a doctor to correct deficiencies in the eyes of the child, were sufficient to justify the Commission in finding that the father had voluntarily resumed his parental relations and obligations to the child, even though the mother had the custody of the child and was assisting to support it and herself by her labors; and that under such circumstances the relations of parent and child had been restored, and the condition of dependency existed at the time of the father's death as though it had never been disturbed.

In the case of Svoboda v. Superior Court, 190 Cal. 727, 214 P. 440, this court had occasion to further review and reconsider the cases above referred to upon which the petitioner in the instant proceeding chiefly relies. That was a proceeding wherein the superior court of the county of Alameda, sitting as a juvenile court, required the father of a minor child to pay a certain sum monthly to the county in order to reimburse it for the expense of the support of the minor child at the Preston School of Industry, to which said minor had been committed as a ward of said court. The father undertook by his application for a writ of review to have annulled the order of said court made in that behalf, alleging that by a decree of divorce theretofore made and entered against him and in favor of his wife, the child's mother, the custody of the child had been taken from him and awarded to its mother without the imposition in said decree of any obligation upon him for the support of the child. He relied therefore upon the foregoing cases of *Lewis v. Lewis*, supra, and *Matter of McMullin*, supra, as absolving him from his legal liability for the further support of the child. This court, however, held that these cases were not to be given such effect, and that the better rule was that announced in the case of *Pacific Gold Dredging Co. v. Industrial Accident Commission*, supra, as above quoted, and should be given application to the facts of that case.

The effect of the foregoing decisions, when applied to the facts of the proceeding before us, is to give full support to the finding of the Commission that a case had been presented to which the provisions of section 14a of the Workmen's Compensation Act, creating a conclusive presumption of total dependency in favor of the minor child of the deceased employee of the Stephens-Adamson Manufacturing Company, of which the petitioner herein was the insurer, could be given application. Whether such conclusion is based upon the proofs of the voluntary resumption on the part of the father of his parental relations and obligations to his child, or upon the legal liability for the support of his child imposed by the terms of the divorce decree, or upon the broader

ground of the basic legal obligation imposed by law upon a father to support his dependent child to the end that it shall not become a public charge, the award of the Commission upon either and all of these grounds can be sustained. The fact that the mother of the child, who had committed its custody to other relations, and had remarried and was living in a foreign land and beyond the jurisdiction of our local court, was also contributing somewhat to the child's support is, we think, an entirely immaterial feature of the case.

The award is affirmed.

We concur: MYERS, C. J.; WASTE, J.; SHENK, J.; LENNON, J.; SEAWELL, J.; LAWLOR, J.

195 Cal. 364

HAMBLIN v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (S. F. 11288.)

(Supreme Court of California. Feb. 5, 1925.)

1. Divorce ⇐168—Defense to mandamus on ground that session of court was unauthorized held a collateral attack on judgment.

Where judge granted plaintiff an interlocutory decree of divorce, but later refused to entertain a contempt proceeding based thereon, and defended mandamus proceeding on ground that session of court during which he entered such decree was unauthorized, such contention on his part was in nature of a collateral attack upon judgment.

2. Courts ⇐74, 75—Time and place as essential to valid functioning as presence of judicial officers.

The elements of time and place are as essential to valid functioning of court as presence of duly constituted judicial officers.

3. Courts ⇐74—Divorce ⇐168—Taking of evidence at unauthorized place does not render proceedings absolutely void.

Where complaint in divorce proceedings was duly filed at clerk's office at county seat, summons was issued therefrom and returned thereto with proof of service, and default entered there, taking of testimony in unauthorized place, while error redressible by direct attack, did not render proceedings absolutely void, or vulnerable to collateral attack, especially in view of Code Civ. Proc. § 585.

4. Courts ⇐74—Taking of evidence at unauthorized place, after default, not a "trial."

In a divorce suit, the hearing of testimony at an unauthorized place, after default, was not a "trial" but a hearing by the judge in chambers of evidence, which Civ. Code, § 130, requires to be taken before court.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trial.]

5. Divorce ⇐146—Hearing of evidence in divorce proceedings before court held not jurisdictional.

The requirement of Civ. Code, § 130, requiring proof of facts in divorce proceedings to

be taken before court, though mandatory, is not jurisdictional.

6. Judgment §495(1) — All presumptions in favor of judgment on appeal therefrom or where judgment collaterally attacked.

Upon appeal from a judgment, all intentions and presumptions are in support thereof, and this rule applies in cases of collateral attack upon a judgment.

7. Divorce §168—Cannot be collaterally attacked, unless void on face.

A judgment of court of record cannot be collaterally attacked, unless it is void on its face, and this rule applies to a judgment of divorce.

8. Judgment §485—Judgment not void on face, unless alleged defects apparent from judgment roll.

Judgment is not void on its face, unless alleged defects are apparent from inspection of judgment roll.

In Bank.

Application for writ of mandate by Edna R. Hamblin against the Superior Court of Los Angeles County and Hartley Shaw, Judge. Writ issued.

P. B. Dougherty, of Los Angeles, and J. E. Pawson and Underwood, Burke & Cree, all of Long Beach, for petitioner.

Roy W. Dowds, of Los Angeles, for respondents.

MYERS, C. J. This is an application for a writ of mandate to compel the respondent court and the respondent judge thereof to proceed with the hearing and determination of a certain contempt proceeding now pending before it, the object of which is the enforcement of the provisions of an interlocutory decree heretofore rendered by said court in a suit for divorce. The facts are undisputed, and the matter is submitted for determination upon the allegations of the petition and a general demurrer thereto. Petitioner herein is the plaintiff in whose favor the interlocutory decree above mentioned was rendered in the divorce action. The defendant therein, who was personally served with summons, defaulted, and, his default having been regularly entered, the cause was thereafter assigned to and set for hearing before Department 28 of the superior court of Los Angeles county, sitting at the city of Long Beach, in said county, and was there heard on the day set, at which time and place an interlocutory decree of divorce was ordered by the court in favor of plaintiff, with provision therein for the payment by defendant to plaintiff of certain alimony and suit money. An interlocutory decree in accordance with this order was thereafter signed by the judge and filed in said action in the office of the county clerk of said county in the courthouse at the county seat there-

of, and was duly entered in the judgment records of said court in said office. Thereafter the defendant therein, having neglected to make the payments so ordered, was cited to appear before the court to show cause why he should not be punished for contempt. When that matter came on for hearing, the respondent judge, being of the opinion that the sessions of court at Long Beach were unauthorized, and that the interlocutory decree was therefore void, announced his refusal to further entertain the contempt proceeding based thereon, whereupon this proceeding was initiated for the purpose of compelling him to proceed with the hearing and determination thereof. It has since been determined that the statute which purported to authorize the holding of sessions of the superior court of Los Angeles county at Long Beach is unconstitutional, as being special legislation (In re Brady [Cal. App.] 224 P. 252; In re Seiler [Cal. Sup.] 227 P. 1116), and respondent contends that the judgment so rendered is void as a consequence.

[1] This contention on respondent's part is in the nature of a collateral attack upon the judgment (Howe v. Southrey, 144 Cal. 767, 769, 78 P. 259; see, also, Crim v. Kessing, 89 Cal. 478, 484, 86 P. 1074, 23 Am. St. Rep. 491), and the question to be determined upon this proceeding, therefore, is whether the judgment so rendered is wholly void or merely erroneous. Respondent suggests that this question has already been determined in and by the two cases first above cited. It is true that those cases, being proceedings in habeas corpus, were in the nature of collateral attacks upon the proceedings then pending before the superior court at Long Beach, (15 Cal. Jur. p. 46), and the granting of the writ therein might therefore be regarded as an implied adjudication that the court proceedings thus attacked were void. But neither of said cases expressly so holds, and it does not appear to have been the intention of the court in either case to decide this particular question. There was no controversy upon this question in the Seiler Case, either in the briefs of counsel or at the hearing. The petitioner therein asserted that the statute purporting to authorize the sessions of the court at Long Beach was unconstitutional, and that the proceedings at such session were therefore void. Counsel for respondent therein did not challenge the latter assertion, but devoted all of their argument to the question of the constitutionality of the statute, so that this was the only question in controversy between the parties in that proceeding. Counsel for respondent in the Brady Case expressly conceded that, if the statute was unconstitutional, the proceedings would be void, and the court was not called upon to decide the question here presented. It may be that counsel in those

cases were so desirous of procuring an adjudication of the question of the constitutionality of the statute that they purposely refrained from argument upon the other question. While we are satisfied with and adhere to the conclusion expressed in those two cases, namely, that the act purporting to authorize the holding of sessions of the superior court at Long Beach is unconstitutional, nevertheless, for the reasons indicated, we are not disposed to regard those cases as determinative of the question here presented.

[2] The general rule is that the elements of time and place are as essential to the valid functioning of a court as is the presence of the duly constituted judicial officers. *White County Commissioners v. Gwin*, 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402; *State v. Atherton*, 19 Nev. 332, 10 P. 901; *Lewis v. City of Hoboken*, 42 N. J. Law, 377; *In re McClaskey*, 2 Okl. 568, 37 P. 854; *In re Lawyers' Tax Cases*, 8 Heisk. (55 Tenn.) 565, at 650; *Levey v. Bigelow*, 6 Ind. App. 677, 34 N. E. 128; 15 Cor. Jur. 895; 7 R. C. L. 992. This rule is well stated in *White County Commissioners v. Gwin*, supra, as follows:

"A court is an instrumentality of government. It is a creation of the law, and in some respects it is an imaginary thing, that exists only in legal contemplation, very similar to a corporation. A time when, a place where, and the persons by whom, judicial functions are to be exercised are essential to complete the idea of a court. It is in its organized aspect, with all these constituent elements of time, place, and officers, that completes the idea of a court in the general legal acceptance of the term."

When we come to consider the effect upon the validity of the proceedings of the absence of one of these constituent elements, as to whether the proceedings are thereby rendered void or merely erroneous, we find no uniformity of decision. There are numerous cases holding that the proceedings of a court at a time or place other than that prescribed by law are *coram non iudice* and void. *Johnston v. Hunter*, 50 W. Va. 52, 40 S. E. 448; *Ex parte Gardner*, 22 Nev. 280, 39 P. 570; *Coulter v. Routt County*, 9 Colo. 258, 11 P. 199; *Patton v. State*, 160 Ala. 111, 49 So. 809; *Williams v. Reutzel*, 60 Ark. 155, 29 S. W. 374; *Hanley v. City of Medford*, 56 Or. 171, 108 P. 188; *Shold v. Van Treeck*, 82 Neb. 99, 117 N. W. 113; *Mattox v. Dunklin*, 39 So. 579; *State v. Osborn*, 36 Kan. 530, 13 P. 850. Many of the cases so holding, however, are cases of direct attack by appeal, wherein the question whether the proceedings were void, as distinguished from erroneous, was not necessarily involved. Some of them were cases wherein a court of one judicial district had attempted to function within the territorial limits of another judicial district. *Johnston v. Hunter*, supra; *Ex parte Gardner*, supra, and *Hanley v. City of Medford*, supra. Others were cases where-

in all of the proceedings in the action, from the filing of the first pleading to the entry of final judgment, were had at a place unauthorized by law (*Patton v. State*, supra; *Williams v. Reutzel*, supra, and *Mattox v. Dunklin*, supra), or where the court had not been legally created (*In re Davis*, 62 Kan. 231, 61 P. 809), or where an attempt was made to hold a county court in an unorganized county (*State v. Osborn*, 36 Kan. 530, 13 P. 850), or where a hearing was held at an unauthorized place and without any notice (*White v. Riggs*, 27 Me. 114).

[3, 4] It is to be noted that in the case here under consideration the only thing that was done by the court at an unauthorized place was the hearing of testimony. The complaint was duly filed at the clerk's office at the county seat. The summons was issued therefrom, was personally served, and was returned with proof of service thereto and filed therein. The default of the defendant was duly entered and noted by the clerk at his office at the county seat. The case was set for hearing by the presiding judge sitting at the county seat and by him assigned to the department sitting at Long Beach. The decision, consisting of the findings, conclusions, and judgment signed by the judge, was filed in the clerk's office at the county seat, and there entered in the judgment record. The only defect in the proceeding, therefore, consists in the taking of evidence at an unauthorized place. While this constitutes error redressible by means of a direct attack by motion or appeal, it is not usually regarded as rendering the proceedings absolutely void so as to be vulnerable to a collateral attack. *Selleck v. Janesville*, 100 Wis. 157, 75 N. W. 975, 69 Am. St. Rep. 906, 41 L. R. A. 563, and note; *Bell v. Jarvis*, 98 Minn. 109, 107 N. W. 547, 8 Ann. Cas. 938; *Carter v. State*, 100 Miss. 343, 56 So. 454, Ann. Cas. 1914A, 369, and note; *People v. Pompa*, 192 Cal. 412, 221 P. 198. Respondent suggests that the *Pompa* Case is to be distinguished from the one here under consideration by the circumstance that in that case the court met regularly at the time and place provided by law, and there proceeded to the trial of the case; that the trial was regularly held and conducted at the place provided by law, with the sole exception that some testimony was taken during a view of the premises by the jurors; that this constituted a mere irregularity insufficient to deprive the court of that jurisdiction which it acquired by the beginning of the trial at the regular time and place, whereas, in the present case, the entire trial was held at an unauthorized place. It is to be noted, however, that the taking of testimony in the present case did not constitute the holding of a trial in the strict sense of the word. There were no issues of fact upon which a trial was re-

quired. The default of the defendant admitted all of the allegations of the complaint. Upon the entry of such default the court might have rendered judgment for the plaintiff without the taking of any evidence (Code Civ. Proc. § 585; *City of Los Angeles v. Los Angeles F. & M. Co.*, 150 Cal. 647, 89 P. 615), except for the requirement of section 130 of the Civil Code, which forbids the granting of a divorce upon the default of the defendant or upon the uncorroborated admissions of the parties. This section requires proof of the facts alleged, either "taken before the court" or "upon written questions and answers," but it is not to be construed as raising "issues of fact" in case of default, nor as constituting the taking of proof, in such case, a "trial," as that term is used in the provisions relating to new trial (*Foley v. Foley*, 120 Cal. 33, 52 P. 122, 65 Am. St. Rep. 147), nor as requiring written findings of fact and conclusions of law (*Waldecker v. Waldecker*, 178 Cal. 566, 174 P. 36). This case, therefore, strictly speaking, is not one where a trial was had at an unauthorized place, but is rather one wherein proof which the law requires to be "taken before the court" was in fact taken before the judge.

This court in its early decisions applied with great strictness the rule which requires the concurrence of the elements of time, place, and judicial officers to render valid a judgment or order which under the law could be made only by the court. In *Smith v. Chichester*, 1 Cal. 409, a judgment of the district court which was rendered in vacation between two terms of court was held invalid. In *Wicks v. Ludwig*, 9 Cal. 173, and in *Bates v. Gage*, 40 Cal. 183, judgments rendered under similar circumstances were held to be void. In *Larco v. Casaneuava*, 30 Cal. 560, where, in an action pending in San Mateo county, the trial judge, while sitting in chambers in the city and county of San Francisco, heard and acted upon a motion to strike out defendant's demurrers as sham, this action was held to be error, but the judgment for plaintiff was nevertheless affirmed. In *Norwood v. Kenfield*, 34 Cal. 329, where the trial judge made an order at chambers continuing the trial of a case to a time in vacation between terms of court, and held the trial at that time over the objection of defendant, this court held that the judge at chambers had no authority to make such order, and that the order so made and the trial so held in vacation pursuant thereto were void. It may be that the strictness with which the rule was applied in those early cases was one of the considerations which moved the framers of the Constitution of 1879 to abolish terms of court and to provide that the superior court "shall always be open (legal holidays and non-judicial days excepted) * * *," Article 6, § 5. However this may be, the strictness of the early rule was abrogated and the early cases above cit-

ed (though not mentioned therein) were in effect overruled in 1872 in the case of *Ex parte Bennett*, 44 Cal. 84. This case is very nearly on all fours with the case at bar. It also involved a contempt proceeding, the object of which was the enforcement of a decree of divorce. It, however, was not a default case, but one in which an answer had been filed raising issues of fact. By consent of the parties it was set for hearing before the judge at chambers in vacation between terms of court, and was so heard and decided, and judgment was rendered in vacation and entered *nunc pro tunc* as of the preceding term of court. There, as here, the defendant having failed to make the payments provided for in the decree, was cited in a contempt proceeding, and there made the point that the judgment, being based upon a trial had at a time and at a place not authorized by law, was void. The contention was rejected by this court, and the following language from the opinion is especially pertinent to the present situation:

"The principal objection made for the petitioner, as we understand it, is that the cause was tried at chambers, and not in open court; and it is said that there is no authority to try a cause except in open court.

"But, even if this be so, we do not see that it would follow that a judgment rendered in a cause which had been tried at chambers would for that reason necessarily be void in the absolute sense.

"The district court in Sonoma unquestionably had jurisdiction of the subject-matter and of the parties litigant. Had the court itself rendered the judgment in question in open session at a regular term, without trial, without proof, and even without submission of the cause for decision, such judgment, however erroneous, would not be held void upon a mere collateral attack. To maintain that it would, would be to ignore the obvious distinction between a total want of authority upon the one hand, and the erroneous exercise of conceded authority upon the other. * * *

"The hearing of proofs, the argument of counsel—in other words, the trial had, or the absence of any or all of these—neither confer jurisdiction in the first instance, nor take it away after it has once fully attached."

The cases of *Johnston v. S. F. Savings Union*, 75 Cal. 134, 139, 16 P. 753, 7 Am. St. Rep. 129; *Beaulieu Vineyard Co. v. Superior Court*, 6 Cal. App. 242, 248, 250, 91 P. 1015; *Dahlgren v. Superior Court*, 8 Cal. App. 622, 626 et seq., 97 P. 681; *People v. Maljan*, 34 Cal. App. 384, 167 P. 547; and *McGrath v. Langford*, 35 Cal. App. 215, 169 P. 424, also lend support to the conclusions there reached. The case last cited is quite in point here. In that case a demurrer to the complaint filed in the justice's court was set for hearing at 3 o'clock p. m. on a Saturday, which was a nonjudicial day. Code Civ. Proc. §§ 10, 133, 134. The demurrer was heard and overruled at that time in the absence of the defendant. It was held that this action

was erroneous but not void, and that the judgment based thereon was invulnerable upon collateral attack. There is language used in the opinion in *Shepherd v. Superior Court*, 54 Cal. App. 673, 202 P. 466, which, when read apart from its context, seems to conflict with the conclusions indicated in the last cited cases, but when it is read in the light of the facts of the case there under consideration no such conflict will be found. It may be conceded that a judgment cannot be legally rendered by the mere telephoning of a statement to that effect from the judge's residence to the office of the clerk upon a nonjudicial day, but the filing in the clerk's office of a written judgment signed by the judge (as was done here) does constitute in law a rendition of such judgment. In *re Newman*, 75 Cal. 213, 221, 16 P. 887, 7 Am. St. Rep. 146; *Baker v. Brickell*, 102 Cal. 620, 623, 36 P. 950; *Powell v. Mohr* (Cal. App.) 230 P. 27.

[5] It must be conceded that the department of the superior court while sitting at Long Beach was not regularly functioning as a court. The result is that the evidence so heard by it was in effect heard by the judge "in chambers." Under the rule adhered to in the later decisions of this state this circumstance does not render the judgment void. It was undoubtedly erroneous, and might have furnished ground for a reversal of the judgment upon appeal, unless the suffering of default by the defendant be deemed a waiver of his right to object to such irregularity or be regarded as a consent thereto. It was a violation of the mandate contained in section 130 of the Civil Code requiring proof of the facts alleged to be "taken before the court." But we are satisfied that this requirement, though mandatory, is not jurisdictional. The provision of section 128 of the Civil Code, forbidding the granting of a divorce unless the plaintiff has been a resident of the state and of the county for the time specified, is of a similar character. This requirement has sometimes been spoken of as "jurisdictional." *Flynn v. Flynn*, 171 Cal. 746, 154 P. 837; *Gould v. Gould*, 188 Cal. 505, 205 P. 1072. But it has never been so decided, so far as we are advised, in any case wherein that question was actually involved. In the cases in which this question has been actually involved and decided it has been held that this requirement is not jurisdictional, and that the failure to comply with it is nothing more than error in the exercise of jurisdiction. *Estate of McNeil*, 155 Cal. 333, 339, 100 P. 1086; *Dahne v. Superior Court*, 31 Cal. App. 664, 161 P. 280; *Bullard v. Bullard*, 189 Cal. 502, 506, 209 P. 361. The same reasoning

applies with equal force to the provisions of section 130 of the Civil Code, and it follows by parity of reasoning that these requirements are not jurisdictional and that a failure to comply with them results in mere error, correctible only by means of a direct attack by appeal or motion in the same case.

[6-8] It may be suggested that we are not entitled to assume upon the record herein that the court in the divorce action did fail to comply with the requirements of section 130. These requirements are, in the alternative, that the court require proof of the facts alleged, either "taken before the court" or "upon written questions and answers." It is nowhere alleged herein that the proofs taken herein were not taken upon written questions and answers. Upon an appeal from a judgment all intentions and presumptions are in support thereof, and this rule applies a fortiori in cases of collateral attack upon a judgment. But we are satisfied, for the reasons above indicated, that a failure to comply with the requirements of this section would not render the judgment void. In our consideration of the case thus far we have assumed as a fact that the judgment under consideration is subject to the defects which we have been discussing, but it is to be doubted that such assumption is justified by the record herein. The general rule is that a judgment of a court of record cannot be collaterally assailed unless it is void on its face. 15 Cal. Jur. p. 45. This rule applies equally to a judgment of divorce. 9 Cal. Jur., p. 750. A judgment of a court of record is not void upon its face, unless the defects which render it void are apparent upon an inspection of the judgment roll. *Estate of McNeil*, supra. It nowhere appears from the record herein that the defects that we have been here considering are apparent from an inspection of the judgment roll, nor does it seem probable that they would so appear. On the contrary, it seems most probable that an inspection of the judgment roll in the divorce action would disclose no defect whatever therein.

It is our conclusion that upon the showing here made the judgment in question cannot be said to be void, and it must therefore be deemed to be valid for the purposes of this proceeding. It is ordered that a peremptory writ of mandate issue herein, directing the respondents to proceed as soon as practicable with the hearing and determination of said contempt proceeding.

We concur: LENNON, J.; LAWLOR, J.; SEAWELL, J.; SHENK, J.; RICHARDS, J.; WASTE, J.

195 Cal. 375

BAUER et al. v. WILLIS, Judge.
(S. F. 11293.)

(Supreme Court of California. Feb. 5, 1925.)

Executors and administrators §35(19)—Order denying petition to remove executor held appealable, and it was duty of judge to settle and certify transcript on appeal therefrom.

An order denying petition to remove an executor is in effect an order refusing to revoke letters testamentary, and hence is appealable under Code Civ. Proc. § 963, subd. 3, and, where petitioners, in appealing from such order, complied with section 953 et seq., it was duty of judge to settle and certify transcript to be used upon such appeal.

In Bank.

Application for writ of mandate by Hamilton A. Bauer and others to be directed to Frank R. Willis, as Judge of Superior Court in and for the County of Los Angeles, to compel respondent to certify transcript on appeal. Writ granted.

Hamilton A. Bauer, of San Francisco, and O. Franklin Baxter, of Los Angeles, for petitioners.

Stanley K. Brown, of Pasadena, for respondent.

PER CURIAM. This is an application to compel the respondent, as judge of the superior court in and for the county of Los Angeles, to certify a transcript to be used upon appeal from an order heretofore made and entered by said court. There is no controversy as to the facts herein, and it appears from the record that one of the petitioners herein heretofore filed a petition in said court in the matter of the estate of Emile Bauer, deceased, for an order restraining the executors of the will of said deceased from selling and disposing of certain assets of the estate claimed to have been specifically bequeathed to petitioners. Thereafter another petition was filed therein by others of the petitioners herein, praying for the same relief, and in addition thereto asking for "the removal of said executors." A citation was issued, the matter came on for hearing before the court, and a hearing was had and evidence taken upon both of said petitions. Both of said petitions were thereupon regularly submitted to the court for consideration and decision, and thereafter the court made its order denying said petitions, which was in part as follows:

"Wherefore it is ordered, adjudged, and decreed * * * that the citation issued herein be and the same is hereby dismissed, and the

petition for removal of executors be and the same is hereby denied."

Said order also awarded costs in favor of the respondents therein and against the petitioners herein. Thereafter and within due time the petitioners appealed from said order, requested and procured a transcript of the testimony, etc., pursuant to section 953 et seq. of the Code of Civil Procedure, and presented the same to the respondent judge for settlement and certification. Respondent refused to settle or certify the same solely upon the ground that the said order was not an appealable order. Petitioners point to the fact that appeals from similar orders have been frequently entertained and acted upon without question by this court and by the District Court of Appeal, citing *In re Newell*, 18 Cal. App. 258, 122 P. 1099; *Estate of Healy*, 137 Cal. 474, 70 P. 455; *Estate of Bell*, 135 Cal. 194, 67 P. 123; *Estate of Rathgeb*, 125 Cal. 302, 57 P. 1010; *Estate of Welch*, 86 Cal. 179, 24 P. 943; *Estate of Kelley*, 122 Cal. 379, 55 P. 136. To this respondent replied that in none of these cases was the point argued as to whether or not an appeal was proper, "and in no case was the discretion of a trial court disturbed by a successful appeal." Respondent is correct in his first point but incorrect as to the second. In the *Estate of Welch*, supra, the order of the trial court removing an administrator was reversed upon appeal. It is true that the cited cases are not to be regarded as direct determinations upon the question of the appealability of an order removing or refusing to remove an executor or administrator. They are somewhat persuasive, however, in view of the circumstance that some of them appear to have been vigorously litigated, and yet it does not appear that in any of them the appealability of the order was even questioned. This question, however, is settled by the provisions of the statute. Code Civ. Proc. § 963, subd. 3. It is there provided that an appeal may be taken "from a judgment or order granting or refusing to grant, revoking or refusing to revoke, letters testamentary, or of administration. * * *" The removal of an executor of necessity involves and includes the revocation of his letters testamentary, and it follows that an order refusing to remove an executor is in effect an order refusing to revoke letters testamentary. It follows that the order involved herein is appealable to the extent that it denied the petition for the removal of the executors, and it was the duty of the respondent judge to settle and certify the transcript to be used upon such appeal.

It is therefore ordered that a peremptory writ of mandate issue herein as prayed.

70 Cal. App. 175

NEW YORK LIFE INS. CO. v. ROSE et al.
(Civ. 4963.)

(District Court of Appeal, First District, Division 2, California. Dec. 10, 1924.)

1. Insurance — 587—Beneficiary, preventing indorsement of change of beneficiary through fraud and concealment of policy, cannot urge absence of such indorsement.

Beneficiary, preventing indorsement of change of beneficiary on policy by fraud and deceit and concealing policy, cannot claim proceeds because of absence of such indorsement, where insured has done all in his power to effect the change.

2. Insurance — 587, 780—Principles governing change of beneficiary apply to fraternal and ordinary life insurance companies.

Equitable principles governing right to change beneficiary apply alike to fraternal and ordinary life insurance companies.

3. Insurance — 587—Indorsement of change of beneficiary on policy can be enforced after death of insured.

Although name of new beneficiary was not indorsed on policy under which insured had right to change beneficiary, he could still enforce such indorsement after insured's death, where policy provided that change should relate back to date insured signed notice.

4. Insurance — 587—Judgment for new beneficiary not reversed, although name not indorsed on policy.

Although name of new beneficiary was not indorsed on policy, judgment awarding her proceeds of policy will not be reversed, where indorsement could be enforced after insured's death so as to make her sole beneficiary.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Action in interpleader by the New York Life Insurance Company against Tony S. Rose and Mary S. Rose, also known as Mrs. R. S. Rose. From judgment for last named defendant, first named defendant appeals. Affirmed.

L. Gonsalves and E. E. Gehring, both of Oakland, for appellant.

A. A. Rogers, of Oakland (Henry G. Tardy, of counsel), for respondent.

NOURSE, J. This is an action in interpleader wherein plaintiff, New York Life Insurance Company, required the two defendants to litigate their respective claims to the proceeds of a certain policy of life insurance issued to Joe L. Rose. The insurance company deposited the proceeds of the policy, less certain expenses, and was discharged. The trial was had upon the cross-complaint of Mary S. Rose and the answer thereto filed by Tony S. Rose. Judgment went to Mary S. Rose, from which Tony S. Rose appeals

under the provisions of section 953a, Code of Civil Procedure.

The facts of the case as found by the trial court are that on July 8, 1919, the insurance company issued its policy of insurance upon the life of Joe L. Rose in the sum of \$2,000. His mother, Mary S. Rose, and her husband were named the beneficiaries. On October 17, 1921, the insured requested the insurer to substitute Tony S. Rose, an uncle of the insured, as sole beneficiary, and the change was duly indorsed upon the policy by the insurer. The policy so indorsed was then delivered by the insured to the new beneficiary, who kept it in his possession. Thereafter, and on December 20, 1922, the insured desired to substitute his mother as sole beneficiary, and from that date until February 3, 1923, made frequent demands upon his uncle for the surrender of the policy. To these demands the uncle replied that the policy was lost; that he did not have it in his possession, and did not know where it was; that all these statements were false and untrue; that the uncle "kept and concealed said policy of insurance for the purpose of endeavoring to prevent said insured, Joe L. Rose, from designating Mary S. Rose * * * as beneficiary thereunder and for the purpose of securing the proceeds of said policy of insurance for himself; and that he so kept and concealed said policy of insurance until after the death of said insured." On February 3, 1923, the insured signed a written request for a change of beneficiary to Mary S. Rose, and mailed this to the insurer, together with his affidavit showing the loss of the policy through his uncle's refusal to make delivery thereof. These documents were received by the insurer after the death of the insured, but the company did not indorse the change of beneficiary on the face of the policy, as required by its rules, because the insurer was unable to deliver the policy for that purpose. The court found that the insured complied with all the rules of the company for the purpose of making the substitution to the extent to which he had the power to comply. He also found that, after these proceedings were commenced, Tony S. Rose surrendered the original policy to the insurer and demanded the full amount due thereunder.

[1] The outstanding fact in these findings, the truth of which is not controverted, is that the appellant, through fraud and deceit, prevented the insured from making a complete substitution of the beneficiary and concealed the policy in order to secure the proceeds for himself. On these facts the trial court held that equity foreclosed the appellant from asserting any claim to the proceeds of the policy.

In the argument on appeal the appellant insists that we should follow the rule of

Freund v. Freund, 218 Ill. 189, 75 N. E. 925, 109 Am. St. Rep. 283, where the Supreme Court of Illinois in a similar case held that, as the insurance policy provided that no change of beneficiary should be effective until indorsed on the policy at the company's home office, an attempt to make such a change by written notice mailed before the death of the insured but received by the company after the death did not confer any rights upon the new beneficiary. The case was decided in 1905, and involved an interpretation of a policy which did not give to the insured the absolute right to change the beneficiary, but required the consent of the company before a change should become effective. The rule of the decision is really based on this distinction, the court holding that the policy was a contract between the insured and the company in which both agreed that a substitution could be effected only in the manner specified. However, the court expressly recognized the rule of those cases which holds that, when the insured reserves the right to change the beneficiary and the indorsement of the company is merely a ministerial act, the original beneficiary cannot by his own fraud prevent an indorsement of the substitution and then prevail over the one who was attempted to be substituted. The respondent concedes that the general rule is as stated in the Illinois case, but she relies upon the well-recognized exception to this rule that, where the original beneficiary through fraud prevents an indorsement by the company of a change in the beneficiary, or where the insured has done all in his power to effect the change, and the indorsement is merely a ministerial act, the old beneficiary cannot urge that the change was not effective because the indorsement was not made on the policy.

The proposition for which the respondent contends is supported by authorities in this state and by the great weight of authority in other jurisdictions. The leading case in this state is *Jory v. Supreme Council American Legion of Honor*, 105 Cal. 20, 38 P. 524, 26 L. R. A. 733, 45 Am. St. Rep. 17. In that case the original beneficiary had possession of the insurance policy, and refused to deliver it to the insured, and kept it concealed in order to prevent the insured from substituting a new beneficiary. As in our case, the insured had taken all reasonable means to effect the change, but the insurer had refused to indorse the change without presentation of the policy. The Supreme Court held that the exception to the rule heretofore noted at pages 26 and 27 (38 P. 525), "is builded upon the principle that equity does not demand impossible things, and will consider that done which ought to have been done; and is embraced within the proposition that when the insured complies with all the requirements of the rules for the

purpose of making the substitution of beneficiaries, with which he has the power to comply, he has done all that a court of equity demands;" citing cases. Again, in the same case the court said at page 27 (38 P. 526):

"But there is another well-settled principle of equity equally fatal to appellant's claims. No person can take advantage of his own wrong * * * if a fraud of her own [the original beneficiary] practicing prevented a legal substitution of beneficiaries, then as against her an equitable substitution will be held to have taken place."

This rule has been followed by the courts of so many jurisdictions that it has become an accepted principle. See *Supreme Conclave, etc., v. Cappella* (C. C.) 41 F. 1, 7; *Rollins v. McHatton*, 16 Colo. 203, 27 P. 254, 255, 25 Am. St. Rep. 260; *Marsh v. Supreme Council American Legion of Honor*, 149 Mass. 512, 21 N. E. 1070, 1072, 4 L. R. A. 382; *Taff v. Smith*, 114 S. C. 306, 103 S. E. 551, 553; *John Hancock Mutual Life Ins. Co. v. Bedford et al.*, 36 R. I. 116, 89 A. 154, 155; *Polish Nat. Alliance of the United States v. Nagrabski*, 71 N. J. Eq. 621, 64 A. 471, 473; *Holden v. Modern Brotherhood of America*, 151 Ga. 673, 132 N. W. 329, 332; *Gross v. Strzyzowski*, 124 Ill. App. 300. In the latter case the opinion was written at about the same time that *Freund v. Freund* was written by the Illinois Supreme Court. A petition for rehearing was filed in the *Gross Case* based on the opinion in the *Freund Case*. In denying the petition the appellate court drew the distinction between a case of mere failure to comply with the company's rules in changing the beneficiary and a case where the change was prevented by the fraud of the beneficiary.

[2] Appellant argues that the rule of *Jory v. Supreme Council, etc.*, and similar cases should be confined to policies issued by fraternal insurance societies, while the rule of the *Freund Case* should govern policies issued by ordinary life insurance companies. There is really no distinction in this respect between the two kinds of policies as now issued. *Love v. Clune*, 24 Colo. 237, 50 P. 34. The cases upon which appellant relies involved policies of ordinary life insurance companies in which the insured had not reserved the right to change the beneficiary, but where this right is reserved the equitable principles which we have discussed apply with like effect to both classes of policies.

[3, 4] The policy under consideration in our case expressly reserved to the insured the right at any time to change the beneficiary without the consent of the original beneficiary. It provided that such change must be indorsed on the policy by the insurer, and that after such indorsement the change should relate back to the date the insured signed the notice of change "whether the

insured be living at the time of such indorsement or not." It was therefore merely a ministerial duty on the part of the insurer to indorse the change. *Mutual Life Ins. Co. v. Lowther*, 22 Colo. App. 622, 126 P. 882, 885; *Quist v. Western & Southern Life Ins. Co.*, 219 Mich. 406, 189 N. W. 49, 51. This would become effective as of February 3, 1923, prior to the death of the insured. If we should reverse the case, the respondent would still have the right to enforce this indorsement, and in that event she would become the sole beneficiary as of February 3, 1923. Thus a reversal would have no other effect than to cause useless and unnecessary litigation which must result in a judgment for the respondent such as we now have on this appeal.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

70 Cal. App. 300

LYLE v. SELLER et al. (Civ. 4909.)

(District Court of Appeal, First District, Division 1, California. Dec. 19, 1924.)

1. Damages ⇐39—Recoverable where plaintiff deprived of use of her machine while being repaired.

Where defendant's negligence caused automobile collision, plaintiff could recover damages for use of her machine while being repaired.

2. Damages ⇐188(1)—Finding that 23 days was reasonable time to make repairs on plaintiff's machine sustained.

Evidence held to sustain finding that reasonable time for making repairs on plaintiff's machine, damaged by defendant's negligence, was 23 days.

3. Damages ⇐39—Automobile owner entitled to damages for deprivation of its use, including delay in arrival of parts.

Plaintiff physician, whose car was damaged by collision occasioned by defendant's negligence, held entitled to damages for deprivation of its use during time necessarily consumed in making proper repairs, including delay in arrival of parts ordered from a distant city because unavailable elsewhere.

4. Damages ⇐42—Amount paid chauffeur during time car was out of commission held recoverable.

Where defendant's negligence caused automobile collision, plaintiff could recover reasonable amount which she was compelled to pay her chauffeur during time her car was out of commission, where payment was shown to have been made, and she had no use for chauffeur during that time.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Annie G. Lyle against Mrs. A. Seller and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Theodore Hale and Barry J. Colding, both of San Francisco, for appellants.

Peter A. Breen and Wilson & Wilson, all of San Francisco, for respondent.

TYLER, P. J. Action for damages in the sum of \$1,008.75 claimed to have been suffered by the plaintiff as the result of an automobile collision brought about through the negligence of defendant Mrs. A. Seller. The amount sued for is composed of the following items: \$234.05, cost of making repairs to plaintiff's automobile; \$487 for deprivation of its use while undergoing such repairs; and the sum of \$80 paid as wages by plaintiff to a chauffeur regularly employed by her to drive her said car.

At the trial it was shown in evidence that plaintiff is a regularly licensed and practicing physician and surgeon engaged in the practice of her profession in San Francisco, in the carrying on of which she requires the constant use of an automobile. It was admitted by said defendant that the collision occurred solely through her negligence, and that the sum of \$234.05 was actually paid for repairs necessitated by the collision, and that she is liable for said amount; her objections being directed to other items of damage included in the judgment against her. In this behalf it appeared from the evidence that the repairs to plaintiff's car included the installation of a new radiator; that part of her automobile having been rendered entirely useless by the collision. It also appears that certain necessary parts for the repair of the car had to be procured from the East, and this entailed considerable delay. After arranging for the repair of the automobile plaintiff hired a taxicab for her professional use during a period of three weeks, the cost of which is included in the amount claimed for deprivation of the use of her car. She also during the whole time that it was undergoing repairs retained in her service her regularly employed chauffeur, to whom she paid wages at the rate of \$25 a week. In her claim for damages she has included such wages for a period of about three weeks, although, as she testified she was deprived of the use of her car for upwards of three months.

Upon this evidence the court found that the cost of repairing the automobile was \$234.05; that plaintiff was deprived of the use thereof for the period of 23 days, to her damage in the sum of \$140, and that she was further damaged in the sum of \$82.10 paid as wages to her chauffeur during such period of deprivation. Judgment was accordingly entered for the sum of \$456.15, the total of the foregoing amounts.

Appellant concedes the correctness of the judgment in so far as it awards to plaintiff the cost of repairs of the automobile, but contends that the amount allowed for loss of use is excessive, and plaintiff's right to recover the amount paid as wages to her chauffeur is denied. The only questions therefore to be considered are: First, was the amount allowed as damages for loss of use excessive? and, second, is plaintiff entitled to recover as damages the wages paid to her regularly employed chauffeur while the damaged car was being repaired?

[1-4] The evidence is clearly sufficient to support the findings. The claim that the greater portion of the time consumed in making the repairs was due to the delay in the arrival of the necessary parts from the East can avail appellant nothing. Plaintiff was entitled to have her machine restored to the same condition it was in immediately prior to the injury. She was also entitled to damages for deprivation of its use during the time necessarily consumed in making the proper repairs. It was due to no fault of hers that the collision occurred, and she was not responsible for the delay made necessary by reason of the fact that the parts were not immediately available. So far as the evidence shows, she was not informed that it was necessary to send East for them, and she knew nothing about the matter when the repairs were ordered to be made, being merely informed that it would not take long to repair the car and in the meantime she hired a taxicab for her professional use. Nor does it appear that there was any unreasonable delay in the arrival of the parts. That temporary repairs might have been made permitting of the use of the car pending the arrival of the parts from the East was also a matter she was not informed of, so far as the record shows, if indeed it could be said that it was incumbent upon her, if she had such knowledge, to use a damaged car pending the arrival of the parts. Moreover, the court limited its award of damages for deprivation of the use of the car to 23 days, thus discounting quite liberally plaintiff's claim under this head. The time consumed in making repairs of the character here involved was a proper element of damage, and the evidence fully supports the finding in this particular. *Meyers v. Bradford*, 54 Cal. App. 157, 201 P. 471. The court having found that the reasonable time for making the necessary repairs to the plaintiff's car was a period of 23 days, it included in the judgment a corresponding amount for the chauffeur's wages. The reasonable amount which an owner of an automobile is compelled to pay a chauffeur during the time that the car is out of commission is also a proper element of damage when payment is shown to have been made and the owner had no use for the

chauffeur during that time. *Cook v. Packard Motor Car Co.*, 88 Conn. 590, 92 A. 413, L. R. A. 1915C, 319; *Blakemore on Motor Vehicles* (2d Ed.) § 1745.

There is ample evidence in the record to sustain both of the elements of damage objected to. This being so, the judgment should be and it is hereby affirmed.

We concur: ST. SURE, J.; KNIGHT, J.

70 Cal. App. 381

PICKERING v. HAVENS. (Civ. 4121.)

(District Court of Appeal, Second District, Division 1, California. Dec. 24, 1924. Hearing Denied by Supreme Court Feb. 19, 1925.)

1. Malicious prosecution — 16—Plaintiff must show want of probable cause and malice.

In actions of malicious prosecution, plaintiff, to recover, must show want of probable cause and malice on part of defendant in instituting criminal prosecution.

2. Malicious prosecution — 30—Prosecution for purpose of protecting property not conclusively deemed malicious.

The institution of a criminal action for the sole purpose of protecting property is not conclusively deemed to be malicious.

3. Malicious prosecution — 64(2)—Evidence held to support verdict for defendant and not affirmatively to show malice.

In an action for malicious prosecution, evidence that plaintiff, after selling certain furniture to defendant, commenced to remove it from defendant's house, and that defendant on advice of lawyer, and with assistance of a justice of the peace, swore out a complaint against plaintiff for burglary, no ill will being shown, held not affirmatively to show malice, and supported a verdict for defendant.

4. Malicious prosecution — 56—Malice must be proved as fact.

There is no legal presumption of malice, and, although malice may be inferred from want of probable cause or other circumstance, as an inference of fact, still it must be proved as a fact.

5. Appeal and error — 1066—Instruction on fraud held not prejudicial, where no proof or evidence of fraud.

An instruction, in action for malicious prosecution, that under the evidence defendant was not guilty of any fraud, was not prejudicial, where fraud was not pleaded; nor was there any evidence that defendant had practiced fraud on the plaintiff.

6. Malicious prosecution — 72(4) — Instruction, requiring finding defendant acted maliciously, held not error.

Instruction, in action for malicious prosecution, requiring finding that defendant instituted action maliciously, held not erroneous, where there was no evidence tending to show motive on defendant's part, and malice not

being conclusively presumed from institution of criminal action.

7. Trial $\hookrightarrow$ 252(1)—Instruction not justified by evidence properly refused.

An instruction was properly refused, where there was no evidence in case justifying giving it.

Appeal from Superior Court, Los Angeles County; Chas Monroe, Judge.

Action by Mary E. Pickering against Cora Havens. Judgment for defendant, and plaintiff appeals. Affirmed.

Leon R. Yankwich and F. W. Shelley, both of Los Angeles, for appellant.

Hahn, Hahn & Landreth, of Pasadena, for respondent.

CURTIS, J. Action to recover damages for malicious prosecution. Judgment rendered in favor of defendant and plaintiff appeals. Appellant and her husband, John W. Pickering, were the owners of the Raymond Villa, a rooming house in the city of Pasadena, together with the furniture therein. On February 16, 1920, they leased these premises to the respondent, and at the same time they sold to respondent all the furniture in said rooming house, excepting certain specific articles. A written lease to the premises was executed by the parties and appellant and her husband also gave to respondent a bill of sale of the furniture sold. In the bill of sale the furniture reserved from the sale by appellant and her husband was particularly described and excepted from the sale. There was also a separate list of this reserved furniture, made out and signed by respondent, and given to the Pickerings. It was agreed by the parties at the time, and so specified in writing, that the furniture reserved by the appellant and her husband should remain in the lodging house until other furniture belonging to the respondent should arrive from the East. Respondent paid to the appellant and her husband for said furniture the sum of \$1,200. She also paid them two months' rental of the rooming house and took possession of the house and furniture immediately after the sale. A Mr. Hisey had acted as the agent of appellant and her husband in their negotiations with the respondent, and had prepared the above-mentioned papers evidencing the transaction between the parties. Some time after the sale, and probably a few days prior to March 31, 1920, appellant's husband called upon Mr. Hisey and said to him "that, when they went out to look for a house or apartment such as they thought they wanted, they found that the rents and everything had gone very high, much higher than they had expected, and he thought they had sold their stuff too cheap." He practically demanded of Mr. Hisey that the latter do something to annul the sale or change it. Mr. Hisey explained

to Mr. Pickering that the sale had been made as agreed upon, and that the transaction was a closed one, and that it was beyond his power to do anything in the way of changing the terms of the sale. A rather lengthy conversation was had between the two, and finally Mr. Pickering said:

"Well, we have been a couple of old fools, that is all. I'm going to law about this anyway."

About this time Mr. Pickering called upon respondent and stated that he was going to sell what things he had in the house. Respondent replied that he hadn't anything except the things he had reserved. Pickering replied, "Why I certainly have." Respondent then got her bill of sale and showed it to Pickering, who said, "We did sign that, didn't we; I didn't remember?" He then said, "We will have to go to law about this." The next day Pickering and his wife came to the lodging house and began removing a portion of the furniture which they had sold to respondent and loading it on a truck. They did not at this time make any claim to the ownership of the furniture, nor did they offer any explanation of their action in removing the furniture. They simply by sheer force began its removal. At the trial it appears that they claimed that they did not sign the bill of sale or that they did not intend to sell all the property called for by the bill of sale which they did sign. They did not, however, prior to their attempting to remove the furniture from the lodging house, or at the time of its attempted removal, make known to respondent either of these claims. The respondent, being unable to prevent them from taking the furniture, called the constable of the township, who stated to respondent that he could do nothing without a warrant of arrest. Whereupon, respondent sought the advice of Edwin F. Hahn, Esquire, a practicing attorney in the city of Pasadena, and now one of the superior judges of the county of Los Angeles. She stated the facts of the case to him, and was advised by him that the Pickerings were guilty of larceny and that she should proceed to the office of the justice of the peace, and have a warrant for their arrest issued by that magistrate. Respondent did as advised by her attorney and a warrant for the arrest of appellant and her husband was issued and delivered to a peace officer for service. It was served upon appellant by the peace officer taking her into custody. He did not, however, imprison her, but suffered her to go upon her own recognizance. Two days thereafter her preliminary examination was held. After hearing the testimony of Mr. Hisey, the charge against appellant, upon motion of the district attorney, was dismissed, and appellant was discharged. Whereupon plaintiff instituted this action for malicious prosecution.

[1] It is well settled in actions of malicious prosecution that plaintiff, in order to recover against the defendant, must show want of probable cause for the institution of the criminal prosecution and malice on the part of the defendant in instituting said prosecution. *Redgate v. Southern Pacific Co.*, 24 Cal. App. 573, 141 P. 1191. In the present action the court instructed the jury regarding probable cause as follows:

"It is for the court to determine whether there is probable cause or not, and I instruct the jury that there was not probable cause for the bringing of this criminal action."

In view of this instruction, we will limit our consideration of the case to the contention of appellant that the evidence is not sufficient to support the implied finding of the jury that defendant did not act with malice in the institution of the criminal action. In doing so we do not wish to be understood as approving the action of the court in giving this instruction:

"The question of probable cause is a mixed question of law and fact. Whether the circumstances alleged to show it probable are true and existed is a matter of fact, and to be determined by the jury; but whether, supposing this to be true, they amount to probable cause, is a question of law." *Newell on Malicious Prosecution*, p. 276; *Sandell v. Sherman*, 107 Cal. 391-394, 40 P. 493.

The first contention of appellant is that malice appears affirmatively from the evidence. In this connection appellant claims that the evidence shows that the only motive of respondent in instituting the criminal action was for the protection of her property from the appellant and her husband. This claim is based upon the testimony of respondent, and particularly that contained in the following question propounded to respondent by the court and her answer thereto:

"You did that [institute the criminal proceeding] not for the purpose of having the laws enforced, but you did it for the purpose of protecting your property? A. Yes."

From this answer, appellant contends, it conclusively appears that the only motive of respondent in instituting the criminal action was for the protection of her property. Such a motive, appellant insists, for the institution of a criminal action, is by law deemed to be malicious. In support of this contention appellant has cited a number of authorities among which are *Cochran v. Bones*, 1 Cal. App. 729, 82 P. 970, and *Burke v. Watts*, 188 Cal. 118, 204 P. 578. A number of cases from other jurisdictions are cited by appellant, but these two from the courts of California are fairly typical of all those cited. In each of these cases the verdict of the jury was in favor of the plaintiff and on appeal it was held that the evidence in each case was sufficient to justify the verdict. In each of these cases it is apparent from the facts, as

stated in the opinion, that the defendant was actuated by express malice in the institution of the criminal proceedings. In *Cochran v. Bones*, supra, the defendant had charged the plaintiff with the theft of a hog. The appellate court, in sustaining the judgment, said:

"That it [the prosecution] was malicious there can be no doubt. As has been seen, the parties had talked about the detention of the hog, in which plaintiff informed the defendant that the hog had strayed onto his premises, did damage, and was detained until damage done by said hog should be paid for. Defendant knew he could get his hog by paying the damage done, and instead of doing so had declared he would have the hog, and would have plaintiff arrested for stealing, and on going to the justice * * * he concealed the facts which, if they had been disclosed, would have shown the justice * * * that there had been no crime committed."

In *Burke v. Watts*, supra, the parties had a dispute about the ownership of a number of folding beds which had been a part of the furnishings of an apartment house. The plaintiff claimed to own them by virtue of a purchase by him of the furniture in said apartment house. The defendant, who was the owner of the building, claimed that they were a part of the building and therefore belonged to him. They were removed by the plaintiff from the apartment house and the defendant swore to a complaint, charging the plaintiff with grand larceny in taking and stealing them from the building. At the preliminary examination the criminal action was dismissed. Plaintiff then instituted an action against the defendant to recover damages, claiming that the prosecution was malicious. At the trial it appeared that the defendant had said to the plaintiff,

"I'll fix you; I fixed you once, and I'll fix you again. I told you I would fix you, you crook; I'll fix you all the time."

And on another occasion the defendant, referring to plaintiff, had said to the officer who arrested plaintiff:

"There he is. Arrest him and take him down, lock him up, put him in jail; he is a crook. I am going to send him to the penitentiary."

In its opinion affirming the judgment in this action, the Supreme Court said:

"There is other evidence that before this conversation appellant showed anger toward respondent as a result of their dealings. From this testimony and evidence that appellant knew respondent actually claimed title to the beds, the jury might have concluded that appellant was prompted by a malicious motive in causing the prosecution of respondent."

[2] We think it will be conceded that neither of these cases can be considered as an authority supporting appellant's contention that a prosecution, instituted for the sole purpose of protecting property, is conclu-

sively deemed to be malicious. The other cases cited by appellant from foreign jurisdictions are no more favorable to her contention than are the two cases which we have briefly reviewed, and which were decided by the courts of our own state.

[3] Furthermore, we are convinced, from a consideration of the testimony in the case as a whole, that the jury were justified in rendering a verdict in defendant's favor, on the ground that no malice was shown. We think the testimony shows that defendant, at the time she swore to the complaint against the plaintiff, believed that the plaintiff and her husband were guilty of the crime charged therein. The defendant was a woman of limited business experience and unfamiliar with legal terms or court procedure. When this trouble arose, she sought the advice of a competent and reliable attorney, and made to him a full and fair statement of all the facts of the case. Upon hearing her statement, the attorney advised her that the Pickerings were guilty of larceny, and that she might have them arrested. She acted upon this advice and went to the office of the justice of the peace for this purpose. This officer concluded that the charge should be burglary instead of larceny, and prepared the complaint accordingly. Why should she not believe these men? One, following the law as a profession, and the other, executing it as an official, caused her to have every confidence in them, and to believe that they were familiar with the laws governing her case. When they told her that appellant and her husband were committing a crime in entering her house and removing therefrom property that she had bought from them, it is very evident to us that she believed what they told her. Had they advised her to institute a civil action, there is nothing in the evidence to indicate that she would not have followed their advice as readily and as willingly as she did when they advised a criminal proceeding. Furthermore, we have not had called to our attention, nor have we found from an independent examination of the testimony in the case, one act or word of the defendant that would indicate in the least degree that in the institution of the criminal action she acted with any ill will toward the plaintiff, or with any desire to injure her.

[4] "There is no legal presumption of malice, and, although malice may be inferred from want of probable cause or other circumstance, as an inference of fact, still, whether by inference or otherwise, it must be proven as a fact. 'To constitute malice there must be *malus animus* denoting that the party who instituted the proceeding was actuated by wrong motives,' i. e., he must have had in his mind some evil or sinister purpose." *Redgate v. Southern Pacific Co.*, 24 Cal. App. 573, 584, 141 P. 1191.

As the evidence fails to show that the defendant was actuated by any such "evil or sinister purpose" in the institution of the

criminal proceeding against the plaintiff in this case, we conclude, not only that malice does not appear affirmatively from the evidence, but that the verdict of the jury in defendant's favor is fully justified and supported by the evidence.

[5] The next contention of appellant is in reference to the instructions. Appellant excepts to the instruction of the court that—

"Under the evidence in this case the defendant Mrs. Havens was not guilty of any fraud in the execution of the bill of sale."

No fraud was pleaded, nor was there any evidence that the defendant had practiced fraud upon the plaintiff. It was claimed by appellant and her husband that they did not intend to sign any bill of sale of any furniture, and that, if they did sign any such document, it was not done intentionally or with knowledge of its contents. The papers evidencing the agreement of these parties, as we have already seen, were prepared by Mr. Hisey, the agent of the Pickerings. There is an intimation that Mr. Hisey had prepared papers different from those which the Pickerings had agreed to sign, and which they understood he was to prepare, and that, when they signed them, they did not understand their contents, nor realize that they were executing a bill of sale of any furniture. The testimony of the Pickerings upon this point is vague, uncertain, and unsatisfactory, and but little, if any, weight could be given to it. But aside from its infirmity in this respect, it does not in any way connect, or attempt to connect, the defendant with any acts of Mr. Hisey which they contend were improper. The instruction under these circumstances, therefore, was in no way prejudicial to appellant. There was absolutely no proof of fraud.

[6] A further objection is made to the action of the court in refusing to give an instruction, proposed by appellant:

"That the commencement of a criminal prosecution by a defendant simply for the purpose of enforcing a civil right of said defendant, or of defeating a civil right or claim to a civil right of the person so prosecuted, would be an abuse of the process of the court and would be conclusive evidence of malice on the part of the person commencing such prosecution, and in such case the advice of counsel would be no protection."

In the place and stead of this instruction the court gave the following instruction:

"If you find from the evidence that the Pickerings' claim to the property was made in good faith, and that such claim was known to Mrs. Havens, and that it was made under such circumstances as would lead a reasonable person to believe that it was made in good faith, and you further find that Mrs. Havens instituted the prosecution maliciously, with intent to further her claim to the property in dispute, and to retain the same or to escape a lawsuit therefor, you may find for the plaintiff, Mary Pickering, even though you are unable to determine

whose claim was just and to whom the property belonged."

The only criticism offered by appellant to this instruction is to the word "maliciously" contained therein. This criticism is stated by appellant's counsel in their brief as follows:

"The instruction given by the court, however, added another element not required by law, to wit, malice, and made it necessary for the jury to find that: (1) The proceeding was instituted solely for private gain, and (2) that it was instituted maliciously before they could return a verdict for the plaintiff."

[7] As we have before stated, in discussing the first point made by appellant, the authorities cited by her fail to support her contention that the institution of a criminal action, solely for the purpose of protecting property, conclusively shows malice, and we know of no authorities declaring such a doctrine. Furthermore, in this action we find no evidence tending to show any such motive on the part of the defendant. It is true that from her answer to the question of the court above referred to, it might be inferred that such was her motive, yet, when we consider her whole testimony, we can draw no such inference. In our opinion, the instruction given by the court was unobjectionable. As to the instruction proposed by appellant and refused by the court, there was no evidence in the case that would justify the giving of this instruction, and it was properly refused by the court.

Judgment affirmed.

We concur: CONREY, P. J.; HOUSER, J.

70 Cal. App. 351

STIEGLITZ et al. v. SETTLE. (Civ. 4319.)

(District Court of Appeal, Second District, Division 1, California. Dec. 23, 1924. Hearing Denied by Supreme Court Feb. 19, 1925.)

1. Brokers ⚡71—Contract for sale of land at "net" price per acre held not to mean that vendor would pay no commission.

That broker's contract with purchaser provided for sale of interest in land at \$400 per acre "net," if owner of remaining interest sold at such price, held not to mean that vendor, in such case, would pay no commission to broker; "net" being intended only to guard against deductions purchaser might claim.

2. Evidence ⚡450(6)—Doubt as to meaning of word "net" in broker's contract for sale of land open to solution by testimony as to parties' intent.

Any doubt as to whether broker's written contract for sale of land at stated sum "net" meant that vendor need pay no commission or referred only to deductions purchaser might claim was open to solution by testimony as to parties' intent.

3. Appeal and error ⚡1099(3)—Confidential relation of attorney and client between broker and principal held not established as law of case by decision on former appeal.

Confidential relation of attorney and client between broker procuring sale and vendor held not established, as law of case, by decision of Court of Appeal, on appeal from judgment on instructed verdict for broker, suing for commission, that, taking evidence favorable to defendant, case was made out for jury; subsequent trial resulting in first and only finding of fact responding to vendor's claim.

4. Attorney and client ⚡106—Attorney must act in highest good faith toward client.

Attorney or other person occupying confidential relation of trust toward another must act in highest good faith toward principal or beneficiary.

5. Appeal and error ⚡1011(1)—Judgment on fact findings, supported by sufficient evidence, affirmed.

Judgment on court's findings, supported by sufficient evidence, though conflicting, that broker suing for commission for selling land was not defendant's attorney in relation to sale and did not contract with purchaser to represent him in same transaction, nor receive fee for so doing, will be affirmed.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Henry Stieglitz, after whose death Rhoda Stieglitz and another, as executors of his estate, were substituted as plaintiffs, against Maria Encarnacion de Settle. Judgment for plaintiffs, and defendant appeals. Affirmed.

See, also, 175 Cal. 131, 165 P. 436; 50 Cal. App. 581, 195 P. 705.

Henry T. Gage, Ingall W. Bull, and W. C. Petchner, all of Los Angeles, for appellant.

W. A. Alderson and K. A. Miller, both of Los Angeles, for respondents.

CONREY, P. J. This action was commenced by Henry Stieglitz, now deceased, to recover his commissions as broker for services which he had rendered in the sale of certain of defendant's land. After the death of Mr. Stieglitz the present plaintiffs as executors of his estate were substituted as plaintiffs. The present appeal is from the judgment entered in favor of the plaintiff after the third trial of the action.

At the first trial the court granted a nonsuit upon the ground that—

"The plaintiff has failed to prove a sufficient case for the jury, and the evidence introduced was insufficient to support a judgment for the plaintiff."

On appeal the judgment of nonsuit was reversed. *Stieglitz v. Settle*, 175 Cal. 131, 165 P. 436. The judgment under review on that appeal was not a judgment on the merits. The Supreme Court, in reviewing that judg-

ment, merely applied the rule that in passing upon a motion for nonsuit "every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as facts proved in favor of the plaintiff." After the second trial the appeal was from a judgment against defendant, entered upon an instructed verdict. That verdict was rendered under instructions whereby the trial court, following what it deemed to be the law of the case, practically withdrew the question at issue from the consideration of the jury. On that appeal the District Court of Appeal (First District, Division 1) held that the evidence presented a case on which the defendant was entitled to have the facts determined by the jury. The Court of Appeal, after reviewing the evidence, said:

"All we have endeavored to show in the foregoing references to the testimony is that, taking the evidence favorable to the defendant, a case was made out for the consideration of the jury, just as the Supreme Court in the former appeal demonstrated that considering the evidence favorable to the plaintiff, the court committed error in granting the defendant's motion for nonsuit. As to the former opinion in this case, it cannot be held that what the court there said is the law of the case. Here we are not considering an appeal from a judgment following the granting of a nonsuit, and there is a substantial difference in the evidence in the two trials." *Stieglitz v. Settle*, 50 Cal. App. 581, 587, 195 P. 705, 707.

The third trial was before the court without a jury, and resulted in a judgment against defendant, based upon findings of fact made and conclusions drawn therefrom by the judge of the trial court. Thus it is seen that now for the first time there has been a judgment on the merits, based upon findings covering the issues of fact presented by the pleadings. The present appeal is similar to the case as presented on the former appeals, in that in each instance there was, upon some of the important questions of fact, evidence favorable to the party against whom the judgment was allowed in the superior court. But the record on the present appeal approximates more nearly to the case as considered on the first appeal, because the facts found by the court at the third trial harmonize closely with the evidence favorable to the plaintiffs as we find that evidence summarized in the decision of the Supreme Court.

The defendant, by Richard Mahar, her attorney in fact, delivered to Stieglitz a written agreement, dated March 17, 1912, authorizing Stieglitz to sell to George H. Peck all of the interest of defendant in the described real property (being a one-half interest therein), "at a price to be agreed upon between myself as the attorney in fact of the said Maria Encarnacion de Sepulveda and Geo. H. Peck, subject to the ratification or consent of Maria Encarnacion de Sepulveda";

and agreed to pay to Stieglitz for making such sale the regular or customary commission for making said sale as fixed by the realty board of the city of Los Angeles. Said agreement was dated back to March 17th to synchronize with a verbal agreement as to said commission, arranged between Stieglitz and Mahar. The legality of such an arrangement having been upheld by the Supreme Court, appellant makes no point against the agreement by reason of its date. It is also a conceded fact that at the time of making said agreement, Mahar was the attorney in fact of defendant, under a general power of attorney, which was sufficient to cover a transaction of this kind. Moreover, Mr. Mahar testified that before making the commission contract he went to Mrs. Sepulveda (appellant), and obtained her consent that Stieglitz should have a commission in case he should find a purchaser. It was after the execution of that agreement, and after the sale, but prior to the commencement of this action, that Mrs. Sepulveda became Mrs. Settle, which is her present name.

Proceeding under and in accordance with said written authority, Stieglitz procured the purchase of defendant's land by George H. Peck, to whom the property was conveyed for an actual consideration of \$400 per acre; the total price paid to the defendant being the sum of \$177,200. The price to be paid by the purchaser, as named in the negotiations between him and Stieglitz, was \$375 per acre. But in the contract of sale between the purchaser and the seller a contingent addition to the price was provided for under the following circumstances: The one-half interest in the land, not owned by defendant, was the property of her daughter, Esperanza Larson. It was ascertained that negotiations were then pending by which it was hoped or expected by Mrs. Larson that she would be able to sell her interest in the land at the rate of \$400 per acre. In view of this fact, the contract provided for the sale of defendant's land to Peck at the price of \$375 per acre, "with the express understanding that if Esperanza Larson, the owner of the remaining one-half interest in said property, should on or before the first day of May, 1912, succeed in getting a purchaser for her said undivided one-half interest in the land herein described, then in that event the said party of the second part shall pay to the said party of the first part an additional sum of \$25.00 per acre, making the sale price of this agreement \$400.00 per acre net instead of \$375.00. * * * And the said party of the second part agrees to pay the said sums of money in the manner and according to the terms and conditions, and at the times hereinbefore specified, that is to say, he will pay \$375.00 per acre for said land, and in the event the said Esperanza Larson should get a buyer at \$400.00 net per acre, the said second party will then pay the said party of

the first part the sum of \$400.00 an acre instead of \$375.00. * * *

It was pursuant to the contract as thus made that the purchaser George Peck ultimately paid to defendant the full price of \$400 per acre.

[1] Counsel for appellant claim that the controlling point of this case lies in the interpretation of the contract with Peck whereby defendant agreed to sell her property; that by the terms of that contract she was to get from Peck the sum of \$400 per acre net (without paying commission); that therefore appellant is entitled to refuse payment of any commission to her agent, because if she is required to make that payment she then will have received not \$400 per acre net for her property, but approximately \$20 per acre less than said agreed price. In determining the question thus presented, it will serve to clarify the matter if we first consider and interpret the Peck contract solely as it affected the rights of the vendor and the vendee as between themselves. As thus considered, there is no obscurity in the words of the contract. It is provided that in the event of the contingency which afterwards occurred, the sale price of the property was to be "\$400.00 per acre net."

Appellant argues that in the light of the fact that Mrs. Larson then expected to obtain, and in fact did obtain, from her purchasers \$400 per acre, without paying a commission to any agent, the provision in the Peck contract, "making the sale price of this agreement \$400.00 per acre net instead of \$375.00," plainly and certainly meant that the vendor Mrs. Sepulveda would pay no commission to her agent; that, therefore, the court erred in overruling appellant's objections to testimony offered for the purpose of proving that the terms of the contract were not intended to cover the subject of commissions. We think, as do counsel for appellant, that the contract is clear and certain in relation to this matter; but we give it a different interpretation. To the purchaser it was a matter of no concern that the vendor would pay, or would not pay, a commission to some third person. Payment of such commission by her would add nothing to the price paid by him. As between the parties to the contract, therefore, the word "net," as used in the contract, must have referred to something other than expenditures made by the vendor. It did not mean, for example, that the vendor would be excused from paying the cost of the revenue stamps on her deed, or that the purchaser would pay that expense. It was merely one of those words, often inserted "from excess of caution," in agreements, and in this instance was intended to guard against any deductions which the purchaser might claim. The fact that this was not necessary, or that the word used was not apt for the intended purpose, does not give to the word some other equally useless and unexplained meaning. This is not

a case like those cited by appellant, where the vendor, in making his contract of employment with the broker, specifies that the sale to be procured by the broker must be for a price which will produce to the vendor a specified sum, "net." In such a contract with the agent or broker, the word so used could have no possible meaning other than that the price to be received must be sufficient to leave in the hands of the vendor a stated sum, exclusive of all expenses which the vendor might have to incur by reason of such sale.

[2] If we concede, for a moment, that the contract as written did not necessarily mean that the word "net" referred only to such deductions as otherwise possibly might be claimed by Peck, then it will follow, quite obviously, that the true meaning is doubtful, and that this doubt was open to solution by testimony showing the actual intention of the parties. On this theory the court was not in error in receiving such testimony.

It is also worthy of consideration that, under the Peck contract, if Mrs. Larson had not sold her property prior to May 1st, Peck would have obtained the property of Mrs. Sepulveda at \$375, and as to that price the word "net" was not used. It would be a strange result if the defendant was obligated to pay a commission on a sale for \$375 per acre, and yet would be wholly exempted from that obligation in the contingency that the sale was consummated at a larger price.

The real problem of this case relates to the questions pertaining to the relations existing between Stieglitz and the defendant. If Stieglitz was in no sense a party to the Peck contract, and not in any way bound thereby, then under the terms of his contract with the defendant he was entitled to the commission claimed by him. This may be illustrated by supposing that defendant had ordered and obtained from a searcher of records an abstract of the title of her land and had then refused to pay for the abstract, for the alleged reason that under her contract with the purchaser she was to receive a stated "net compensation." Undoubtedly, the searcher of records, who had nothing to do with the Peck contract, would be entitled to recover his compensation. To him it would be a matter of indifference whether the defendant paid him out of the proceeds of the sale of the land or paid him out of funds derived from some other source. So here Stieglitz, as broker, became entitled to recover under his contract, unless it can be established that by reason of some relation existing between him and the defendant, affecting the terms of the Peck contract in its application to the payment of a commission, defendant's obligation to him under the brokerage contract never matured.

[3] Appellant contends that there did exist between Stieglitz and defendant a confidential relation of attorney and client as to this

very matter in dispute, and at the same time with respect to other matters; and that the fact of such relationship is now a part of the law of the case as determined by the Court of Appeal in its decision on the last appeal. The decision of the Court of Appeal cannot be considered as binding in the sense claimed by appellant. We have quoted the words of the court in that decision which show how the decision was limited to the proposition that, "taking the evidence favorable to the defendant, a case was made out for the consideration of the jury." The subsequent trial resulted in the first and only finding of fact responding to the claim of appellant that Stieglitz was her attorney. The point relied upon is that because (as appellant claims) the relation of attorney and client existed between Stieglitz and herself, he was required to act in the highest good faith toward her throughout the transaction; and that the circumstances and terms of the sale and of his relationship thereto are such that it would not be an act of good faith for him to demand and recover the commissions claimed in this action.

[4] It is not necessary to cite decisions affirming the duty of an attorney or other person occupying a confidential relation of trust toward another to act in the highest good faith toward his principal or beneficiary. The two questions at issue are: Was Stieglitz the attorney of appellant in relation to the sale of this property or at all? If he was her attorney, was he, in good faith and conscience, entitled to recover this commission?

[5] The court found, and it is an admitted fact, that at the time of the transactions in question and long prior thereto Henry Stieglitz was an attorney engaged in practice in the county of Los Angeles, with an office at San Pedro. Referring to paragraph IV of the answer, the court further found that prior to March, 1912, he had performed services for appellant as an attorney at law in a condemnation proceeding mentioned in the answer, and in a partition action of Mrs. Larson against the defendant, and had performed professional services in the matter of the estate of Sepulveda, deceased husband of the defendant (having been employed by the administrator Mahar therein); and that said partition proceedings affected the particular property mentioned in the complaint herein.

"But the court finds that it is not true, as alleged in said paragraph, that said deceased performed services as attorney at law to the defendant in all matters requiring legal advice or services, and that he was so actively engaged in her behalf until after the sale of said property by said deceased, as alleged in the complaint; that it is not true that said deceased was at all times, or at all, the general attorney or the legal counselor of the defendant; that it is not true that the defendant relied exclusively on said deceased for legal advice and direction in all, or any, matters; that it is not true that the defendant followed explicitly,

or at all, the advice and counsel of the deceased. The court finds that at the time the defendant and said Henry Stieglitz, deceased, entered into said commission contract the commissioners in said partition proceeding had filed their report; that the engagement of said Henry Stieglitz as the attorney for the administrator of the estate of the husband of the defendant had terminated in December, 1910; that in rendering professional services in said proceedings, said Henry Stieglitz did so through said Richard Mahar, attorney in fact for the defendant; that deceased never met the defendant but two or three times, and could not converse with her because the defendant could only speak Spanish and said Henry Stieglitz could not speak Spanish.

"The court finds that it is not true that said deceased performed any professional services to or on behalf of the defendant, except as employed by the attorney in fact of the defendant, and only in the particular matters aforesaid; that at no time was said deceased the general attorney and counselor of the defendant.

"The court finds that it is not true that the defendant, for any reason, placed an unusual reliance in said deceased as her legal adviser in any matters, and particularly it is not true that she placed any reliance in the deceased as an attorney in respect to the sale of the property mentioned in the complaint; that it is not true that because of any relation of said deceased to the defendant professionally that he gained great familiarity with and knowledge of the property and rights and business affairs of the defendant, but deceased only in a general way knew about such matters and as he was informed by reason of the professional services rendered by him in the proceedings mentioned aforesaid.

"The court finds that it is untrue, as alleged in paragraph VI of said second amended answer, that the defendant advised frequently with said defendant, but the court finds that said deceased only on two or three occasions personally met the defendant; that said deceased was employed by said attorney in fact and at all times relied upon said attorney in fact for his instructions, authority and directions in any and all matters in which he was so employed. The court finds that it is not true that the commission contract set forth in the complaint was attempted to be made, or was made, by the deceased and said attorney in fact clandestinely or surreptitiously, or without the knowledge, consent or acquiescence of the defendant, or that said contract was wrongfully or fraudulently entered into in such manner by said deceased and said attorney in fact, Richard Mahar, with the purpose to take advantage of the confidential and fiduciary relations existing between them and between them and the defendant and to impose upon the ignorance of the defendant at all or to deprive the defendant of any property or rights; that it is not true that there was any understanding or agreement between said Henry Stieglitz and said Richard Mahar that they would divide between them, or at all, any commission that might be paid or collected pursuant to said contract, or any sum from any source whatever; that it is not true that there was any conspiracy at all between said deceased and said attorney in fact to do anything for their own benefit or the benefit of either one of them."

The foregoing findings are very much in line with the evidence referred to by the Supreme Court and relating to the same issues, as that evidence is described in the decision of the Supreme Court on appeal from the judgment of nonsuit. That evidence was in effect the same as the evidence received at the last trial, which resulted in the findings which we have quoted. Commenting thereon, the Supreme Court said:

"Touching Mr. Stieglitz' position and conduct, there is absolutely nothing shown in the evidence which would forbid him, on either legal or ethical grounds, from entering into a contract with Mrs. Sepulveda which had no bearing on or relation to his position as her attorney at law in the partition suit, especially so as in the making of the contract he did not even personally see her and so could not have personally influenced her, and the explanation of the contract was made by and her assent given to her trusted agent and man of affairs. An attorney is under no actual incapacity to deal with or purchase from his client. All that is required where the relation of confidence exists and where the questioned transaction has a bearing upon that relationship is a clear showing that there has been no abuse of confidence and no advantage taken."

In aid of the contention of appellant that Stieglitz did not act in good faith toward her in relation to the sale to Peck, appellant alleged that without her knowledge, and while Stieglitz was representing appellant as her attorney in drawing the Peck contract, and while representing and advising her and her attorney in fact concerning said sale, Stieglitz also contracted with Peck to represent, advise, and protect him in relation to the same transaction, and for his services to Peck received from him a fee of \$500.

The court found adversely to appellant upon this issue. Specifically, however, the court found that after the consummation of the sale, Peck voluntarily and upon his own initiative paid to Mahar the sum of \$500; that said sum was not on account of and had nothing to do with the purchase price for said land, or said commission contract; that thereafter Mahar, as the attorney in fact of defendant, paid Stieglitz the sum of \$250; that said payment to Stieglitz was on another and different account than the sale of said land to Peck and the performance of said commission contract by Stieglitz; that there never was any agreement between Peck, Mahar, and Stieglitz, or any of them, for the payment of said or any sum by Peck, or as to a division between Stieglitz and Mahar of said or any sum; that Stieglitz never solicited or expected any sum whatever from any source on account of the matters which constitute the subject of this action, other than the payment to him of the commission provided for in said commission contract. These findings are adequately supported by the evidence. On the last trial, as on the

first, the same testimony was produced which was summarized by the Supreme Court in its decision, wherein it referred to the testimony of Stieglitz "that there had been no previous agreement between himself and Mr. Peck, or between himself and Mr. Mahar, concerning the \$500, and that he never had any agreement with Mr. Mahar by which he—Mr. Mahar—was to receive any part of the commissions for the sale of the land." And notwithstanding that there was evidence tending to contradict this testimony, it was held that the evidence concerning this matter was not sufficient to destroy the force and effect of the other evidence in the case, and was not sufficient to sustain the judgment of nonsuit. And now, although the court has made its findings of fact upon conflicting evidence, yet it is apparent that they rest upon sufficient evidence.

For the foregoing reasons, the judgment is affirmed.

We concur: HOUSER, J.; CURTIS, J.

70 Cal. App. 279

ODSON v. SWANSON et ux. (Civ. 2858.)

(District Court of Appeal, Third District, California. Dec. 17, 1924.)

1. Vendor and purchaser $\S$ 37(2)—Representations as to acreage of tract held to constitute deceit.

Under Civ. Code, $\S$ 1710, that vendor had told purchaser that he did not know its acreage; that it might be little more or less than 6 acres, but that his grantor had said it was that, when he knew acreage to be less, was sufficient to constitute deceit.

2. Evidence $\S$ 434(11)—Parol evidence admissible to show misrepresentation in acreage of tract.

In action to cancel land contract, where it called for six acres more or less, purchaser may show by parol that vendor, knowing there was less, represented that there were six acres, under Code Civ. Proc. $\S$ 1856, making such evidence admissible to show fraud.

Appeal from Superior Court, Sacramento County; George L. Jones, Judge.

Suit by Gilbert H. Odson against O. H. Swanson and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

Hugh H. Sydenham and William Rigby, both of Sacramento, for appellants.

Charles A. Bliss, of Sacramento, for respondent.

FINCH, P. J. The plaintiff and the defendants entered into a written contract by the terms of which the latter agreed to sell and the former to buy an irregular tract of land which, according to a subsequent survey, contains 4.82 acres. The agreed pur-

chase price was \$1,650, of which the sum of \$650 was paid at or before the execution of the contract. The remainder was to be paid in semiannual installments. This action was instituted for the cancellation of the contract and the recovery of the sum paid, on the ground of misrepresentations alleged to have been made by defendants as to the number of acres contained in the tract. The plaintiff was given judgment as prayed for, and the defendants have appealed.

The defendants had resided on the premises for about two years prior to the execution of the contract. They listed the property for sale with a real estate agent and authorized him to sell the same at the price and upon the terms which were later embodied in the contract of sale. Mr. Swanson testified that, at the time the property was listed with the agent—

"I told him the party that sold to me told me there was six [acres]; I did not know."

The agent placed a card in his window describing the property and stating that it contained six acres. The card attracted the plaintiff's attention and, after making inquiries of the agent, he inspected the property and, while on the premises, he inquired of Mr. Swanson how many acres were in the tract. The defendant testified:

"He asked me how many acres in there. I told him I did not know how many acres there were there, but the party that sold to me told me there were six acres, but I could not tell him how many acres there were. * * * He asked me if there were six acres. * * * I told him I did not know."

Plaintiff testified, relative to the same conversation with Swanson:

"I said, 'Well, it is kind of hard to see, being an irregular piece like that, but it looks very likely it is six acres.' * * * He said, 'It may be less, it may be a little more.'"

On the same day the plaintiff returned to the agent's office and paid \$50 on the purchase price of the property. The agent thereupon signed and delivered to the plaintiff an instrument acknowledging receipt of the \$50 "as a deposit on account of the purchase of * * * 6 acres more or less * * * now owned by O. H. Swanson" and stating the terms of the sale. The plaintiff also signed the instrument. Thereafter the plaintiff and the defendants executed the written contract first referred to and the plaintiff paid the additional sum of \$600 and took possession of the property. A few days later the plaintiff measured the land and computed its area as 4.7 acres. Thereafter the plaintiff served notice of rescission of the contract and demanded the return of the money paid. One witness testified that he saw Swanson measuring the land before the latter purchased it. Another testified that, while Swanson was residing on the premises,

he told the witness that the tract contained 4.75 acres. A receipt for taxes paid by the defendants refers to the tract as containing 4.375 acres. Mr. Swanson testified that he "never looked inside of the tax receipt."

Appellants urge the following grounds for reversal:

"(1) That the contract of purchase and sale being in writing * * * could not be varied by the testimony admitted in evidence; (2) that the judgment * * * is not supported by the evidence, and is contrary to the entire evidence; * * * (3) that no fraudulent misrepresentations were made to the respondent by the appellants; (4) that the respondent has failed to show that he was in any way damaged by any misrepresentations made to him by appellants; * * * (5) the contract being in writing, the lower court erred in overruling the demurrer of appellants, and denying their motion to strike out parts of the complaint."

[1, 2] There is ample evidence to show that the tract was represented to plaintiff as containing 25 per cent. more land than it actually does contain. If the defendants are chargeable with such misrepresentation, it is clear that plaintiff was entitled to rescind and recover the amount paid by him. There is sufficient evidence, if believed, to show that Swanson knew the number of acres in the tract; that he led the agent to believe that it contained six acres; that, acting on such information, the agent so represented it to the plaintiff; that the plaintiff believed such representation and relied upon it in his purchase of the property; and that Swanson, knowing of such belief and knowledge, and knowing the actual acreage in the tract, answered plaintiff's inquiry relative to such acreage by stating that he "did not know how many acres there were," that "it may be less, it may be a little more," than six acres, that the person from whom he had purchased the land told him "there were six acres." Section 1710 of the Civil Code defines deceit as:

"(1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true. * * *

"(3) The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact."

The evidence is sufficient to bring Swanson's conduct within the provisions of the foregoing section. This disposes of all of the appellants' contentions, except that to the effect that parol evidence was improperly admitted to vary the terms of the written contract. Section 1856 of the Code of Civil Procedure, cited by appellants in support of their contention, expressly provides that such evidence is admissible to establish fraud. Most of appellants' contentions are sufficiently answered by citing *Mooney v.*

Cyriacks, 185 Cal. 70, 195 P. 922, in which similar contentions were overruled.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

70 Cal. App. 268

RYLAND et al. v. APPELBAUM et ux.
(Civ. 4862.)

(District Court of Appeal, First District, Division 1, California. Dec. 17, 1924.)

1. Landlord and tenant — 144, 291(1) — Duty of tenant to surrender possession of premises as soon as tenancy expires; if tenant continues in possession without permission, action may be begun without notice.

Tenant must, as soon as his tenancy expires by its own limitations, surrender possession of premises, and no notice of termination is necessary; and, if he continues in possession beyond that period without permission of landlord, he is guilty of unlawful detainer, and action may be commenced under Code Civ. Proc. § 1161, subd. 1, at once without service on him of any notice.

2. Landlord and tenant — 291(1) — Tenants held not entitled under hold-over clause to notice before suit for restitution could be brought.

Where tenants continued in possession of premises beyond term fixed by lease in violation of its terms and against express will and consent of lessors, no notice under hold-over clause was necessary to terminate their tenancy before suit could be commenced for restitution of premises, where such clause gave tenants no right to continue in possession without plaintiffs' permission.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Dwight E. Ryland and another against Max Appelbaum and wife. Judgment for plaintiffs, and defendants appeal. Affirmed.

Harry K. Wolff, of San Francisco, for appellants.

Timothy Healy, of San Francisco, for respondents.

KNIGHT, J. Unlawful detainer. On April 10, 1920, plaintiffs leased certain real property to defendants for a term of three years, commencing May 1, 1920, and ending April 30, 1923, under a written lease, which provided for a surrender of the premises at the expiration of the term, and also that—

"Should the said lessee hold over the term herein created, such tenancy shall be from month to month only, and be on the same terms and conditions herein stated."

On January 17, 1923, the lessees were personally served with written notice, signed by

the lessors, to the effect that the lease would "terminate and end on the 30th day of April, 1923, at twelve (12) o'clock midnight," and that the defendants would be required to vacate said premises and surrender and deliver the possession of the same to plaintiffs "on or before April 30, 1923." Subsequently, on April 20, 1923, in a letter written by plaintiffs' attorney, the defendants were reminded of the previous notice served upon them by the lessors, to the effect that the lease would not be renewed, and suggesting that if defendants would consult an attorney they would be advised that they had no right to continue the occupancy of said premises beyond April 30, 1923. Said letter further stated:

"Also, please take notice that under the terms of the lease you must surrender possession of the premises on the expiration of the lease. Should you fail to do so, it will become my duty to institute proceedings on behalf of the owners of the property."

Notwithstanding these two notices, defendants continued in possession after April 30, 1923, and on May 1, 1923, the day following the expiration of the term of the lease, plaintiffs commenced this action in unlawful detainer under subdivision 1 of section 1161 of the Code of Civil Procedure, and on June 28, 1923, were given judgment for the restitution of the premises and for the payment of damages for the unlawful detention thereof.

Defendants have appealed from the judgment upon the sole ground that service upon them of a three-day notice after the expiration of the term fixed by the lease was a necessary prerequisite to the commencement of this action, which notice was not given. In other words, defendants contend that because they continued in possession of the premises beyond the term fixed by the lease, in violation of its terms and against the expressed will and consent of lessors, they became tenants from month to month under the hold-over clause of the lease, and that consequently a three-day notice was necessary to terminate such monthly tenancy before suit could be properly commenced against them for restitution of the premises.

[1, 2] The contention is wholly without merit. It is well established that it is the duty of the tenant as soon as his tenancy expires, by its own limitations, to surrender the possession of the premises, and that no notice of termination is necessary, the lease itself terminating the tenancy; and if he continues in possession, beyond that period, without the permission of the landlord, he is guilty of unlawful detainer, and an action may be commenced against him at once, under the provisions of subdivision 1 of section 1161 of the Code of Civil Procedure,

without the service upon him of any notice. *Earl Orchard Co. v. Fava*, 138 Cal. 76, 70 P. 1073; *Bettens v. Hoover*, 12 Cal. App. 313, 107 P. 329; *Lee Chuck v. Quan Wo Chong & Co.*, 91 Cal. 593, 28 P. 45; *Kuhn v. Smith*, 125 Cal. 615, 58 P. 204, 73 Am. St. Rep. 79; *McKissick v. Ashby*, 98 Cal. 425, 33 P. 729; *Canning v. Fibush*, 77 Cal. 196, 19 P. 376; *Buhman v. Nickels & Brown Bros.*, 1 Cal. App. 266, 82 P. 85; *Perine v. Teague*, 66 Cal. 446, 6 P. 84. Manifestly, the hold-over clause of the lease did not operate to create a new tenancy unless it was consented to by the landlord, nor can it be considered as an option for a renewal. It gave defendants no right whatever to continue in possession without plaintiffs' permission, which, as we have already seen, was positively refused. The cases cited by defendants in support of their position are not in point for the reason that they arose under a state of facts where there was an existing tenancy at will to be terminated, or under subdivision 2 of said section 1161 of the Code of Civil Procedure, wherein the tenancy already created was sought to be terminated by the lessor, prior to the expiration of the term of the lease, for default in payment of rent, or where the tenant was permitted to hold over, beyond the term fixed by the lease, with the express or implied permission of the landlord. Judgment affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

70 Cal. App. 303

LITTLE et ux. v. YANAGISAWA.
(Civ. 4955.)

(District Court of Appeal, First District, Division 2, California. Dec. 19, 1924. Hearing Denied by Supreme Court Feb. 16, 1925.)

1. Death ☞58(1)—Care on part of deceased presumed.

In absence of contradiction, when pedestrian attempting to cross street was killed by automobile there was a presumption of law that she used due care for her own protection and preservation.

2. Municipal corporations ☞706(7)—Negligence of pedestrian killed by automobile held for jury.

In action for death of plaintiffs' daughter when struck by defendant's automobile, whether she was in exercise of ordinary care held for jury.

3. Death ☞99(1)—\$5,000 for death of adult daughter held not excessive.

Verdict of \$5,000 for death of plaintiffs' daughter when struck by defendant's automobile was not excessive, where she was 21 years old and in view of her training would soon have acquired a substantial earning capacity to contribute to support of her parents, notwithstanding that father was earning a living for

himself and wife and that they were not dependent on daughter for support.

4. Death ☞84—Evidence of funeral expenses admissible on question of damages.

In action for death of plaintiffs' daughter when struck by defendant's automobile, evidence of amount paid by plaintiffs for her funeral expenses was admissible on question of their damages.

Appeal from Superior Court, Alameda County; Mortimer Smith, Judge.

Action by J. Edwin Little and wife against J. Yanagisawa. Judgment for plaintiffs, and defendant appeals. Affirmed.

Hearing denied by Supreme Court; LENNON, J., dissenting.

Snook & Brown, of Oakland, and Walter H. Linforth, of San Francisco, for appellant.

James M. Koford and A. J. Woolsey, both of Oakland, for respondents.

LANGDON, P. J. This is an appeal by the defendant from a judgment for \$5,000 against him in an action brought to recover damages for the death of the daughter of plaintiffs. It is alleged that said death was caused by the negligence of defendant in driving an automobile in the city of Oakland, Cal.

The accident happened at the intersection of Moraga avenue and Pleasant Valley avenue. Moraga avenue enters Pleasant Valley avenue with a sharp curve. At about 8 o'clock in the morning on November 15, 1922, the defendant drove a Ford automobile down Moraga avenue and into its intersection with Pleasant Valley avenue at a speed variously estimated at 20 and 25 miles an hour. He came down quite a grade as he approached this intersection and did not sound any warning signal as he descended the hill, approached the intersection, or rounded the curve.

Dorothy Little, the 21-year-old daughter of plaintiffs, was crossing Moraga avenue at the intersection and was struck and dragged by defendant's automobile, suffering injuries from which she died in a few days.

Another feature of the case is that along the curb at the intersection of the streets are 12 trees, which at the time of the accident were 15 feet high and had been trimmed into a mushroom shape so that they hung down to about 4 or 5 feet from the ground. Because of the curve in the street, these trees obstructed the vision of one crossing at the intersection so that he could not see up Moraga avenue after he had reached a point about in the middle of the street. In other words, it appears in evidence that an automobile coming down Moraga avenue on the right-hand side of the street could be seen by a person at the time he started across the intersection and until he reached about the center of the street, when the view was lost around the curve because of the in-

interference of the trees. Moraga avenue is 32 feet wide, so for about 16 feet of the crossing it would be impossible to see a vehicle coming down the hill toward the place of intersection.

At the time of the accident the deceased was accompanied by her cousin, Miss Fake, who testified at the trial that before she and deceased started across the street, Miss Fake looked up Moraga avenue and saw the automobile of the defendant several hundred feet up Moraga avenue coming down the hill. She did not know whether deceased looked and saw the automobile or not. Miss Fake did not again look at the automobile, but continued across the street with deceased and was not aware of the proximity of the automobile until both girls were struck by it. Miss Fake stated that she did not know whether deceased looked toward the north, the direction from which the automobile came, while she was crossing the street, and that she (Miss Fake) did not look in that direction except as she started to cross; that when they got halfway across, they quickened their pace and were struck about 7 feet away from the curb.

Appellants do not deny that the record shows negligence upon the part of the defendant, but it is contended that it also shows contributory negligence on the part of the deceased, proximately causing the injury. It is contended that it was negligence as a matter of law for deceased not to have looked in the direction from which traffic might be expected when she reached the center of the street and was about to continue across with her view to the north obstructed; and because the record is silent as to whether deceased did or did not look to the north upon reaching the center of the street, appellant takes both horns of the dilemma and argues that if deceased did not look she was negligent, and if she did look she must have seen the automobile and was negligent in attempting to cross. Appellant then argues the question of proximate cause, contending that the proximate cause of the injury and death was the negligence of deceased.

[1, 2] Defendant moved for a nonsuit after the plaintiffs' case was rested; this motion was denied. The defendant declined to offer any testimony other than a map of the vicinity of the accident. The case was submitted to a jury and a verdict returned for plaintiffs. The question thus presented is as to the correctness of the court's ruling upon the motion for nonsuit, and we think this question but presents another: Is there any evidence from which a jury might reasonably draw the conclusion that the deceased was in the exercise of ordinary care? We think there was such evidence. True, the evidence regarding the conduct of deceased is scanty, but in the absence of contradiction we have the presumption of law that deceased used due care for her own protection and

preservation. *Crabbe v. Mammoth Channel G. Min. Co.*, 168 Cal. 500, 506, 143 P. 714; *Drouillard v. So. Pac. Co.*, 36 Cal. App. 447, 172 P. 405; *Ross v. Railways Co.*, 47 Cal. App. 753, 761, 191 P. 703. This presumption and the facts appearing in the record make it reasonable for the jury to conclude that deceased looked north before leaving the curb and seeing an automobile quite a distance away from her up the hill concluded that she had ample time to cross the street and attempted to do so, making a mistake of judgment due to her inability to judge the speed of the automobile.

The situation thus presented comes directly within the rule laid down in *Burgesser v. Bullock's*, 190 Cal. 673, 214 P. 649, wherein it is said:

"It is sufficient for the purposes of a new trial in this case to say that where the evidence showed that the decedent looked in the direction of the approaching automobile and saw the automobile, and, nevertheless, proceeded to cross the street, it is for the jury to say whether or not his conduct with reference to the approaching automobile was, under all the circumstances at the time and place and conditions of the traffic, negligence on the part of the decedent."

In the case last cited our Supreme Court considered most of the cases relied upon by appellant upon this appeal and found them not in conflict with the rule above quoted. The matter was one for the jury's determination, therefore, and the motion for nonsuit was properly denied.

[3] The only other contention requiring discussion is that the verdict is excessive. As before stated, the verdict was for \$5,000. The deceased was 21 years old. She lived with her parents and assisted her mother with the household duties when her school work permitted and gave to her parents the comfort and pleasure of her society during her leisure hours. She was a graduate of the high school and at the time of her death was a student at the Arts and Crafts School. It is evident that a girl with this training would soon have a substantial earning capacity and be in a position to contribute to the support of her parents if such contribution became necessary. But the appellant urges that the record discloses that the father was earning a living for himself and his wife and that the parents were not dependent upon this daughter for support. This argument is answered in the case of *Atkeson v. Jackson Estate*, 72 Wash. 233, 130 P. 102, wherein it is said:

"But, since adversity and misfortune are sometimes the accompaniments of life, as well as prosperity and success, there is another side to the picture. It is possible that the respondents may lose the property they have accumulated, and at the same time their health and ability to earn money. If such a misfortune should befall them, might it not be said that the daughter's earnings, had she lived, would have greatly exceeded her cost of maintenance?"

And who shall say that such a misfortune may not befall them? And if the probability exists, why may not a recovery be based thereon? There is, of course, no certain measure of damages in cases of this character; but, notwithstanding this difficulty, the great weight of authority is that a substantial recovery may be had."

[4] The appellant asserts in his brief that error was committed by the trial court in admitting evidence of the amount paid by the plaintiffs for the funeral expenses of their daughter. In support of his position he quotes from *Munro v. Dredging Co.*, 84 Cal. 523, 24 P. 303, 18 Am. St. Rep. 248. An examination of that case discloses that the court, in using the language quoted by appellant herein, was stating the holding of an English case decided under the Lord Campbell Act, and tracing the history of an action for damages brought by heirs at law or personal representatives of a deceased person whose death had been caused by the wrongful act of another. The case is not authority for appellant's position, the question involved and decided therein being whether or not recovery could be had for grief and mental suffering of surviving parents.

On the other hand, the case of *Koehl v. Carpenter*, 47 Cal. App. 642, 191 P. 43, treats the question raised by appellant herein as settled in this state, saying:

"Lastly it is contended that the damages should not have included the amount paid to the undertaker, because the bill was not paid by either of the plaintiffs. The allegation of the complaint was that these expenses had been incurred. This was sufficient to support the finding that the plaintiffs had been damaged to the amount of \$1,000, including funeral expenses of \$272.50."

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

70 Cal. App. 362

PEOPLE v. VELASQUEZ. (Cr. 1157.)

(District Court of Appeal, Second District, Division 1, California. Dec. 23, 1924.)

1. Criminal law §412(3)—Defendant's statements as to place of birth held competent.

In prosecution of alleged foreign-born non-citizen for unlawful possession of firearms, testimony concerning his statements as to place of his birth is competent.

2. Criminal law §535(2)—Defendant's extrajudicial admissions or confessions inadmissible to prove corpus delicti.

Defendant's extrajudicial admissions or confessions are inadmissible to prove corpus delicti.

3. Criminal law §563—Corpus delicti in prosecution of noncitizen for unlawful possession of firearms held sufficiently proved.

In prosecution of alleged foreign-born non-citizen for unlawful possession of firearms, defendant's testimony that he lived in Mexico from his earliest recollection until about six years before, and understands and speaks but little English, held sufficient proof of corpus delicti.

4. Criminal law §315—Prosecution proving defendant's foreign birth need not show that he was never naturalized.

In prosecution of alleged foreign-born non-citizen for unlawful possession of firearm, prosecution, after showing that defendant was foreign-born, need not show that he was never naturalized; presumption being that status shown continues until contrary is shown.

5. Criminal law §447—Naturalization not provable by parol.

Naturalization is judicial act, provable only by record or duly authenticated copy, and not by parol.

6. Criminal law §327—Burden of proving negatively averred fact peculiarly within defendant's knowledge is on him.

Where subject-matter of negative averment in information is peculiarly within defendant's knowledge, burden of proof is on him.

7. Aliens §17—State need not prove that alleged noncitizen prosecuted for unlawful possession of firearm was never naturalized.

Defendant's naturalization being peculiarly within his own knowledge and easily provable by naturalization papers or properly authenticated copies, state, in prosecution of alleged foreign-born noncitizen for unlawful possession of firearms, need not prove that he was never naturalized.

8. Aliens §17—Allegation that defendant was never naturalized taken as true, in absence of proof to contrary.

Prosecution having proved foreign birth of defendant charged with unlawful possession of firearms, allegation of information that he was never naturalized must be taken as true, in absence of proof to contrary.

Appeal from Superior Court, Riverside County; B. F. Warmer, Judge.

E. Velasquez was convicted of unlawful possession of firearms, and appeals. Affirmed.

John A. Hadaller, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and John L. Flynn, of Los Angeles, for the People.

CURTIS, J. Defendant was charged with having under his control and in his possession a firearm capable of being concealed upon his person, he being then and there a foreign-born person and not a citizen of the United States. He was found guilty as charged.

The only question involved in this appeal is whether there was any legal evidence produced at the trial tending to prove that the defendant, at the time of the conviction of the offense charged, was an unnaturalized, foreign-born person. In support of the allegation of the information, charging that defendant was a foreign-born person and not a naturalized citizen of the United States, the prosecution called a police officer of the city of Riverside, and over the objection of the defendant asked this officer regarding certain statements made by said defendant, shortly after his arrest. The officer testified that the defendant, at the time in question, stated to him and two other police officers that he was born in Mexico and had been in the United States six years. It was further stipulated, without waiving any objection to the admission of this evidence, that the two other officers, if called, would testify in the same manner. The defendant took the stand in his own behalf and testified that his parents died in the state of Durango, Mexico, when he was only six years old; that neither his parents, nor any other person, ever told him where he was born; that his parents were Mexicans and lived in Mexico up to the time of their death; that he had no recollection of having ever lived in any other place, except in Mexico, before the death of his parents; that after the death of his parents he lived with his godfather in various places in Mexico, until about six years ago, when he came to this country; that he does not speak English and only understands a few English words; that he is 21 years of age and works picking oranges and in packing houses.

[1] The first point made by appellant is that the court erred in overruling his objection to the question asked the police officer relative to the statements made by the appellant that he was born in Mexico. Appellant contends that the testimony of a person as to the place of his birth is hearsay, and therefore not only would his evidence be inadmissible, but that his extrajudicial statements would also be inadmissible and incompetent to prove the place of birth. It is conceded that this question has never been directly decided by the appellate courts of this state. It has been repeatedly held, however, that a person can testify as to his own age. "A person's age may be proved by his own testimony, and the fact that knowledge of that age is derived from statements of the parents, or from family reputation, does not render it inadmissible." *People v. Ratz*, 115 Cal. 132, 133, 46 P. 915. We can conceive of no reason why a different rule should be invoked when the question in issue is not the date of the person's birth, but the place where he was born. As to either of these facts, the person himself can have no positive knowledge, and must rely entirely upon in-

formation received from other persons. Under our national mining laws, the citizenship of an applicant for a patent may be proven by his own affidavit. 17 Stats. at L. 94; 6 Fed. Stats. Ann. (2d Ed.) 522 (U. S. Comp. St. § 4616). It may also be proven by the testimony of the locator himself. *Thompson v. Spray*, 72 Cal. 529, 530, 14 P. 182. Under the statutes of our own state, an applicant to purchase school lands must show by affidavit, among other things, that he is a citizen of the United States. Pol. Code, § 3495. While we find that the courts have decided, in proceedings under the above section of the Political Code, that the testimony of the applicant is incompetent to prove his naturalization (*Prentice v. Miller*, 82 Cal. 570, 575, 23 P. 189), we are unable to find any instance in which it was held that his testimony would not be received when offered for the purpose of proving his place of birth. We find cases in which the applicant testified regarding the place of his birth, and while his testimony appears to have been admitted without objection no question seems to have been raised either by the court or counsel as to its competency. *Miller v. Prentice*, 82 Cal. 104, 106, 23 P. 8; *Prentice v. Miller*, 82 Cal. 570, 574, 23 P. 189.

There are a number of early decisions, rendered both by the courts of England and by those of our own country, holding that a pauper cannot testify to the place of his birth. *Chamberlayne's Law of Evidence*, § 4066. These decisions were rendered in actions brought to determine the liability of the town, in which it was charged that the pauper was born, for the support of the pauper. There appears to be some diversity of opinion as to the grounds upon which such decisions are based. We do not find, however, that the rule excluding such testimony has been extended beyond those cases in which the support of the pauper himself has been involved. We see no good reason for extending it to include actions such as the one under consideration. We are, therefore, of the opinion that the statements of the defendant, as to the place of his birth, were competent evidence, and that the court committed no error in admitting in evidence such statements.

[2, 3] Appellant further contends that, even with this testimony admitted, the corpus delicti has not been proven. This contention is based upon the well-established principle of law that the extrajudicial admissions or confessions of the defendant are inadmissible to prove the corpus delicti. Conceding, as contended by the appellant, that the citizenship of appellant is a part of the corpus delicti, and therefore cannot be proven by his extrajudicial statements, it will be remembered that the appellant in this action took the stand in his own behalf and gave testimony that his parents were Mexicans and lived in

Mexico up to the time of their death, which occurred when he was only six years of age, and that from his earliest recollection he lived in Mexico until about six years ago, when he came to this country, and that he now understands and speaks but little English. This evidence was sufficient to justify the jury in finding that the defendant was born in Mexico. *Walther v. Rabolt*, 30 Cal. 185. The facts in this case were much like those in the present case, and its syllabus is as follows:

"Evidence that a person was in Germany, living with German parents, when six years old, and that he remained in Germany until he was eighteen years old, when he came to the United States, and that he could not then speak the English language, is sufficient to justify the court in finding that he was an alien born."

The corpus delicti was therefore proven in court by the testimony of the defendant himself.

[4] Finally, the appellant contends that, even if it be conceded that there is proof of his foreign birth, there is no evidence tending to show that he had not been naturalized. Appellant argues that not only is the burden upon the prosecution of proving all the allegations of the information but that the presumption is that every person is a citizen of the country in which he resides. We have already shown that the evidence was sufficient to prove that the defendant was an alien by birth. The presumption is that this status continues until the contrary is shown. *Bode v. Trimmer*, 82 Cal. 513, 517, 23 P. 187. It was therefore unnecessary for the prosecution, after showing that the defendant was foreign-born, to further show that he had never been naturalized.

[5-8] In this connection the Attorney General has suggested that the allegation of the information, relative to the defendant not being a naturalized citizen of the United States, is an allegation of a negative fact which is peculiarly within the knowledge of the defendant, and therefore that it comes within the rule that the burden of proving such an allegation is cast upon the defendant. While no authorities are cited in support of this argument, we are nevertheless of the opinion that it is both reasonable and sound. Naturalization of an alien as a citizen of the United States is a judicial act. It can only be proven by the record itself, or a duly authenticated copy thereof. It cannot be proven by parol. *Bode v. Trimmer*, supra. On the other hand, to prove that a person had not been naturalized would require evidence to the effect that no court of this country, having jurisdiction of naturalization proceedings, had ever granted naturalization to defendant. The rule is well settled in this state that, where the subject-matter of a negative averment lies peculiarly within the knowledge of the defendant, the burden of

proving the fact rests with the defendant. 8 Cal. Jur. § 148. This is an exception to the general rule that the burden of proof rests upon the prosecution, and the reason given for such exception is that it would greatly inconvenience the prosecution to prove such fact, whereas the defendant can prove it with no inconvenience at all. 8 Cal. Jur. § 148. This rule is applied in the main to prosecutions of persons charged with the violation of statutes making it illegal to engage in certain business or to follow certain professions without first obtaining a license so to do. In most, if not in all of the cases of which we have any knowledge, the statute designates the particular board or officer from which such a license is to be obtained. The inconvenience in such a case of procuring evidence that the accused had no such license as required by the statute can hardly be compared with that cast upon the prosecution in an action like the present, if required to prove that the defendant had not been naturalized. In the former class of cases, it would only be necessary to examine the records of one board, or the books of one officer, to ascertain whether the required license had been issued or not, and to have as a witness one person from the office of such a board, or officer, to prove the fact that no license had been issued to the accused. In an action like that before us, owing to the fact that the defendant might have been naturalized in any one of a large number of courts, it would be necessary to have as witnesses at the trial representatives or officers from all of said courts, and possibly the records themselves to show, if such were the fact, that the defendant had never been naturalized in any of said courts. Such a requirement would cast upon the prosecution an interminable amount of labor and the greatest of inconvenience. On the other hand, to require the defendant to show that he was naturalized casts no unreasonable burden upon him. If he has had conferred upon him, by any court of competent jurisdiction, the privilege of citizenship, he either has his naturalization papers, or, if they have been lost, properly authenticated copies thereof might be procured with little trouble or expense from the court which granted the original. We are therefore of the opinion that this exception to the general rule, relative to the burden of proof, should apply to actions like the present, and that it was not obligatory on the part of the prosecution to prove that the defendant had not been naturalized. His naturalization, if such were the fact, was peculiarly within his own knowledge and could have been proven by him with but little inconvenience. The prosecution having proven by competent evidence the foreign birth of the defendant, the allegation of the information that he had never been naturalized must be taken as true in the absence of proof

to the contrary. *People v. Wah Hing*, 47 Cal. App. 327, 190 P. 662.

The judgment and order denying a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

70 Cal. App. 315

PEOPLE v. CONNORS. (Cr. 779.)

(District Court of Appeal, Third District, California. Dec. 20, 1924.)

1. Embracery ⇨—No defense that accused did not mail letter if he caused it to be mailed.

In prosecution for corruptly attempting to influence juror by sending letter to him, it is no defense that accused did not personally mail the letter, if he caused it to be mailed.

2. Embracery ⇨—Evidence held to sustain finding that letter sent with intent to corruptly influence juror.

In prosecution for corruptly attempting to influence juror in pending case by sending letter to him, evidence that defendant knew of pending syndicalism cases, that letter discussed situation of one of defendants and his family, and made disparaging statements relative to witnesses who would probably testify, and denounced prosecutions under Criminal Syndicalism Law, and that similar letters were sent to other counties in which syndicalism cases were pending, held to make question whether intent was present for jury, and to sustain finding that letter was sent with intent to corruptly influence juror.

3. Criminal law ⇨—§1170(3)—Erroneous exclusion of evidence not ground for complaint where later admitted.

Erroneous exclusion of evidence is not ground for complaint where such evidence was later admitted.

4. Embracery ⇨—General intent to corrupt all jurors in criminal syndicalism case includes particular intent to corrupt individual juror.

If defendant sent 20,000 copies of letter, in attempt to corruptly influence all jurors in respect to their verdict to be rendered in a particular case, and a copy was delivered to one of such jurors, that defendant did not know that such juror had been summoned was immaterial, because general intent to corrupt all jurors on panel included particular intent to corrupt such individual juror.

5. Criminal law ⇨—§1172(6)—Instruction permitting conviction if defendant attempted to influence juror in any pending case, held prejudicial error, where indictment alleged pending of only one case, and there were several pending cases.

Where indictment charged that defendant by means of letter attempted to corruptly influence a juror in respect to a named pending case, an instruction that if jury find that defendant attempted to influence juror in respect to his verdict in any pending cause or pro-

ceeding, they should find defendant guilty, held prejudicial error, where there were other cases pending, since jury may have based conviction upon finding that defendant attempted to influence juror as to one of such other three cases, and not case alleged in indictment.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Tom Connors was convicted of corruptly attempting to influence a juror in respect to his verdict, and he appeals. Reversed.

R. W. Henderson, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the crime of corruptly attempting to influence a juror in respect to his verdict in a criminal case pending in the superior court. This appeal is from the judgment and the order denying defendant's motion for a new trial.

The indictment charges that on the — day of March, 1923, there was pending and set for trial and undecided "an action entitled the People of the State of California v. Barney Brooks et al."; that the defendants therein were charged with the crime of criminal syndicalism; that the trial of said action had been set for March 26, 1923; that a regular panel of jurors had been "duly summoned and drawn;" and that one of such jurors was H. D. Arnold; that defendant knew that Arnold had been so drawn and summoned, and that he "would continue as said summoned and drawn juror during the trial of" said criminal action; and that defendant corruptly attempted to influence said juror "in respect to his verdict to be thereafter rendered in said action of the People of the State of California v. Barney Brooks et al., * * * by means of a written communication then and there had by said" defendant "with said juror, H. D. Arnold." The indictment then sets forth those parts of the following writing which are herein italicized:

"March 15th, 1923.

"To the Citizens of Sacramento County:

"We wish to take only a moment of your time on a matter of importance to the people of this state. This matter is of great importance to all the people of California and of vital importance to all the Workers. At the present time if you will take trouble to do so, you may step into the county courthouse and view a very interesting case now being tried before the superior court.

"There you will find eight men being tried on a charge of having violated the Criminal Syndicalism Law. Their conviction means a prison sentence of from 1 to 14 years. These men are not accused of having committed any overt act or of otherwise doing any deliberate thing which would jeopardize their liberty.

However, they are at the present moment almost certain of being convicted and given a long prison term without having been even accused of having committed any overt act.

"The law which makes such gross injustice possible was introduced before your state Legislature by a representative who admits never having read it previous to that time. A trio of degenerates will be on hand when the prosecution offers its evidence, and these three persons will offer, as testimony, some weird tales of crimes committed by themselves. These men who go continually from place to place trading for a few pieces of gold the liberty of honest workmen by claiming that while members of a certain labor organization they themselves had committed certain crimes, at the same time admitting that no punishment has ever been meted out to them for having done so. To the intelligent this should prove a fair example of what extremities men will go to for the sake of \$10 per day and expenses.

"Did you ever stop to consider that with a sometime membership of several hundred thousand members that only three persons are to be found who knew of these acts having been committed. Think again that these three are employed continually for this purpose, and besides being of a very low moral type they admit having remained members of this organization to further the interests of some certain corporate interests who have at all times shown bitter enmity toward all labor organizations.

"There is another matter we would like to mention. In your city there is a wife, a mother, and she is waiting for some one who does not come home. This woman is Mrs. Barney Brooks, who is alone with two very small children because of a certain law which states that a man must answer for the thoughts and ideas of others who may now be dead and forgotten, if ever they lived at all.

"This young man who led a good, clean life among you for years made an apparent mistake, but a mistake only from a very narrow and selfish point of view. He wishes to improve working conditions for his own and other people's children when they arrive at the proper age. His wife and kiddies await him at home, and he cannot go to them because three perverted minds have contrived to turn lies into dollars, and laws are enacted which corporations can twist and turn to their financial benefit. This young man is being held under bonds of \$2,500, and others already convicted of the same charge are out awaiting appeal under bonds of \$250 each.

"We leave these facts for your consideration, and trust that you will investigate them. Then write to your newspaper and responsible officials and, in the name of fairness and justice, demand the repeal of this extremely vicious and inhuman piece of legislation.

"Yours for fair play and justice to all,

"California Branch of the General Defense Committee."

March 2, 1923, an indictment was duly filed charging Barney Brooks, Joe Wagner, and R. C. Russell with the crime of criminal syndicalism. March 6th the defendants entered pleas of not guilty. The case was set to be tried on the 26th of the same month. The record does not show on what day the

order was made setting the case for trial, or whether it was before or after the mailing of the foregoing communication. March 22d, Brooks withdrew his plea of not guilty, and entered a plea of guilty. He was thereupon placed on probation. The trial of the other defendants was commenced March 26th. During the month of March three other actions were pending, in which the defendants therein were charged with criminal syndicalism. The trial dates of these cases were set and successively continued as follows: *People v. Vargo et al.*, November 2, 1922, and January 2, January 15, February 21, March 5, March 6, and March 26, 1923; *People v. Flanagan et al.*, February 5, February 6, March 13, and April 27, 1923; *People v. Stewart et al.*, February 5, February 6, March 19, and May 5, 1923. In addition to the foregoing cases, there was pending another criminal syndicalism case against eight defendants. The trial of that action was commenced March 5, 1923, and was still in progress as late as March 18th.

March 2, 1923, a regular panel of jurors was drawn for service commencing the 12th day of March. Arnold's name was one of those so drawn. From this panel the jury was selected to try Wagner and Russell. Arnold was called into the jury box, examined as to his qualifications, and excused from service in that case.

The Legislature was in session at the time the alleged communication was mailed. A movement was then in progress to bring about the repeal of the Criminal Syndicalism Law (St. 1919, p. 281). The defendant contended at the trial and now urges that the communication was not sent for the purpose of influencing any juror but that it was merely a part of a general agitation to influence public opinion in favor of the repeal of the law. Appellant says that "the evidence in this case is practically without conflict." This may be conceded, but conflicting inferences may be rationally drawn from the evidence as to the purpose or intent with which the communication was sent.

The general defense committee of the I. W. W., with headquarters in Chicago, had charge of the defense of persons arrested under criminal syndicalism statutes. The defendant was secretary of the California branch of the committee, with offices in San Francisco. He was in charge of the defense of criminal syndicalism cases in this state. The alleged communication was mailed in San Francisco March 17, 1923, and the envelope containing it was addressed to H. D. Arnold, Sacramento. The defendant testified that it was a multigraph letter, and that he caused 20,000 copies thereof to be mailed to residents of Sacramento county between the 5th and the 25th of March, 1923; that he knew there were several criminal syndicalism cases then pending in that county;

that a part of his work was "to keep a record of all cases pending"; that he knew Brooks, Wagner, and Russell were "in jail in Sacramento at that time, and twelve other men throughout the state, which were not listed as cases, they were individuals, they were in jail—no indictment returned, to my knowledge—no record of it in our office at that time"; that he had no information that a jury had been drawn in Sacramento county; that he had never heard of the name H. D. Arnold or of any of the four other jurors who, the evidence shows, received copies of the letter; that the thought that any of the letters might reach jurors or prospective jurors never crossed his mind, was never thought of or mentioned; that similar letters were sent to residents of nine counties prior to his arrest; that 25,000 were sent to Lassen county; that his intention in sending copies of the letter to residents of Sacramento county "was to make the public acquainted with these facts, to create public opinion which we believed would cause the repeal of this act, and to raise funds to defend these cases"; that there were two Sacramento county telephone directories in his office from which names and addresses of residents of that county were taken in mailing out literature. There were inclosed in the envelopes containing these letters, two printed leaflets attacking the Syndicalism Law and prosecutions had thereunder. The defendant's office was searched at the time of his arrest, and packages of letters were found therein addressed to the residents of several counties, including Lassen and Siskiyou. The evidence shows that there was a criminal syndicalism case pending in each of those counties at that time.

[1] Appellant says that "the defendant caused to be mailed a large quantity of printed matter relating to the injustice of prosecutions under the Criminal Syndicalist Act and to the repeal of that act; that one of these letters was addressed to H. D. Arnold, and referred to the misfortune of one accused of this crime and whose case was pending in the same court in which H. D. Arnold had been summoned as a juror. The proof is utterly insufficient to show either that Mr. Connors had mailed the letter to Arnold, or, that, if he had done so, his act was corrupt." If the defendant caused the letter to be mailed, his guilt is not less than if he had personally mailed it. It may be conceded that the evidence does not show that the defendant actually knew of the existence even of such a person as Arnold, or that he had been drawn or summoned as a juror. It does not necessarily follow, however, that the defendant did not corruptly attempt to influence such juror. Had defendant given directions to one of his agents to place a copy of the letter in the hands of

every person drawn as a juror in syndicalism cases, and the agent, in pursuance of such directions, had given a copy to Arnold, it would not be contended that the defendant could shield himself behind his ignorance of the fact that Arnold was one of such jurors. Neither is such a defense available to the defendant, if he caused copies of the letter to be mailed to 20,000 residents of Sacramento county in the hope and expectation of thereby reaching many jurors, and with the intent of corruptly influencing them. It is not a question of transfer of intent from one objective to another, as in *People v. Wells*, 145 Cal. 138, 78 P. 470; *People v. Suesser*, 142 Cal. 354, 75 P. 1093; *People v. Ramirez*, 64 Cal. App. 358, 221 P. 960, but the application of an intent manifested toward a class of persons to every individual of that class.

"A man out of general malignity may fire on a crowd or may displace a rail on a railway, and then, if any life be lost, he is responsible for murder, though he may have had no intention of taking any particular life. * * * When there is a general intent to do evil * * * of which evil the wrong actually done may be looked upon as a probable incident, then the party having such general intent is to be regarded as having intended the particular wrong. A man using a deadly weapon in a crowd, intending to kill, must be regarded as intending to kill all within the range of the weapon." *Wharton's Criminal Law* (11th Ed.), § 157.

If, in such a case, the person using the deadly weapon be charged with the intent to kill a particular person in the crowd, it would be no defense to prove that the defendant did not know of the existence of such person. On the other hand, if the defendant herein sent out copies of the letter promiscuously, in good faith, for the sole purpose of creating public opinion in favor of the repeal of the Syndicalism Law, and without any intention of influencing jurors, then the mere fact that copies of the letter were by chance sent to some of the jurors, the defendant not knowing that they were jurors, would not establish the corrupt intent essential to constitute the crime charged.

[2] In view of defendant's knowledge of the pendency of the syndicalism cases in court, of the discussion in the letter of the situation of one of the defendants and of his family, of the disparaging statements therein relative to witnesses who would probably testify in those cases, of the denunciation of prosecutions under the syndicalism law contained in the printed leaflets accompanying the letter, and of the fact that similar letters were sent to other counties in which syndicalism cases were pending, it cannot be said that there is not sufficient evidence to support the implied finding of the jury that the letter was sent with intent to corruptly influence the juror. Whether or not such

intent was present in the act was a question for the jury under the conflicting evidence.

[3] Complaint is made of the court's refusal to permit the defendant to state the purpose and intent with which he sent out the copies of the letter and leaflets. Such evidence was clearly admissible, and, later in the trial, the court permitted the defendant to state fully such purpose and intent. Under those circumstances, the defendant's rights were not prejudiced by the erroneous ruling first made.

[4] Appellant contends that it was error to refuse a proposed instruction stating five elements of the crime necessary to justify a conviction. The instruction appears to be faultless except as to the fourth element of the crime charged. That part of the instruction was erroneous in stating that, in order to justify a conviction, it was necessary to find that, at the time the letter was sent, the defendant "knew that said H. D. Arnold was on the said jury list, and might be chosen as a juror on the trial of the said criminal action against Barney Brooks." As hereinbefore stated, if the defendant sent 20,000 copies of the letter in an attempt to corruptly influence all jurors into whose hands they probably would be delivered, in respect to their verdict to be rendered in the Brooks Case, and a copy was delivered to Arnold, the fact that the defendant did not know that Arnold had been summoned as a juror was immaterial, because the general intent to corrupt the jurors on the panel included the particular intent to corrupt Arnold. The court instructed the jury as follows:

"If you find from the evidence that H. D. Arnold was a juror regularly summoned and drawn as such, in the superior court of the state of California, on the 12th day of March, 1923, and continued to be such juror until after the 20th day of March, 1923, and if you further find from the evidence that the defendant, Tom Connors, corruptly attempted, by a written communication, as alleged in the indictment, to influence said juror H. D. Arnold, in respect to his verdict in, or decision of any cause or proceeding pending, or about to be brought before him as such summoned or drawn juror, then you should find the defendant guilty."

Appellant contends that this instruction is prejudicially erroneous. The contention must be sustained. The indictment alleges the pendency of but one action, that of *People v. Brooks et al.*, and charges a corrupt attempt to influence the juror Arnold in respect to his verdict to be rendered in that particular action. The indictment would have been fatally defective if it had failed to state the action, or class of actions, in respect to which the alleged attempt to influence the juror was made. It may be conceded that it would have been sufficient to allege that the corrupt attempt was made to influence the juror to vote not guilty in all pend-

ing criminal syndicalism cases in which he might sit as a juror, without naming any particular case. *People v. Markham*, 64 Cal. 157, 30 P. 620, 49 Am. Rep. 700. The indictment, however, was not framed upon that theory. The fact that the letter would probably tend as strongly to influence the juror in respect to his verdict in other pending syndicalism cases as in the Brooks Case is immaterial. It would probably have as much tendency to influence the other jurors who received copies thereof as Arnold, but no one would contend that, under the charge stated in the indictment, the defendant could be convicted of attempting to influence such other jurors. The vice of the instruction is that it authorized the jury to convict the defendant of a crime with which he was not charged. In *State v. Moore*, 178 Mo. 348, 77 S. W. 522, the information charged the defendant with a felonious assault upon one Nancy M. Lewis. It was held error to instruct the jury to find the defendant guilty, "if he unlawfully committed an assault upon Nancy M. Lewis, Troy Lewis or Roy Lewis, or any of them." Presumably, the assault had been made upon the three persons named. The instruction in that case, of course, was manifestly erroneous, but it did not differ in principle from the one here in question. Every person who enters any building "with intent to commit grand or petit larceny or any felony is guilty of burglary." Pen. Code, § 459. In *People v. Mulkey*, 65 Cal. 501, 4 P. 507, it is said:

"The defendant was charged by information with the crime of feloniously entering a certain dwelling-house with intent to commit larceny. The court below instructed the jury that if they believed from the evidence that the defendant entered the house with the intent to commit grand or petit larceny or any felony, they should find him guilty. This instruction was clearly erroneous. There is nothing better settled than that the crime charged must be proved before a conviction can be had."

If there had been no other syndicalism case pending at the time the letter was sent, the error in the instruction might be regarded as harmless, under the constitutional provision forbidding the reversal of judgments on the ground of mere technical errors (Const. art. 6, § 4½), because the letter would have no tendency to influence a juror in other classes of cases. But, as stated, three other syndicalism cases were then pending awaiting trial, and a fourth case was being tried, and the defendant testified that he knew of the pendency of these four cases, but did not know that an indictment had been found against Brooks, though he knew Brooks had been arrested. The trials of syndicalism cases often run through several weeks. The jury may have found that, at the time the letter was sent, the defendant reasonably believed that these cases would

be tried in the order in which the indictments therein were found, and that consequently the panel of which Arnold was a member would be discharged before the Brooks Case was reached, and that, therefore, the letter was sent with the purpose of influencing Arnold's verdict in any of the three cases awaiting trial in which he might serve, rather than in the Brooks Case. If the jury had expressly found the defendant guilty of attempting to influence Arnold in respect to his verdict to be rendered in the Vargo, Flanagan or Stewart Case, it would not be contended that the verdict could be upheld, because the defendant was not charged with attempting to influence the verdict to be rendered in any of those cases. It is equally clear that the verdict returned cannot stand, because, under the instruction given, it may have been based upon a finding by the jury that the defendant attempted to influence Arnold's verdict to be rendered in one of the three cases last mentioned, and not in the case alleged in the indictment.

The judgment and the order are reversed.

We concur: HART, J.; PLUMMER, J.

70 Cal. App. 415

AMERICAN MARINE PAINT CO. v. NYNO LINE, Inc. (Civ. 4800.)

(District Court of Appeal, First District, Division 1, California. Dec. 30, 1924.)

1. Trial ⇨194(7)—Undisputed testimony held to show falsity of representations, if made so that instruction to that effect did invade jury's province.

Undisputed testimony held to show falsity of representations of broker's agent that broker was to receive only 2 per cent. from commission demanded for sale of defendant's vessel, so that instruction that the representation, if made, was false, did not invade jury's province.

2. Brokers ⇨88(7)—Instruction, inaptly using word "he" as referring to brokerage company, held not misleading.

In broker's action for commission for sale of vessel, defended on ground that broker's agent procured contract for 5 per cent. commission, by false representations that he was required to pay 3 per cent. to the buyers, an instruction, which inaptly used the word "he" as referring to broker, a company, held not misleading.

3. Trial ⇨295(1)—Instruction to be considered as whole.

In determining whether jury has been properly instructed, instructions are to be considered as a whole.

4. Trial ⇨296(1)—Questionable instructions not ground for reversal, where other instructions clearly state appellant's rights.

Questionable instructions are not ground for reversal, where other instructions clearly state appellant's rights.

5. Trial ⇨296(1)—Instruction, misleading, inaptly using word "he" as referring to brokerage company, held not to require reversal in view of other instruction.

An instruction as to representation by broker's agent, inaptly using word "he" as referring to brokerage company, held not to require reversal, where another instruction plainly stated the claimed representation.

6. Brokers ⇨8(3)—Evidence held to establish between defendant company and broker's agent, an agency imposing exercise of highest good faith.

Evidence held to establish between broker's agent and broker's principal an agency to sell principal's vessel, which imposed upon the agent the duty to act in the highest good faith towards the principal, and precluded him from obtaining any advantage by virtue of his agency.

7. Brokers ⇨19—That agent was without discretion to fix price held not to relieve agent from responsibility of acting in good faith.

That agent for sale of defendant's vessel was without discretion to fix price held not to relieve agent from responsibility of acting in good faith towards defendant.

8. Principal and agent ⇨1—That employment is not styled an "agency" does not affect relationship.

That agent's employment is not styled an "agency" does not affect relationship of agency.

9. Principal and agent ⇨69(1)—Agent not entitled to profit beyond agreed compensation for his services.

One, acting for another, whatever his designation, is not entitled to avail himself of any advantage his position may give him to profit beyond agreed compensation for his services.

10. Appeal and error ⇨216(2) — Appellant cannot predicate error on incomplete instruction, in absence of request for more specific instruction.

Appellant cannot predicate error on incomplete direction in instruction, as distinguished from misdirection, in absence of request for more specific and explicit instruction.

11. Appeal and error ⇨999(1)—Jury's verdict on questions of fact is conclusive.

Jury's verdict on questions of fact is conclusive.

12. Brokers ⇨86(7)—Evidence held to support judgment for defendant, based on fraud of plaintiff's agent in misrepresenting facts.

Evidence, in action for commissions on sale of vessel, held to support judgment for defendant, based on fraud of plaintiff's agent in misrepresenting facts as to the percentage of commissions to be paid to others.

13. Brokers ⇨86(7)—Proof of actual loss from misrepresentation not necessary, but sufficient if necessary.

Broker's agent having obtained defendant's promise to pay commission of 5 per cent. on sale of vessel by falsely representing that it was necessary to pay 3 per cent. to buyers,

proof of actual loss to defendant was not necessary to defeat recovery of commissions, but, if necessary, was supplied by fact that recovery would deprive plaintiff of money rightfully belonging to it.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by the American Marine Paint Company against the Nyno Line, Inc. Judgment for defendant, and plaintiff appeals. Affirmed.

Ira S. Lillick, of San Francisco, for appellant.

W. G. Van Pelt and Loren O. Crenshaw, both of Los Angeles, for respondent.

KNIGHT, J. An appeal by plaintiff from a judgment rendered in favor of defendant, after verdict by a jury, in an action brought to recover the sum of \$16,500, claimed to be due appellant as commission for the sale of the steamer Portland, belonging to the respondent, under a contract wherein a gross commission of 5 per cent. of the purchase price was agreed upon. The contention of respondent upon the merits was and is that W. C. Lacombe, the admitted agent and representative of the appellant company, with whom the agreement with respondent for the sale of said steamer was made, and by whom the transaction with the purchaser thereof was conducted, had procured the contract calling for a 5 per cent. commission through fraud, in that he had falsely and fraudulently represented to respondent that he would be required, in any sale which he would consummate, to pay the purchaser or purchasers of said steamer a sum equal to 3 per cent. of the purchase price, out of his commission, and that, for that reason, he would have to receive a commission equal to 5 per cent. of the purchase price, otherwise he could not consummate said sale, and would not undertake to do so. Respondent claims that, relying upon such representations, it agreed to make said sale and to pay said commission, which it otherwise would not have done.

This is the third time an appeal has been taken in this action. Juries in the two former trials found for the appellant, but the verdicts were set aside, and new trials were granted by the trial court, and the orders granting the same were, upon appeal, affirmed. The order granting the new trial following the first verdict was general in its terms, but upon appeal, when the question arose as to the ground upon which it was granted, it was held that, whether said order was based upon the insufficiency of evidence or confusing instructions, the trial court had not abused its discretion in granting the same. *American Marine Paint Co. v. Nyno Line*, 45 Cal. App. 1, 187 P. 71. The order, granting the retrial following the second verdict, was made upon the express ground that

the evidence was insufficient to sustain the verdict. Upon appeal it was again held that the trial court acted within its discretion in granting a new trial, and that therefore the order appealed from should be and was affirmed. *American Marine Paint Co. v. Nyno Line*, 56 Cal. App. 331, 205 P. 45. In this last trial the jury found a verdict for respondent, and judgment was entered accordingly. Appellant now seeks a reversal of said judgment upon the grounds that the instructions given to the jury were erroneous and that the evidence is insufficient to justify the verdict. The evidence offered during this last trial was practically the same as that presented upon the preceding trial.

[1] Briefly stated, it is to the effect that in January, 1916, the Portland was on drydock, near the city of New York, and at the request of a representative of the president of the respondent company, Lacombe agreed to interest himself in the sale of said steamer for a commission equal to 3 per cent. of the sale price. A month later Lacombe opened negotiations with one Aaby, who was the son and representative of a Norwegian shipowner, which resulted in the making of a tentative offer by Aaby for the purchase of said steamer for \$325,000, which included the payment of a commission to Aaby out of the sale price. Lacombe forwarded the terms of Aaby's offer, by telegram, to Will E. Keller, the president of respondent company, who at that time was in California, and regarding commissions stated:

"Commissions 5 per cent. foreign buyers which makes additional commissions necessary to close deal."

Keller, in his reply telegram to Lacombe, after setting forth the terms upon which he would sell the vessel, stated:

"Out of this will pay you eight thousand dollars commissions."

A few days later Lacombe wrote Aaby a letter, offering on behalf of Keller to sell the steamer for a gross price of \$325,000, and on the same day wrote him another letter wherein he stated that, upon final payment for the vessel, Aaby would receive a commission of 1 per cent. on the total purchase price. About the same time, pursuant to a previous private arrangement between Lacombe and one Palmer, Lacombe agreed to pay Palmer 1 per cent. of the purchase price. Later, on the same day, Lacombe sent a telegram to Keller reading:

"Compelled to allow buyers three per cent.; cannot complete deal less five per cent."

Afterwards, on the same day, February 29, 1916, Aaby handed Lacombe a letter specifying more particularly the terms of his offer and at the same time deposited with Lacombe a check for \$25,000. Thereupon Lacombe immediately sent Keller a telegram embodying the terms of Aaby's offer, but

making no mention of the commissions. Lacombe learned, for the first time, from the check and letter of Aaby, that the Kerr Steamship Company of New York City, and not Aaby's father, as he had previously supposed, was the prospective purchaser. The contents of the telegrams above mentioned are set forth in the opinion rendered upon the preceding appeal, making it unnecessary to again quote the same here. In order to avoid any misunderstanding about the matter, Lacombe in the evening of that same day, February 29, 1916, telephoned to Keller at Los Angeles, the former being at the time in New York, and the terms of that conversation, over the telephone, apparently served as the vital factor in the case, and about the truth of which the parties are wholly disagreed. Regarding the discussion of commissions over the telephone Lacombe testified:

"I asked Mr. Keller had he received my two telegrams. Mr. Keller replied that he had and said didn't I think the commission was rather stiff, and I told him 'No'; I had to have the amount stated in my telegram, and I had other parties to take care of. Mr. Keller's remark to me over the phone was 'Well, then go ahead and close it up.'"

Lacombe's testimony is, to some extent, corroborated by Palmer, who was with Lacombe when the latter telephoned. Keller's version of the telephone conversation is different. He testified as follows:

"He said he would have to allow the buyers 3 per cent. or the trade would not go through; claimed he would have to have 5 per cent. to put the trade through or it would not go. I objected to paying 5 per cent. and told him I thought it was entirely too high. He said the trade would not go through unless he could allow the purchaser of the boat 3 per cent. I told him I was anxious to sell the boat, and if it was absolutely necessary to make the trade, and he had to allow the buyers 3 per cent. to go ahead."

Keller's testimony is in a measure supported by Aaby, who was also present with Lacombe when the latter telephoned from New York. Later Keller, at Lacombe's request, made over the phone, confirmed by telegram the authority to sell the vessel, and regarding commissions, the telegram read:

"We to pay you five per cent. commission on three hundred and twenty five thousand dollars when remainder three hundred thousand is paid."

The vessel was afterwards delivered to the buyer and the purchase price was paid.

The court gave the following instruction to the jury, at the request of respondent:

"In considering the evidence, you must treat the American Marine Paint Company, the plaintiff herein, and Mr. Lacombe, as one person, and if you believe from the evidence that Mr. Lacombe in his telephone conversation with Mr. Keller led Mr. Keller to believe that he

was receiving only 2 per cent., and that others were receiving 3 per cent. of the purchase price, as a commission, then such statements are false and untrue, for the evidence of Mr. Lacombe clearly shows that the plaintiff was receiving in excess of 2 per cent."

[2-5] Appellant contends that the instruction contains an inaccurate statement of the effect of Lacombe's evidence, and was an invasion of the province of the jury in that it was an instruction upon a question of fact. There is no merit in either point. The statement of the effect of Lacombe's evidence is in full accord with the undisputed testimony given by him upon that point. As stated in the instructions, Lacombe and his employer, American Marine Paint Company, must be treated as one person, and Lacombe admits that out of the transaction his employer was to receive 2 per cent. commission and he personally was to receive an additional 1 per cent., making a clear 3 per cent. commission for "plaintiff," which in itself proves the falsity of Lacombe's representation that plaintiff was receiving only 2 per cent. of the commissions, if, in fact, such representation was made. True, the pronoun "he" was inaptly used in said instruction as referring to plaintiff, but we think the jury could not have been misled thereby, in view of the fact that it has never been contended by any one at any time that Lacombe represented that he personally was going to receive 2 per cent. of the commissions. If, however, any confusion did arise therefrom, it was entirely dispelled by instruction No. 18, given at the request of respondent, which plainly stated to the jury the terms of the representation respondent claims was made by Lacombe; and, furthermore, the evidence upon this subject was perfectly clear. In determining whether a jury has been properly instructed as to the law, the instructions taken as a whole must be considered (*Henderson v. Los Angeles Traction Co.*, 150 Cal. 689, 89 P. 976; *Taylor v. Pacific Electric Co.*, 172 Cal. 638, 158 P. 119); and questionable instructions are not ground for reversal where the rights of appellant are clearly stated to the jury in other instructions. *Moore v. San Vicente Lumber Co.*, 175 Cal. 212, 165 P. 687.

[6-9] Appellant also attacks instructions Nos. 12 and 22 upon the ground that said instructions contain an assumption of agency which is not supported by the evidence. In this respect appellant claims that the evidence shows that Lacombe was not vested with the discretion to fix the terms for the sale of said vessel, and therefore was not an agent or broker for the respondent company, but was merely a middleman, and as such owed no duty to respondent such as was described by the court in its instructions upon the question of fraud. We think it manifest from the evidence already narrated that, not only was there an agency estab-

lished, but one that imposed upon Lacombe the duty to act in the highest good faith toward the principal and precluded him from obtaining any advantage over his principal in any transaction by virtue of his agency. *Calmon v. Sarraile*, 142 Cal. 638, 76 P. 486. The fact that he had no discretion to fix the price for the sale of the vessel did not relieve him from the responsibility of acting in good faith toward his principal. The rights of the principal will not be changed nor the capacity of the agent enlarged by the fact that the agent is not invested with a discretion, but simply acts under an authority to purchase a particular article at a specified price, or to sell a particular article at the market price (*Porter v. Woodruff*, 36 N. J. Eq. 180); nor does it matter whether or not his employment be called an agency.

"Everyone—whether designated agent, trustee, servant, or what not—who is under contract or other legal obligation to represent or act for another in any particular business or line of business, or for any valuable purpose, must be loyal and faithful to the interest of such other in respect to such business or purpose. He cannot lawfully serve or acquire any private interest of his own in opposition to it. This is a rule of common sense and honesty as well as of law. The agent is not entitled to avail himself of any advantage that his position may give him to profit beyond the agreed compensation for his services." *R. C. L.* vol. 21, p. 825.

[10] Appellant further complains that the instruction given by the court upon the question of fraud did not include all of the essential elements thereof, namely, that the misrepresentation must be upon a material point; that it was necessary to show that Lacombe knew that the representation was false when it was made; that there was an intent to deceive; that respondent had a right to rely on Lacombe's representations; and that the defendant suffered damage. It may be conceded that an instruction embodying those elements, except the last one, would have been proper; but the inclusion of those elements was not indispensable. The instructions given did not contain a misdirection to the jury, but rather an incomplete direction. In such case, an appellant is in no position to complain, when he has not asked for a more specific and explicit instruction. *Rice v. Whitmore*, 74 Cal. 619, 16 P. 501, 5 Am. St. Rep. 479; *Nichol v. Laumeister*, 102 Cal. 658, 36 P. 925; *Peluso v. City Taxi Co.*, 41 Cal. App. 297, 182 P. 808.

[11, 12] We are also of the opinion that the evidence is sufficient to sustain the verdict

in favor of respondent. The decision rendered upon the preceding appeal practically disposed of this question when it sustained the ruling of the trial court granting a new trial to respondent, upon the sole ground of the insufficiency of the evidence, after the jury had rendered its verdict in favor of the appellant. It appears from the opinion there rendered that there were but two debatable questions of fact left open for the jury's determination; the first of which was whether or not Lacombe represented over the telephone that "he was compelled to allow the purchaser 3 per cent. or the trade would not go through," and, secondly, as to whether the jury believed Keller's testimony that he relied upon such statement and that, but for that reliance, would not have agreed to pay the commission of 5 per cent. which Lacombe insisted upon. The jury by its verdict resolved those questions of fact in favor of respondent and, having done so, its verdict must be accepted as controlling. The materiality of the representation is shown by Keller's testimony to the effect that, had it not been for the representation, he would not have made the contract for the payment of 5 per cent. commission; such was the very basis of the contract, so far as these parties were concerned; the falsity of the representation was proved by the fact that Lacombe knew before he telephoned that the payment of the additional 3 per cent. commission to the buyers was not necessary in order to make the sale; and the question of whether Lacombe intended to deceive respondent was one for the jury to pass upon from all the evidence before it. The circumstances under which the contract was made, including the legal relationship of the parties, were ample to warrant respondent in relying upon the statements of Lacombe.

[13] Proof of actual loss to respondent was not necessary in view of the agency established between the parties. An agent will not be permitted to justify the violation of his trust and retain from his principal the fruits of his fraud upon the plea that the principal would not be damaged thereby. But, if such proof be necessary, it is supplied by the fact that respondent would, in the event of appellant's recovery, have been deprived of an amount of money equal to 3 per cent. of the purchase price of the vessel, which amount, not being paid to the purchaser, rightfully belonged to respondent.

Finding no prejudicial error in the record, the judgment is affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

70 Cal. App. 283

PACIFIC GAS & ELECTRIC CO. v. CROCKETT LAND & CATTLE CO. et al.
(Civ. 4858.)

(District Court of Appeal, First District, Division 1, California. Dec. 18, 1924.)

1. Adverse possession ⚡13—**Hostile occupancy is occupancy with hostile intent known to owner.**

Hostile occupancy consists of hostile intent in mind of adverse claimant during occupancy and knowledge thereof by owner.

2. Adverse possession ⚡57, 85(1)—**Burden on occupant to prove occupancy hostile and continued.**

Presumption being that holder of legal title has been in possession within statutory period and that occupation by another was subordinate to it, claimant of title by adverse possession has burden of proving his occupancy hostile and for five-year period.

3. Appeal and error ⚡1011(1) — **Finding on conflicting evidence that use of land was under claim of right not disturbed.**

In suit to quiet title to easement for pole line, court's finding on conflicting evidence, in effect, that use was under claim of right, will not be disturbed on appeal; the question being one of fact.

4. Easements ⚡5—**Claim of right must be actually or presumptively known to owner.**

Right of way by prescription may be established by use under claim of right known to owner or use so notorious as to give rise to presumption of claim of right.

5. Easements ⚡36(1)—**In event of presumption of grant, adverse user under communicated claim also presumed.**

Where open and uninterrupted use of easement is sufficiently long to create presumption of grant, law will presume also that use was hostile and under communicated claim of right.

6. Easements ⚡36(3)—**Evidence held to support finding of adverse occupancy under communicated claim.**

Evidence of long-continued peaceful maintenance of electric pole line, and evidence also of actual lost grant, held sufficient to warrant finding that occupancy was adverse and under communicated claim of right either on theory of actual or presumed grant.

7. Easements ⚡36(1) — **Claim of right to easement presumed from use for prescriptive period.**

Presumption of use, adverse and under claim of right, arises from undisputed enjoyment of easement for period of prescription, which must be met by party alleging use by license.

8. Easements ⚡61(12) — **Territorial description of easement for electric transmission line held sufficient.**

Territorial description of easement for electric transmission line to which title was quieted held sufficient, where it was described by courses and distances and as being 15 feet

in width equally on each side of line; pole line itself being established monument.

9. Easements ⚡61(12)—**Description of easement for electric transmission line not indefinite for failure to state character of materials to be used; "secondary easement."**

Description of easement for electric transmission line, in judgment quieting title thereto, is not indefinite for failure to designate character of materials to be used, since every easement includes "secondary easement," being right to do things necessary to full enjoyment of easement itself.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Secondary Easement.]

10. Easements ⚡41, 54—**Prescriptive rights strictly construed; owner may make improvements or changes not affecting substance of easement.**

Rights acquired by prescription are stricti juris, and extent of easement so acquired is determined by the user; but, so long as use of easement is confined to purposes under which it was acquired without increasing the burden on the servient estate, the owner of the easement may make improvements or changes that do not impair or affect its substance.

11. Easements ⚡36(3)—**Evidence as to user held to warrant fixing width of easement.**

In proceeding to quiet title to easement for electric transmission line, evidence as to user under which easement was gained held to warrant fixing width as 15 feet lying equally on each side of pole line.

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Suit by the Pacific Gas & Electric Company against the Crockett Land & Cattle Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Courtney L. Moore, of San Francisco, for appellants.

Thos. J. Straub, L. H. Sussman, and M. R. Jones, all of San Francisco, for respondent.

TYLER, P. J. Action to quiet title to an alleged easement consisting of a certain right of way for a pole line, and to restrain defendants from interfering with its use.

Plaintiff is a public utility corporation, and it claims that it and its predecessors in estate have owned and actually possessed and used the electric transmission line in question across the premises of defendant corporation since about the year 1901. The interests claimed in the amended complaint are the right to the easement of the pole line which is described by surveyor's angles and distances; the right to repair; a right of way of ingress and egress 30 feet wide along the line of the poles; and the right to an easement for the overhang along the boundary line.

The evidence discloses that the pole line so

situated on the defendants' property consists of 26 poles, each pole being approximately 29 feet in height above the ground, with a vertical pipe extension affixed to the top thereof 5 feet in length. On each of these poles there are three cross-arms. The lower one carries telephone wires used by the plaintiff company for its own private purposes; the next supports three strands of wire through which 11,000 volts of electricity pass; and the upper cross-arms, together with the pipe extension, have attached thereto three strands of wire carrying 60,000 volts.

The transmission line was originally constructed during the years 1900 and 1903 by the Bay Counties Power Company, plaintiff's predecessor in interest. As originally constructed, the line carried 11,000 volts of electricity. In the year 1906 the line was reconstructed and the 60,000-volt circuit was installed. Title to the line in question passed by grant and delivery of possession in October, 1907, from the Bay Counties Power Company to the California Gas & Electric Company, which latter company subsequently and two years later executed a conveyance of all its property to the present plaintiff. The two transmission lines installed on the premises of defendant as above described have always been operated and used for supplying electricity for public use in the towns of Crockett, Selby, Richmond, and adjacent territory. From the time of its installation the line has been in continuous service and has been maintained by plaintiff and its predecessors, who have kept it in proper operation and repair, and in so doing they have maintained regular patrolmen in order that proper service over the same might be had. Necessary repairs were always made openly and in the daytime. No objection of any kind was ever made by any one to the maintenance of the transmission lines or to their repair and upkeep until along about the year 1914 or 1915, when one Thomas R. Hanna, president of the defendant company and the husband of one of the owners of the land, made certain inquiries through officers of plaintiff corporation concerning its rights or interest in the easement in question and the status of the pole line; and later along about the year 1915 or 1916 he ordered the poles removed. Plaintiff company refused to comply with this demand. The following year Hanna also objected to certain repairs being made. Before making the inquiry concerning plaintiff's rights in the premises or registering his objection to the presence of the pole lines, Hanna had examined the record of the county and had been unable to discover any record establishing plaintiff's rights. His testimony shows, however, that defendants' predecessors in interest knew of the original construction of the transmission line and its enlargement in 1906, for he testified that his

mother-in-law, a Mrs. L. S. Muir, who was the owner of the land during those periods, maintained an agent upon the premises to whom the tenants regularly paid their rents. Other evidence shows that plaintiff and its predecessors in interest in the pole line and easements in question were the owners thereof, having been in actual, open, visible, continuous, and uninterrupted possession and use of the same since about the year 1901 and up to the very time of the commencement of the action. An attempt was made by plaintiff to show that its predecessor in interest, the Bay Counties Power Company, secured a grant from the owner of the land to the easements in question. Mr. P. M. Downing, in charge of the electrical construction of plaintiff company, and who formerly was associated with the Bay Counties Power Company, testified that it was the policy of that company to always secure the consent of the owner to go upon the land and that it never trespassed upon other people's property. He further testified that many of the written documents giving that company rights on lands were lost during the fire in San Francisco in 1906 before they were ever recorded; that during the early days of the company's existence it was not customary to record all deeds and documents, and that its policy was not changed until the year 1905 or 1906; and that a large number of grants of rights of way were in the office of the attorney of the company unrecorded at the time of the fire and were destroyed.

In accordance with this evidence, the trial court found plaintiff to be the owner and in the actual possession, use, and enjoyment of the claimed easements, and a judgment accordingly went in plaintiff's favor quieting its title to the easement in the pole line and the overhang, and it also allowed plaintiff an easement of ingress and egress of 15 feet in width along the line of the poles, and enjoined any interference with its proper use and possession.

In support of this appeal it is first claimed by appellants that there is no evidence to support the finding that respondent company ever claimed an easement or occupied the land of appellants with hostile intent; and, second, that there is no evidence which in any way sustains the implied finding that appellants at any time had any knowledge of any claimed hostile intent in the mind of the respondent company. In other words, it is appellants' contention that the judgment is premised upon the sole theory that adverse possession is established by proof of mere occupancy for a period in excess of five years unattended by any color of title or claim of right.

[1, 2] It is, of course, elementary that in cases of this character the asserted hostile claim must be manifested to the true own-

er. The owner must be informed in some way that the possession is hostile, or the statute does not operate against his right. The object of the statute in defining the acts essential to constitute an adverse possession is that the real owner may by unequivocal acts of the disseisor have notice of the adverse holding, and be thereby called upon to assert his legal title. *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100. The owner will not be condemned to lose his land because he has failed to sue for its recovery where he has no notice that it is held or claimed adversely, but the statute cuts off his remedy only when he has neglected to commence his action within the period assigned for it. *Thompson v. Pioche*, 44 Cal. 508. Hostile occupancy consists of two elements: First, hostile intent in the mind of the adverse claimant, coupled with, second, knowledge on the part of the owner. These two elements must be present to support a claim of hostile occupancy. It is therefore not sufficient that the claim of right exist only in the mind of the person asserting it. It must be manifested in such manner that the owner has knowledge thereof. *Thomas v. England*, 71 Cal. 456, 12 P. 491. Neither a hostile intent without occupation nor occupation without hostile intent is sufficient. The burden of proving the hostile claim is, of course, upon the party in possession claiming against the holder of the legal title. In an action for the recovery of real property or the possession thereof, the person establishing a legal title is presumed to have been possessed thereof within the time required by law; and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title unless it appears that the property has been held and possessed adversely to such legal owner for five years before the commencement of the action; and the burden of proof is upon the person in possession claiming against the holder of the legal title to show that his occupancy is hostile and not subordinate to the legal title. *Janke v. McMahon*, 21 Cal. App. 781, 133 P. 21.

[3] Here the court found in effect that plaintiff's possession and use were hostile and under a claim of right communicated to the owner of the land covered by the pole line and easement. The question as to whether the use was under claim of right is one for the court or jury to determine as a fact in the light of the relations between the parties and the surrounding circumstances, and where there is a conflict upon this subject the findings will, of course, not be disturbed here. *Wells v. Dias*, 57 Cal. App. 670, 207 P. 913.

[4] The contention of appellants that there is no evidence of hostile occupancy is predicated upon their claim that in no case is the hostile state of mind of the hostile claimant

ever presumed, but independent evidence must always be offered competent to prove this state of mind, and that proof of mere occupancy alone has no probative relevancy to this issue. But a right of way by prescription may be established in either of two ways: First, by use with knowledge on the part of the owner whose land is used that the person using the same claims a right to so use it; second, by a use so open and notorious that knowledge of a claim of right will be presumed. Evidence in negation of either or both of these ways is competent. Evidence disproving an actual knowledge of any claim of right compels the claimant to rely on the use of the land so visible, open, and notorious that the law will presume a knowledge of the claim to use it as a matter of right.

[5] There are three ways in which occupancy may be initiated, namely, through a trespass, under a license, or by a grant. Where there is no evidence to enlighten a court or jury under which manner the original entry was made, the court may indulge the presumption of a grant. It is, of course, a rule of elementary application that in order to establish a prescriptive title the claimant must show every element to constitute a title. Thus he must prove that the possession was actual, open, and notorious, continuous for the full time required by the statute, exclusive, hostile, and under a claim of right. It is also an elementary rule, however, that in the absence of direct evidence as to the nature of the entry, long continued, peaceable possession of land accompanied by the usual acts of ownership justifies the presumption that the adverse holding is under a communicated claim of right based upon a lost grant to the claimant of the property. This presumption supplies the place of positive proof of an ancient grant. Presumptions of this character are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and public policy in supporting long and uninterrupted possession. They are founded upon the consideration that the facts are such as could not, according to the ordinary course of human affairs, occur unless there was a presumptive title to or admission of an existing adverse title in the party in possession. Accordingly, it has been held in this state that where an open and uninterrupted use of an easement for a sufficient length of time to create the presumption of a grant is shown, the law will presume the elements of hostile intent and that the use is adverse and under a claim of right. *Franz v. Mendonca*, 131 Cal. 205, 63 P. 361; *Fleming v. Howard*, 150 Cal. 28, 87 P. 908; *Clarke v. Clarke*, 133 Cal. 667, 66 P. 10. If the other party relies upon the fact that these acts were permissive or in the nature of a license, or merely given as a matter of accommodation, it is incumbent

upon him to rebut the presumption of a non-appearing grant. Otherwise the presumption stands as sufficient proof and establishes the right. *Yuba Cons. Goldfields v. Hilton*, 16 Cal. App. 228, 116 P. 712, 715; *Costello v. Sharp* (Cal. App.) 223 P. 567; *Ricoli v. Lynch* (Cal. App.) 223 P. 88. If there is any evidence which throws any light upon the question as to whether the occupancy was under a license or a claim of right, it presents a question of fact, and a finding thereon is here conclusive. *Wells v. Dias*, supra; *Ricoli v. Lynch*, supra.

[6] Here the trial court expressly found that plaintiff's occupancy was adverse and under a communicated claim of right to the owner of the legal title. It is immaterial whether such finding is based upon the evidence of Downing relating to the lost grant, or is reached by indulging the presumption that one was executed, for in either case it constitutes evidence upon the subject; and not being repelled, is sufficient to support the finding and conclusion here. *Alper v. Tormey*, 7 Cal. App. 8, 93 P. 402.

[7] We are cited by appellants to California cases which they claim are in conflict with these views and which support their contention that direct proof upon the subject is requisite. We do not deem an analysis of these cases necessary. They are cases in the main presenting the situation where the facts and circumstances surrounding the entry disprove and dispel the theory of a grant. Whatever may be said of the language employed in some of them, there can be no question that the rule is firmly established in this state that the presumption that the use was under a claim of right and adverse arises from an undisputed enjoyment of an easement for the established period of prescription; and the burden is upon the party alleging that the use has been by virtue of a license or permission to prove that fact by affirmative evidence, and defendants have not met this burden.

In connection with this subject it is urged by respondents in support of the judgment that its title to the pole line and easements claimed is established under the evidence by the doctrine of occupancy for public use as laid down in the case of *Gurney v. N. C. P. Co.*, 160 Cal. 669, 117 P. 906, 36 L. R. A. (N. S.) 185. The conclusion we have reached upon the subject relative to plaintiff's rights in the claimed easement renders unnecessary a discussion of this question.

Appellants further contend that even conceding the evidence shows that respondent did acquire a prescriptive title, the judgment fails to contain an exact description of the adjudicated easements or the territorial locat on of the pole line. This seems to be its main contention, as the objection is described as the basic cause of this appeal and the principal reason why appellants are dissatisfied with the judgment.

The easement is described in the findings and judgment as follows:

"The right to repair, maintain, reconstruct, use, and operate for the transmission of electricity and for its own private telephone purposes in connection therewith, an electric transmission line consisting of one line of poles with wires, cross-arms, braces, guys, insulators, pins and fixtures installed thereon, constructed and erected upon, over and across the following described tract of land situated in the county of Contra Costa, state of California, to wit: The most westerly 1571.79 acres of the northerly portion of Rancho Canada del Hambre y las Bolsas, more particularly described in the deed of partition of Raye, Piper and Crockett, recorded in vol. 14 of Deeds, at page 171, in the office of the county recorder of Contra Costa, said land being bounded on the north by Carquinez strait and the town of Valona, on the east by the lands of the California Hawaiian Sugar Refining Company, on the south by the lands of B. Fernandez, and on the west by the lands of Tormey; together with a right of way along the same 15 feet in width lying equally on each side of the hereinafter described center line, for all purposes connected with the proper repair, maintenance, reconstruction, patrolling, use, and operation thereof for the purposes hereinbefore specified, and also the right of ingress thereto and egress therefrom along, on and within said fifteen feet right of way. Said electric transmission line has at all times herein mentioned been maintained and operated for the purposes aforesaid by plaintiff in the same location as that in which the same is now being maintained and operated."

"Said transmission line is located on and across said tract of land, and the center line thereof is more particularly described as follows, to wit: Commencing at pole bearing No. 1/6 of said transmission line which is north 73 degrees 25 minutes west 78 feet from the intersection of the center line of Flora street with the center line of Fifth avenue in the town of Valona, said county and state, and runs thence west 471.5 feet to pole bearing No. 1/9 of said transmission line; thence north 69 degrees 24 minutes west 1,850.9 feet; thence north 67 degrees 09 minutes west 380.7 feet; thence north 71 degrees 19 minutes west 211 feet; thence north 50 degrees 26 minutes west 1,577.9 feet; thence north 70 degrees 44 minutes west 177.8 feet; thence north 88 degrees 24 minutes west 86.5 feet to the fence marking the northwesterly boundary line of said tract of land. * * * Said plaintiff also owns the right to maintain, repair and use existing guys on poles 1/9, 1/18, 1/22, 1/31 and 1/32."

[8] The objection, in so far as it concerns the territorial description, is that there is nothing to show where the pole line enters the property line of defendant or where it leaves the same. There is no merit in this objection. There can be no question but that an easement consisting of a right of way must contain a description of the land which is to be subjected to the servitude with sufficient clearness to locate it. While here the land is described as the most westerly 1,571.79 acres of the northerly portion of the tract, the judgment further fixes the transmission

line as being on and across said tract of land the center line thereof commencing at a pole, bearing the mark $\frac{1}{8}$, of said line, which is 73 degrees 25 minutes west 78 feet from the intersection of the center line of Flora street with the center line of Fifth avenue, two intersecting streets in the town of Valona adjoining appellants' land, and carries it by courses and distances across the entire tract. In addition thereto, as pointed out by respondent, the pole line itself is an established monument upon the ground which locates itself (*Hamaker v. Pacific Gas & Electric Co.*, 59 Cal. App. 642, 211 P. 266); and the easement is 15 feet in width lying equally on each side thereof—which is equally definite; and its use is restricted to this territorial limit. It would be difficult indeed to imagine how the territorial description could be more certain and definite.

[9, 10] Equally untenable is the objection that the judgment is indefinite for failing to designate the character of the materials to be employed in the use and enjoyment of the easement or the extent of the servitude. It is true that rights acquired by prescription are stricti juris and cannot extend beyond the user; and the extent of an easement so acquired is fixed and determined by the user under which it is gained (*North Fork Water Co. v. Edwards*, 121 Cal. 662, 54 P. 69); but so long as the use of the easement is confined to the purposes under which it was acquired and created without increasing the burden upon the servient estate, it inflicts no injury upon the owner thereof, and within these limits the owner of the easement may make improvements or changes that do not impair or affect its substance. *Burris v. People's Ditch Co.*, 104 Cal. 252, 37 P. 922; 9 R. C. L. 784; 19 C. J. 983. This is not only a right, but in many cases it becomes a positive duty, and public service corporations should be encouraged rather than embarrassed in the betterment of their property in order that they may carry out the purposes for which they were created. Every easement includes what are termed "secondary easements"; that is, the right to do such things as are necessary for the full enjoyment of the easement itself (*North Fork Water Co. v. Edwards*, 121 Cal. 662, 54 P. 69); and repairs and replacements which cause no greater burden are permitted to be made (*City of Gilroy v. Kell* [Cal. App.] 228 P. 400). The question really resolves itself into what may be considered a reasonable use of the right as acquired. Manifestly it would be impossible in a judgment to describe and limit the exact kind and character of the materials that might be used by the company when it is called upon to repair or reconstruct its lines. Any question which might arise by reason of such repairs or reconstruction as

to whether such change was justified under the use, or whether it created an additional servitude beyond that originally imposed, is to be determined in an appropriate proceeding. This question, however, is not now before us.

[11] And, finally, it is urged that the court had no jurisdiction to set aside any definite right of way underneath the poles. The character and extent of the way claimed by prescription are fixed, and they were determined by the user under which the right was gained. There is ample evidence in the record to show that the easement acquired extended through the area delimited and set apart and to which plaintiff is confined in the use of the easement.

From what we have said it follows that the judgment should be and it is hereby affirmed.

We concur: KNIGHT, J.; ST. SURE, J.

70 Cal. App. 336

SMITH v. SHARP. (Civ. 2678.)

(District Court of Appeal, Third District, California. Dec. 22, 1924. Hearing Denied by Supreme Court Feb. 19, 1925.)

1. Pleading $\S$ 127(1)—In determining whether conveyance was as security, court could consider verified answer and defendant's testimony as to prior transactions.

In suit to have land adjudged held as security, and for accounting in connection with testimony as to whether quitclaim deed was given as security, court had right to consider verified answer of defendant and his testimony, conflicting therewith, as to why he took over mortgage and paid outstanding liens, following execution as security of prior bargain and sale deed.

2. Mortgages $\S$ 608 $\frac{1}{2}$ —Evidence held to support finding that grantor was advanced in years and illiterate.

In suit by grantor to have land adjudged held as security, and for accounting, evidence held sufficient to support finding in substance that plaintiff was advanced in years and illiterate.

3. Mortgages $\S$ 608 $\frac{1}{2}$ — Testimony held to warrant conclusion that grantee, in paying off liens, acted as trustee for grantor.

In suit to have it adjudged that land was held in trust, and as security and for accounting, testimony held sufficient to warrant conclusion that defendant, in paying off prior liens, acted in behalf of plaintiff, so as to be deemed a trustee under Civ. Code, $\S$ 2219.

4. Trusts $\S$ 102(1)—Grantee agreeing to reconvey to grantor and to attend to renting of his land, etc., held to be trustee.

Grantee of land as security, who agreed to reconvey to grantor and to attend to renting of land, etc., held to stand in such a relation of confidence to grantor that his attempt to acquire title by quitclaim deed made him an involuntary

trustee for grantor, in view of Civ. Code, §§ 2224, 2924.

5. Appeal and error ⇐1052(7)—Error, if any, in admitting evidence of value of mortgaged land held not to warrant reversal.

In suit by grantor to have land adjudged held in trust and as security and for accounting, where testimony sustained finding that deed was mortgage, error, if any, in admission of testimony as to value of land would not warrant reversal of judgment for plaintiff.

6. Mortgages ⇐38(1)—Evidence held sufficient to sustain finding that quitclaim deed was mortgage in effect.

Evidence held sufficient to sustain finding that quitclaim deed was mortgage in effect.

7. Trial ⇐400(1)—Refusal to allow items on accounting by mortgagee as settled by previous findings held error.

In suit to have land adjudged held in trust and as security and for accounting, refusal on accounting to permit defendant to prove payment of taxes and interest, on ground that such matters were settled by findings filed when accounting was ordered, held error, where no judgment had been entered.

8. Trial ⇐400(1)—Court may of own motion change findings any time before judgment.

Court may of own motion, without ordering new trial, change findings any time before judgment.

9. Appeal and error ⇐1140(1)—Error in refusal to allow items in accounting by mortgagee held not to call for reversal, except as to amount found due.

In suit to establish trust in land and for accounting, error in refusal of court to permit mortgagee on accounting to prove payment of taxes and interest does not call for reversal of judgment for plaintiff, except as to amount of money found due.

Appeal from Superior Court, Kings County; J. A. Allen, Judge.

Suit by Ed. T. Smith, as administrator of the estate of James Gillespie, deceased, against Sidney J. W. Sharp. From judgment for plaintiff, defendant appeals. Affirmed, as modified.

H. Scott Jacobs, of Hanford, R. Justin Miller, of Minneapolis, Minn., and Sidney J. W. Sharp, of Hanford, for appellants.

J. F. Pryor and H. P. Brown, both of Hanford, for respondent.

PLUMMER, J. This action was brought by the plaintiff against the defendant for the purpose of having it adjudged that the estate and interest of the defendant in and to a certain section of land containing about 635 acres, situate in the county of Kings, state of California, was held by the defendant in trust for the plaintiff, and as security for the repayment of moneys owing by the plaintiff to the defendant, if any, and for an

accounting of the rents, issues, and profits arising from said real property. The plaintiff acquired title to the lands in controversy from the state of California during the year 1911, and asserts that his ownership thereof continued down to and including the entire period involved in this action.

The defendant asserts in his answer that he is the owner in fee of said lands, claiming to have acquired title thereto by a constable's deed, made by a constable on September 14, 1916, under a sale of the land theretofore had under execution. The defendant also further claims to have acquired title to the lands involved by reason of a certain quitclaim deed made and delivered to him by the plaintiff on or about the 24th day of October, 1916. On the part of the plaintiff it is contended that whatever title was acquired to the lands and premises by the defendant, under and by virtue of the constable's deed, was acquired by him for the benefit of the plaintiff, and merely as security for the repayment of moneys advanced by the defendant for the uses and purposes of the plaintiff, and as security for the payment of a certain mortgage note made by plaintiff to defendant and the defendant's brother.

The court found in favor of the plaintiff, and directed that an accounting be had of the rents, issues, and profits arising from said real estate, and upon the conclusion of the accounting adjudged that the rents, issues, and profits received by the defendant exceeded the amount of the indebtedness of the plaintiff to the defendant in the sum of \$204.89, and directed that the plaintiff have judgment for said amount, and also that the plaintiff was entitled to a reconveyance of the 635 acres.

A review of all the authorities and points discussed by the respective parties in their briefs would extend this opinion beyond all reasonable limits, and will therefore not be undertaken. Two points are set forth prominently, to wit, the existence of a confidential relation between the parties and the effect of the quitclaim deed, dated October 24, 1916, as an absolute conveyance, or, as found by the court, merely a mortgage. If a mortgage, the existence of the confidential relation, whether correctly or incorrectly determined by the court, becomes of no vital importance, we shall therefore treat it only as an incidental matter.

An understanding of the questions involved necessitates a rather full statement of the facts. In this particular the transcript shows the following:

The plaintiff began working for the defendant's father in 1908, and continued in such employment until some time during the year 1910, making his home in a store building owned by the defendant's father. In 1910, the plaintiff went to live at the home of the defendant and the defendant's parents,

under an agreement by which the plaintiff agreed to pay the defendant's mother the sum of \$20 per month for board and lodging. This relationship continued until about February, 1916. In March, 1914, it appears that the plaintiff had become indebted to the defendant's mother in a considerable sum for such board and lodging, and that on or about the 4th day of March, 1914, the plaintiff made and delivered to the defendant and his brother, Craigie S. Sharp, at the request of the defendant's mother, a certain promissory note for \$1,500, bearing interest at the rate of 10 per cent. per annum, payable on or before March 4, 1916, and at the same time to secure the payment of said note, the plaintiff executed and delivered to the defendant and his brother a mortgage on the 635 acres hereinbefore mentioned, and also upon a certain 16-acre tract, referred to and known as the "16-acre tract," then owned by the plaintiff. As to the 16-acre tract, the mortgage just referred to created a second lien, said tract at that time being subject to a first mortgage given to one H. V. Brenton to secure the payment of the sum of \$1,200 and interest, and as to the 635-acre tract, known as and called the "lake land," the mortgage given to the defendant and his brother by the plaintiff was subject to a mortgage theretofore given to one John A. Wilson to secure the payment of a promissory note in the sum of \$1,835. In July, 1914, the plaintiff conveyed the 16-acre tract to the defendant and his brother, Craigie S. Sharp, and the defendant and his brother gave back to the plaintiff an instrument of defeasance. This instrument purported to grant to the plaintiff the right to repurchase or redeem said 16-acre tract within 18 months from the date of the agreement by payment of \$3,068.85, together with interest at the rate of 10 per cent. per annum. This sum was made up of the amount due H. V. Brenton, theretofore the owner of the prior lien upon said 16-acre tract and the \$1,500 note and mortgage given by the plaintiff to the defendant and his brother, as hereinbefore stated.

It appears that Brenton, the holder of the first mortgage on the 16-acre tract, had made a proposition to the plaintiff to enter into a similar transaction, giving the plaintiff 18 months to redeem or repurchase said tract, and that, after a conference had been had between the defendant and the plaintiff, the defendant agreed to take up the Brenton note and mortgage, and enter into the agreement as herein stated. After the execution of the instruments relating to the 16-acre tract had been had, the buildings on said tract burned, and the defendant received as insurance thereon the sum of \$250. The plaintiff was not given credit upon his indebtedness for said sum. The plaintiff did not succeed in paying the \$3,068.85 necessary to effect redemption of the 16-acre tract, and thereafter sale was made of said tract by

the defendant for the sum of about \$2,600, and thereafter, other than as showing the transactions between the parties and their relationship, the 16-acre tract drops out of this case. In August, 1915, the "lake land" was sold by the O'Bryan reclamation district to one John A. Wilson, the holder of the first mortgage thereon, for the sum of \$446.92, on account of an unpaid reclamation district assessment. The right to redeem from this sale would have expired on August 21, 1916. On or about the 9th day of September, 1915, the same land was sold by a constable to one Charles G. Lamberson, for the sum of \$516.51, to satisfy a judgment theretofore rendered against the plaintiff. The certificate of sale was assigned by Lamberson to Wilson. The right to redeem from this sale would have expired on September 9, 1916. The "lake land" was also still subject to the Wilson mortgage, and the mortgage given to the defendant and his brother by the plaintiff. On June 8, 1916, in an action brought by the First National Bank of Hanford against the plaintiff, an attachment was levied on the "lake property" for an indebtedness in the sum of \$560. On June 21, 1916, the plaintiff executed a mortgage on the "lake lands" to one George H. McKissick, to secure the payment of a promissory note in the sum of \$237, and interest thereon.

On the 19th day of August, 1916, the plaintiff executed and delivered to the defendant a quitclaim deed for the 16-acre tract hereinbefore referred to, and, at the same time, the plaintiff executed and delivered to the defendant a grant, bargain, and sale deed to the "lake land." This deed bears date of August 12, 1916, but was acknowledged on the 19th day of August. It is admitted by the defendant that this last-mentioned deed, to wit, the grant, bargain and sale deed covering the 635 acres involved in this action was taken merely as security for the advances about to be made by him. The defendant's testimony in this particular appears as follows:

"I also explained that the bargain and sale deed that he was giving me at that time was to protect me on my advances; we had arranged that I should take up the Johnny Wilson mortgage and the other liens that were existing at that time, and this deed was to protect me in taking those up and paying them off, and to protect me on my \$1,500 mortgage; that was the substance as I remember it."

During the months of August and September the defendant, either by assignment to himself, or to his brother, Craigie S. Sharp, took over all the liens and mortgages to which we have referred, and the indebtedness then existing against said lands and premises amounting to the sum of about \$6,500. The trial court found that the 635 acres of land at the time of the transactions herein referred to was not subject to any other liens or incumbrances, except state and county taxes for the year 1916.

After these transactions had been had the plaintiff, on the 24th day of October, 1916, executed and delivered to the defendant a quitclaim deed, which purported to quitclaim to the defendant the 635-acre tract. On the part of the plaintiff it is contended that this conveyance was made in pursuance of an oral agreement between the plaintiff and the defendant that it should be executed by the plaintiff and received by the defendant as security for the payment by the plaintiff to the defendant of such moneys as had theretofore been and were thereafter to be loaned to plaintiff by the defendant, or advanced by the defendant for the uses and purposes of the plaintiff, and that said conveyance was so understood by both plaintiff and defendant. On the part of the defendant it is alleged that this quitclaim deed was executed and delivered for the purpose of conveying from the plaintiff to the defendant all the right, title, and interest that the plaintiff might then have in and to said premises, and as an absolute and final conclusion, or, as the defendant testified, "a closing out of the whole transaction." The finding of the trial court as to the character of this instrument is, in substance, as follows: That on or about the 24th day of October, 1916, the plaintiff, at the special instance and request of the defendant, executed said instrument, wherein it is recited that the plaintiff remises, releases, and forever quitclaims said real property unto said defendant; that said instrument was executed by plaintiff and was received by the defendant under and pursuant to said oral agreement between plaintiff and defendant, and not otherwise, and was executed by plaintiff and received by defendant as security for the repayment by plaintiff to defendant of such moneys as had then been and would thereafter be loaned to plaintiff by defendant and advanced by defendant for plaintiff, together with interest thereon under and pursuant to said oral agreement between plaintiff and defendant; * * * that said instrument was not intended by plaintiff and defendant or by either of them to be an absolute conveyance of said real property or of any part thereof or of plaintiff's estate in said property or in any part thereof; * * * that at the time of the conveyance in question no money or property was paid or transferred to plaintiff in consideration for the execution by plaintiff of said instrument; and that the only consideration for the execution of said instrument by plaintiff was the aforesaid oral agreement on the part of defendant to hold, manage, and preserve said real property and plaintiff's estate therein for plaintiff and the advancement by defendant of the aforesaid moneys then advanced and thereafter to be advanced by defendant * * * as security for repayment by the plaintiff to the defendant of the sums herein referred to.

It was also found by the court that during

all of the periods herein referred to there existed between the plaintiff and the defendant a relation of faith and confidence, which the plaintiff placed in defendant, and by reason of the reliance of the plaintiff upon the defendant in his management and protection of the property herein referred to, he (plaintiff) did not read the quitclaim deed signed and executed by him, dated as aforesaid, October 24, 1916, but believed at the time that he was executing a trust deed. The finding of the court is also to the effect that the value of the property at the time of the execution of the quitclaim deed last herein mentioned was in excess of the indebtedness in the sum of about \$4,000.

The finding of the court that the quitclaim deed bearing date of October 24, 1916, was, in legal effect, a mortgage is assailed by the appellant as not supported by the evidence. That the plaintiff, during the month of August, 1916, was making efforts to secure funds to protect his interest in the "lake lands" is clearly evident from the record. The testimony there set forth shows that the plaintiff went to see the defendant about paying the amount of the reclamation assessment; that during this conversation the plaintiff said to the defendant that he had interviewed one Mr. Pryor in regard to securing the money; that Mr. Pryor had made some offer to take up the land, pay the indebtedness, give the plaintiff a certain portion thereof, and that at the conclusion of such conversation, the defendant stated that he would take up the matter. "He said he would take up the Wilson mortgage, the reclamation assessment and the Lamberson certificate." The defendant's own testimony, which we have hereinbefore set forth, is exactly the same in effect, to wit, that he took the grant, bargain, and sale deed to protect him in the advances necessary to be made to pay off the prior liens. In relation to the execution of the quitclaim deed, the defendant further testified:

"Mr. Gillespie made me a deed on October 24, 1916. It was executed in Ed Smith's office, I think. I think probably I prepared the deed. Mr. Gillespie came to my office downstairs. I don't know whether it was at my request or his own suggestion. I don't know whether I read it to him or not; I know I explained to him what it was; he knew what it was. My answer doesn't say; but I say he understood it. I don't know as a matter of fact whether I read the deed over to him or not. I told him about it at this time; he knew what it was; he knew what he was going to sign. * * * I told Mr. Gillespie at that time that we would close this whole transaction up, and that I would take from him this quitclaim deed which I had there and cancel all our obligations that existed between himself, my mother and my brother and myself, and clean out the whole account, or words to that effect."

The testimony of Ed. T. Smith, the notary, is, in substance, as follows:

"I didn't pay any particular attention to his physical condition. I knew he was James Gillespie, and I asked Mr. Gillespie if that was his signature, and I put my signature on it and handed it to Mr. Sharp."

The plaintiff's testimony concerning said transaction was:

"Q. Well, now, later on you made a quitclaim deed that is marked in evidence here? A. Yes."

"Q. To Sidney Sharp: Do you recall the circumstances under which that was executed? Do you recall how you came to sign that? A. Yes; I recollect that he asked me to come up there and sign it, and I went up and signed it."

"Q. Just what did he say to you? A. He asked me to sign this paper."

"Q. He handed you this paper, did he? A. Yes."

"Q. And did you read the paper at the time? A. No; I did not."

"Q. And did he explain to you what the paper was? A. No."

"Q. And did you understand you were—what did you understand you were signing when you signed that paper? A. I understood I was signing a trust deed."

"Q. A trust deed to Sidney Sharp, securing the money which had put up for you in relation to this land? A. Yes, sir."

[1] The transcript further shows that at the time of the execution of this quitclaim deed there was no cancellation of the indebtedness from the plaintiff to the defendant, that nothing was turned over by the defendant to the plaintiff evidencing any cancellation of the previous indebtedness, or anything done in relation thereto, further or other than as we have hereinbefore stated. In connection with this testimony, given by the plaintiff and defendant, and as bearing upon the weight to be given to the defendant's version of the transaction, the trial court had a right to take into consideration the verified answer of the defendant and his testimony as to why he took over the Wilson mortgage and paid off the outstanding liens. As we have shown, the defendant testified that he took the grant, bargain and sale deed, as stated by him in his own language—"to protect me on my advances. We had arranged that I was to take up the Johnnie Wilson mortgage and the other liens that were existing at that time, and this deed was to protect me in taking those up and paying them off to protect me on my \$1,500 mortgage."

R. Justin Miller, a friend of the defendant, before whom the grant, bargain and sale deed was executed, testified that:

He informed Mr. Gillespie "what the instrument was that he was asked to sign; that Mr. Gillespie by signing this quitclaim deed was turning over to Mr. Sharp all of his right including his equity of redemption in the 16 acres; and that he was giving this bargain and sale deed by way of further security to Mr. Sharp to recover the amount of the \$1,500 mortgage, and such other advances as were then necessary to be made in order to protect the

mortgage, and Mr. Gillespie signed them in my presence and I took the acknowledgment." (The witness Miller appears to have been the attorney for the defendant.)

The witness Miller further testified:

"There was nothing said in that conversation about anything other than the relationship of mortgagor and mortgagee as between Sidney Sharp and James Gillespie."

Mr. Miller also testified that he was acting as attorney for Sidney Sharp, "I was advising with him all the way along."

It thus appears that the prior mortgage and liens were agreed to be taken up by the defendant, and, to secure the repayment thereof, the plaintiff executed a grant, bargain, and sale deed. Under such circumstances, any act performed by the defendant in relation thereto would be for the uses and purposes of the plaintiff, under and by virtue of the agreement had between the parties preceding the execution of the grant, bargain, and sale deed. It further appears from the testimony that the plaintiff and the defendant in Miller's office had further conversation and agreement as to the amount to be paid and satisfactory to both of them to be paid for taking up some of the liens held by John A. Wilson; the defendant wanting one of the claims cut down, because he thought Wilson was asking too much for the same, "and it was too much to sting the old man." In contradistinction to this agreement, which is made clearly to appear, the defendant in his verified answer denies that he took an assignment of the Lamberson certificate of sale under any agreement between plaintiff and defendant, but in this behalf alleges "that he took said assignment for the purpose of protecting the interest of Craigie Sharp and himself, and for the purpose of acquiring the title to said property for himself and said Craigie S. Sharp," and that, by the conveyance executed by the constable:

"The defendant became the owner of said real property jointly with Craigie S. Sharp; that he procured said deed for the purpose of protecting his interest and the interest of said Craigie S. Sharp, and was not acting at any time, or at all for or on behalf of the plaintiff in the procurement of said deed."

While admitting by his testimony that he was going to take up said liens for the plaintiff and took the grant, bargain, and sale deed from the plaintiff to secure him in so doing, the defendant, in his verified answer, claims that he took up said liens in order to acquire the title thereto for himself and his brother. Mr. Wilson, from whom the assignments were taken, thus gives his version of the affair:

"When I made that assignment of the certificate of sale I was in Mr. Miller's office, the district attorney's office. Mr. Sharp asked me to come up, but I was delayed some time; I told him I would be up one day; I think it was with-

in a day or two of the time it would expire; I think it would expire the next day, and I told him I would attend to it that day, and I was out of town and delayed in getting there, and some time in the evening, why, I was telephoned to come up. I couldn't say whether it was Mr. Sharp or Mr. Gillespie who telephoned to me, but I think it was Mr. Gillespie. I went to Sharp's office. Mr. Gillespie and Mr. Sharp were present. A conversation thereafter took place in my presence between Mr. Gillespie and Mr. Sharp. It was in regard to this certificate. Mr. Sharp wanted to know how much I wanted for the assignment, and it occurs to me I told him \$500 or \$525, and he said that was too much, and he asked Mr. Gillespie if he didn't think that was too much, and Mr. Gillespie said, 'Yes.' Then I asked, 'What's the matter with \$400? How will that suit you?' And Mr. Sharp says to Mr. Gillespie, 'Is that all right?' and he said, 'Yes.' I says, 'All right. I'll make the assignment for the \$400.'"

It was at this time that Mr. Wilson testified:

"That Sharp said he didn't think I ought to hold up the old man on account of me only paying \$250 to Lamberson for it [the certificate]."

Mr. Wilson further testified:

"We had a conversation; it was in regard to making the assignment of the mortgage that I held against Mr. Gillespie. I don't believe Mr. Gillespie was there then; I won't be sure of that. Mr. Sharp made a statement at that time as to why he wanted the mortgage; he said he wanted to get things so that he could collect his interest and he would take care of Gillespie."

[2] The court, as we have stated, found that there was a confidential relation between the plaintiff and the defendant during all the times of these transactions, and also further found in substance that the plaintiff was advanced in years and was illiterate, not conversant with legal procedure or legal instruments. This finding is also assailed by the appellant, but evidence in the transcript shows that the plaintiff was advanced in years, and that he was illiterate, the following letters written by him abundantly demonstrate:

"Hanford March 27 1916 S. J W Sharp Dear Friend yours received and contents noted I have two parteys that is figren on the place one is estren party and the other one I ben on hand for a time his brother wants him to thak the place So you better post pond your trip for a week after the first of the month I will no Some thing defent before that time I want it to gow as Soon as pasable and get it off my mind it maik me feale blue I hope I will have Somthing that will chear us up in my next letter I dewing the best I can at present time yours truly James Gillespie," and

"Hanford March 15 1916 S J W Sharp Dear Friend your at hand and contens noted this is the second letter I got from you I have been trying hard to get the deal stratend out and got a nuff out to pay your mother as well as you and your brother but on the count of the house brunt up it is a draw back to me but I offer two

hundred of for the house not thare and I may have to give more off if it is agreeable as I want to get it stranted out I did not have much to report but I will get thing it fixed as Soon as I can now the Lak land is gown under a gaine that is why I want to get the three thousand as near as I can So you and your mother will get all but but if I have to thro of Som to maik the saile I maik it as little as I can now Mr. Sharp have as much pashens as can with me as I am dewing the best I wating Every to be able to report to you and I did mean to dis regard bening courtest in any to you I did not office as Soon as I should of done you Se that thay was on the eave Sending back I hope you will for give me this time and I will dew so no mor I cant Sea anny other way and present for your mother to get her money, and I want her to get all her money and I want to have it if I am left a beger I have a rather hard tim to get a long Sence I was sent out I slep in the barn on the floor but I will trye offel har to get it Sold if I have to loose Som I will try and maik it up Som way if I dew I will close and I hope you will for give me and I will dew the best I can Yours truley James Gillespie."

[3] The testimony which we have hereinabove set forth, we think, warranted the conclusion of the trial court that the defendant, in paying off the prior liens and mortgages, paying reclamation assessments, etc., was acting for and in behalf of the plaintiff, and was advancing money for his uses and purposes, and thus created the relationship of principal and agent, and brought matters directly within the terms of section 2219 of the Civil Code, which reads:

"Every one who voluntarily assumes a relation of personal confidence with another is deemed a trustee, within the meaning of this chapter, not only as to the person who reposes such confidence, but also as to all persons of whose affairs he thus acquires information which was given to such person in the like confidence, or over whose affairs he, by such confidence, obtains any control."

[4] There is no question but that the defendant, so obtaining a deed, obtained control over the affairs of the plaintiff and of all the real estate theretofore belonging to him, and of all matters pertaining thereto. Having assumed that relation, every transaction thereafter by which the defendant attempted to acquire title in himself in and to the premises would necessarily be viewed with suspicion. There appears nothing in the transcript tending to show any change in the relations between the plaintiff and the defendant prior to the execution of the quitclaim deed. We think the rule set forth in 2 Pomeroy's Equity Jurisprudence, 4th edition, section 956, applicable:

"* * * That where a relation of confidence is once established, either some positive act or some complete case of abandonment must be shown in order to determine it. The mere fact that the relation is not called into action is not, I think, sufficient of itself to determine it, for this may well have arisen from there having been no occasion to resort to it."

The plaintiff further testified that prior to the making of the deeds in question the defendant agreed to reconvey to him, and also to attend to the renting of the land, etc. And the finding of the court being that this is true, the defendant, by his attempt to acquire title, brings himself within the terms of section 2224 of the Civil Code, which reads:

"One who gains a thing by fraud, accident, mistake, undue influence, *the violation of a trust, or other wrongful act* is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

In this particular, we do not need to refer to authorities other than that as they appear appended to said section in Kerr's Cyc. Codes. Section 2924 of the Civil Code further provides that every transfer of property made as security, other than a trust, is deemed to be a mortgage.

[5, 6] It is further contended on the part of the appellant that the court erred in the admission of testimony relative to the value of the 635 acres. At the time the transactions hereinbefore referred to were had the land was submerged, and no crops had been raised thereon for a considerable period of time. Reclamation works were being carried on, and, as the testimony shows, during the years 1918, 1919, and 1920, crops aggregating a net return of more than \$10,000 in value were obtained therefrom. We do not need to set forth anything in relation to the alleged error as to the admission of testimony concerning the value of the land, because we think, irrespective of value, the testimony sustains the finding of the court that the quitclaim deed, dated October 24, 1916, was, in legal effect, nothing but a mortgage, and, if the court erred in relation to the admission of testimony as to the value of the land at that time, it would not warrant a reversal of the judgment herein.

[7] Upon the conclusion of the first hearing in this case, the court prepared and filed findings, as we have hereinbefore stated, and ordered the entry of an interlocutory judgment, and also directed that an accounting be had of the rents, issues and profits of said lands and premises. Thereafter, and without the entry of any interlocutory judgment, the court proceeded to take an accounting, and filed supplemental findings. In so doing, the court found that the defendant had paid out items, including interest thereon, up to the 23d day of August, 1920, \$10,532.30, and that the defendant had received as net rents, issues, and profits of the lands, including the sum of \$10,737.19, being an excess of the sum of \$204.89, and for a reconveyance of the said 635 acres of land.

[8] Upon the second hearing the defendant

offered and attempted to prove that on June 24, 1916, he paid taxes in the sum of \$68.02 on account of assessments levied during the year 1915, together with interest amounting to the sum of \$102.13, and also that on October 17, 1916, he paid taxes in the sum of \$52.39, which, together with interest, amounted to the sum of \$76.24, aggregating the total sum paid as taxes and interest thereon of \$178.37. These items the court refused to allow on the ground that those matters were settled by the findings already filed. In this the court was in error. It appears to be settled law in this state that the court may change its findings at any time before judgment, without ordering a new trial, and this of its own motion. *Spaulding v. Howard*, 121 Cal. 194, 53 P. 563; *Smith v. Taylor*, 82 Cal. 533, 23 P. 217; and *Hayes v. Wetherbee*, 60 Cal. 396.

The payment of taxes is a matter of absolute proof, and it does not appear that any objection was made upon any ground other than that such items had not been considered when inquiring into expenditures made by the defendant preceding the ordering of an accounting as to defendant's profits derived from the lands in controversy after the execution of the quitclaim deed. As no judgment had been entered the court was still in a position to make findings in accordance with the facts, and to correct its findings to conform with the facts.

[9] This error, however, does not necessitate a reversal of the judgment in this case other than as to the amount of money found due from the defendant to the plaintiff. It is therefore ordered that the judgment in this case be affirmed as to all matters contained therein, save and except the amount of \$204.89, awarded to the plaintiff, and as to this portion of the judgment a new trial is granted, and the trial court directed to proceed and ascertain the amount of taxes paid by the defendant from which he has not been given credit, and deduct the same from the money judgment awarded the plaintiff, unless the plaintiff herein, or his representative in interest, within 30 days after the going down of the remittitur herein, consents to the reduction of said money judgment in the sum of \$178.37, with interest thereon at the rate of 7 per cent. per annum from the date of the entry of the judgment heretofore entered in this case in favor of the plaintiff and against the defendant, and, in the event that satisfaction of the money judgment in said amount is entered within said 30 days, then, and in that case, the judgment in this cause, and the whole thereof, stands affirmed, the appellant to recover his costs on appeal.

We concur: FINCH, P. J.; HART, J.

70 Cal. App. 435

**ROYAL INDEMNITY CO. v. INDUSTRIAL
ACCIDENT COMMISSION et al.**
(Civ. 5052.)

(District Court of Appeal, First District, Division 2, California. Dec. 30, 1924.)

1. Master and servant ⇨405(4)—Cause of infection need not be demonstrated beyond doubt.

Exact cause of infection following injury need not be demonstrated beyond possibility of doubt, where there is sufficient medical testimony to sustain award.

2. Master and servant ⇨417(7)—Appellate court not concerned with conflicting testimony, where award is sustained by medical testimony.

Where record contains medical testimony sufficient to sustain award, appellate court is not concerned with conflicting testimony before Commission as to exact cause of infection resulting in employee's illness.

Proceeding for compensation under the Workmen's Compensation Act by G. W. Rollins, employee, opposed by the Royal Indemnity Company, insurance carrier. Compensation awarded by the Industrial Accident Commission, and the insurance carrier applies for certiorari. Award affirmed, as modified.

F. N. Foley and R. P. Wisecarver, both of San Francisco, for appellant.

Warren H. Pillsbury, of San Francisco, for respondent.

LANGDON, P. J. [1, 2] This matter comes to us upon a writ of review. It is contended first that the evidence before the Industrial Accident Commission did not warrant a finding that G. W. Rollins sustained an injury by bumping his knee against a gate upon the ranch on which he was working, which injury caused a slight wound, followed by a severe infection. We shall not review the evidence here. It is true that the nature of the injury, the facts and circumstances surrounding the same, and the symptoms which followed made it impossible to demonstrate, beyond the possibility of a doubt, the exact cause of the infection which resulted in most severe and lengthy illness for applicant, Rollins. But such demonstration was not required. There is medical testimony in the record sufficient to sustain the award, and, that being true, we are not concerned with the conflicting testimony introduced before the Commission. *Southern Pac. Co. v. Industrial Accident Commission*, 177 Cal. 378, 170 P. 822; *General Accident, etc., v. Ind. Acc. Comm.*, 186 Cal. 653, 200 P. 419.

The only other point raised is that the Industrial Accident Commission erred in allowing compensation after August 1, 1924, as it appears from the evidence that upon

that date the applicant returned to his work at his regular wages. The respondent does not contest this claim, and has attempted to correct the error by securing a stipulation from the applicant that the award should be modified so as to terminate the compensation allowed to applicant as of August 1, 1924. A modification of the order was made, accordingly, by the Industrial Accident Commission. This modification was made while an application for a writ of review was pending in this court, and petitioner is not satisfied as to its efficiency to effect its purpose, contending that the Industrial Accident Commission was without jurisdiction to make any effective modification of its judgment at that time. In order to place the matter beyond question and effectively carry out the expressed desire of all parties hereto and to do justice under the facts appearing in evidence, we modify the award of the Industrial Accident Commission entered herein on September 10, 1924, so as to terminate, on August 1, 1924, the disability compensation allowed to applicant, subject, however, to the continuing jurisdiction of the Industrial Accident Commission to make any further allowance under the powers given it by the Workmen's Compensation, Insurance, and Safety Act that conditions in the future may warrant.

With such modification, the award of the Industrial Accident Commission is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

70 Cal. App. 245

McDEVITT v. CHAS. CORRIEA & BROS.
et al. (Civ. 2770.)

(District Court of Appeal, Third District, California. Dec. 15, 1924. Rehearing Denied Jan. 14, 1925.)

1. Appeal and error ⇨931(7)—Presumption that findings, not specific as to contractual relation between parties, support judgment and theory thereof.

Where findings following language of complaint, under which proof of contractual relation contended for by either party was competent, are not specific as to which existed, presumption must be indulged that they support judgment and theory thereof.

2. Principal and agent ⇨145(4)—Principal and agent not jointly liable.

As principal and agent are not jointly liable on contract made by latter for former, judgment against several defendants, on theory of joint or joint and several liability on contract made by some, must be supported by substantial evidence of joint adventure or partnership for limited or special purpose.

3. Principal and agent —145(4)—Judgment against codefendants on theory of joint liability on contract held not warranted.

Where plaintiff's sole claim was that defendant acted as agent of codefendant in purchasing turkeys, and there was no substantial evidence of agreement to jointly buy turkeys and share in profits of resale, findings and judgment on theory of joint liability were not warranted.

4. Principal and agent —145(4)—One suing both principal and agent on latter's contract for former must elect which he desires to hold liable.

One suing principal and agent on contract made by latter on former's behalf is not entitled to judgment against both, but, having ascertained or discovered such relation between them, must elect, before close of trial, which he desires to hold liable.

5. Appeal and error —934(3)—Presumption that defendants' default, with essential consequences, was entered on plaintiff's application.

Where judgment, in action on contract, recites that defendants defaulted, and that default was duly entered, presumption under Code Civ. Proc. § 585, subd. 1, is that such default, with essential consequences, was entered on plaintiff's application.

6. Principal and agent —145(4)—Prosecution of action to judgment against known agent is election to hold him liable.

One prosecuting action to judgment against one party, after learning that latter was acting only as codefendant's agent in transaction on which action is based, elects, as matter of law, to hold agent liable, and must stand on such election, whether or not judgment is or may be satisfied by him.

On Petition for Rehearing.

7. Appeal and error —1122(2)—Appellate court cannot make finding, though evidence supports only findings opposed to those made.

While case will be reversed, where vital findings are without sufficient support in evidence, or appellate court, where justified or required by very character of findings, may order trial court to enter different judgment thereon, reviewing court cannot make finding, even if evidence would support only findings diametrically opposed to those made.

8. Appeal and error —1177(7)—Appellate court reversing judgment as not supported by evidence cannot assume that evidence will be precisely same on retrial.

Appellate court cannot assume, on reversing judgment as not supported by evidence, that evidence on retrial will be precisely same, and hence must remand case for retrial.

9. Appeal and error —1177(7)—Case remanded on reversal of judgment as not sustained by evidence and findings, though evidence on retrial would be same.

Though evidence on retrial, after reversal of judgment against appellant and codefendants on theory of joint liability on contract

as not supported by evidence and findings, was precisely same as at first trial, case must be remanded for retrial for clear and specific findings as to relationship between defendants and judgment exonerating appellant from liability, if plaintiff still maintained and court accepted theory that relation of principal and agents existed between appellant and codefendants.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Mrs. A. McDevitt against Chas. Corriea & Bros. and others. Judgment for plaintiff, and the named defendant appeals. Reversed as to appellant, with directions.

Devoto, Richardson & Devoto, of San Francisco, for defendant and appellant.

W. P. Rich, of Marysville, for other defendants.

Ray Manwell, of Marysville, for respondent.

HART, J. The plaintiff brought this action to recover from the defendants the aggregate sum of \$1,101.33, alleged to be balances due her and four other parties who assigned their claims to her prior to the commencement of this action, from the sale of turkeys to the defendants. The complaint, which was filed on the 13th day of January, 1923, is unverified, and, in five different causes of action, each in the form of a common count, sets up plaintiff's own and the claims of her several assignors for goods, wares, and merchandise sold to the defendants.

The answers of defendants Chas. Corriea & Bros. and Charles Corey (erroneously sued as Charles Correy), each denied the allegations of each of the causes of action set up in the complaint. The defendants A. C. and Rose Biggerstaff failed to answer the complaint, and judgment against them was taken by default.

The case as to the answering defendants was tried by the court sitting without a jury, and the findings and the judgment were against them and the Biggerstaffs in favor of the plaintiff in the total sum of \$1,068.71. The defendant Chas. Corriea & Bros. made a motion for a new trial, which was denied, and the appeal is by said defendant from the judgment.

According to his answer and testimony, the defendant Chas. Corriea, at the time that the transactions herein involved took place, was a commission merchant, buying and selling farm produce in the city of San Francisco under the firm name of "Chas. Corriea & Bros.," said Chas. Corriea being the sole owner of said business and hence the sole member of said firm. (We shall hereinafter refer to said defendant as Corriea.)

It appears that, either in the month of July or August, 1922, the defendant A. C. Biggerstaff, a resident and farmer and turkey

raiser in Yuba county, entered into some sort of understanding or arrangement with Corriea, whereby the former was to purchase and ship turkeys to the latter at San Francisco for the Thanksgiving and succeeding holiday trade in said city. Said Biggerstaff subsequently employed the defendant Charles Corey to assist him in the purchase of turkeys for the purpose stated. Corey was also a resident of and a farmer in Yuba county. A few weeks prior to Thanksgiving Day in 1922, said Biggerstaff and Corey purchased the turkeys of a number of the turkey raisers in Yuba county and shipped them to Corriea in San Francisco. Among those from whom turkeys were thus purchased were the plaintiff and her assignors. Corey, in a majority of the instances of the purchases so made, personally conducted the negotiations and completed the bargains leading to such purchases. The Biggerstuffs turned over their check book to Corey, the understanding being that Corey, on purchasing turkeys, should give the vendor a check signed by the Biggerstuffs on the First National Bank of Marysville, at Marysville, an arrangement having been made with the cashier of said bank by said A. C. Biggerstaff that said checks were to be held by the bank until the money called for thereby was deposited in the bank by Corriea, upon drafts drawn upon him by said Biggerstaff. The plaintiff and her assignors were each given such a check for the amount for which the turkeys bought from them totaled. We do not understand from the record that the plaintiff or her assignors, at the time of the sale of their turkeys, knew of the arrangement spoken of between A. C. Biggerstaff and the bank with regard to the payment of the checks. But, at all events, the plaintiff and her assignors presented their checks to the bank for payment, but they were dishonored because of there being no funds in the bank from which they could be paid. Some time thereafter—a week or ten days or perhaps a longer period—the plaintiff and her assignors received or were paid one-half of the amount for which the checks so issued to them respectively called.

It appears that the day immediately preceding Thanksgiving Day of 1922 there was a "slump" in the turkey market in San Francisco, with the result that the prices at which turkeys could be sold in said market were below those which Biggerstaff and Corey agreed to pay the plaintiff and her assignors for their turkeys. This situation provoked a controversy between A. C. Biggerstaff and Corriea which culminated in the commencement of the present action.

The defendants A. C. Biggerstaff and Corey claimed at the trial that in purchasing the turkeys they acted under authority conferred upon them by Corriea as the agents of the latter. Corriea likewise claimed that said Biggerstaff acted independently

of him, and bought the turkeys upon his own responsibility, with an understanding between him and said Biggerstaff that the latter would ship such turkeys as he might purchase to him at San Francisco on consignment, and there to be by Corriea sold for said Biggerstaff. The foregoing embraces a general statement of the facts and the issue upon which the case was tried below.

The defendant and appellant make these points: (1) That the findings do not derive support from the evidence; (2) that, assuming that the theory of the decision is that A. C. Biggerstaff, as the agent of Corriea, purchased the turkeys, and that upon that theory the findings derive sufficient support from the evidence, the judgment, nevertheless, cannot stand, for the reason that it fixed a joint and several liability against all the defendants, whereas, in such case, or where an action is based upon a transaction initiated and consummated for a party through an agent, and both the principal and agent are made parties defendant thereto, the plaintiff, while having the right to make both parties defendants to the action, must, either during the progress of the trial or before the close thereof, in case the relation of principal and agent between the defendants as to such transaction is disclosed, make an election as to which of the two, the principal or the agent, he desires and intends to fix liability upon for the claim sued on.

The findings are substantially in the language of the allegations of the several counts of the complaint. The conclusion of law from the findings is as follows:

"As a conclusion of law from the foregoing facts the court finds that the plaintiff is entitled to joint and several judgment against defendants A. C. Biggerstaff, Chas. Corey, and Chas. Corriea & Bros., in the sum of \$1,068.71, and said plaintiff is also entitled to judgment joint and severally against defendants A. C. Biggerstaff and Chas. Corriea & Bros. in the further sum of thirty-two dollars and sixty-two cents (\$32.62), and for the costs of suit."

The judgment follows the conclusions of law.

[1-3] The evidence justified a decision only upon either one or the other of two opposing theories, to wit: (1) That the relation between Corriea and Biggerstaff and Corey was that of principal on the part of Corriea and agents on the part of the other two; or (2) that the agreement between Corriea and A. C. Biggerstaff was that the latter was to purchase the turkeys on his own account and ship the same to Corriea and by the latter marketed or sold for the former. These were the positions taken at the trial by said Biggerstaff and Corey, on the one hand, and by Corriea on the other, and they constituted the single issue submitted

for decision. Under the allegations of the complaint, it was competent to prove whatever might have been the contractual relation existing between the defendants as to the transactions involved herein. The findings, following as they do the language of the complaint, are not specific, and, taken alone or without reference to the judgment, it would be impossible to determine from them what the decision of the court is as to the legal relation existing between the defendants in the business of purchasing the turkeys. In that condition of the findings, however, the presumption must be indulged that they support the judgment and the theory upon which it proceeds. The theory of the judgment upon its face is that the defendants, in the carrying out of the transactions upon which the action is founded, were both jointly and severally liable. Whether that theory was founded in the belief that a principal and his agent, as to any contract the latter has made within the scope of his authority as such for the former, is jointly or both jointly and severally liable thereon, cannot be ascertained from the findings. As will later be pointed out, a principal and his agent are not jointly liable upon any contract made by the agent for the principal. Therefore, to support the theory that the liability of the defendants here was joint or joint and several, there must have been substantial evidence introduced showing that the defendants were either joint adventurers or copartners for a limited or a special purpose. But, save and except a detached statement here and there of A. C. Biggerstaff and Corriea in giving their testimony—a statement which might be interpreted to bear different meanings, but from which a supposition might be strained that the agreement between A. C. Biggerstaff and Corriea was that they were jointly to buy the turkeys and share in the profits of the enterprise—there is absolutely no evidence to support the findings, interpreted here as they must be. In other words, there is no substantial, if any, evidence affording support to the theory upon which the findings and the judgment seem to proceed, to wit: That the defendants were or are jointly liable to the plaintiff and her assignors for the turkeys purchased by Biggerstaff and Corey from them and shipped to Corriea.

The sole theory upon which the plaintiff's case was tried below was that, in purchasing the turkeys, A. C. Biggerstaff and Corey acted for and represented Corriea as his agents. There was not at the trial, nor is there here, any pretense by the plaintiff that Biggerstaff and Corey purchased the turkeys in any other capacity than as agents of and for Corriea. The evidence presented by the plaintiff was addressed solely to the proof of the proposition, contended for by her attorney at the trial and here, that Corriea had employed A. C. Biggerstaff as his agent to buy

turkeys for him, and that Biggerstaff employed Corey as a subagent to assist him in the business and that Corriea ratified said Biggerstaff's act in so employing Corey for that purpose. The testimony relied upon by the plaintiff to establish, as between Corriea on the one side and said Biggerstaff and Corey on the other, the relation of principal and agent in conducting the transactions involved herein is that of said Biggerstaff. As briefly as it may be stated, that portion of his testimony directly bearing upon the question of his relationship, contractually, with Corriea in the purchase of the turkeys, is, in substance, as follows:

That during either the month of July or the month of August, 1922, A. C. Biggerstaff received from Corriea several letters in which the latter stated that he intended going to Yuba county and "fix me (the witness) up for *buying turkeys for him* for these holidays. Later on," proceeded Biggerstaff, "he came up and out to my ranch. I met him in town and he went out to my ranch with me and looked over the turkeys. * * * We talked the matter over. He told me he would give me an opportunity to buy turkeys—a chance to make four or five or six hundred dollars, and he says, 'You are not limited if it is \$10,000.' * * * We then came back to town (meaning the city of Marysville) to see Mr. Smith (cashier of the First National Bank of Marysville). We went down to his (Smith's) house Saturday afternoon, parked the car in front of his house, but he was out. * * * He told me he would give me a percentage for *doing his buying that way*. * * * There was nothing said about profits at that time. He says, 'I will treat you right in all deals.' * * * Afterwards I called him up on the phone and asked him about buying turkeys, what I could pay for them, a number of times. Chas. Corriea (appellant) fixed the price which I should pay for turkeys."

The witness proceeded to explain that the arrangement was that, upon the purchase of turkeys, the check of his wife on the First National Bank of Marysville would be given the vendors for the amount when the turkeys were received by Corriea in San Francisco, he (said Biggerstaff) to draw on Corriea through said bank for the amount of the check issued by him or his wife or Corey, and that the money received on the draft was to be deposited in the bank, to be used in honoring such checks as he or Corey had given to the vendors. Said Biggerstaff further testified that he employed the defendant Corey as a "subagent" to assist him in buying turkeys for Corriea, agreeing to divide with Corey any money he (witness) received as compensation for his services as agent. "A day or two before Thanksgiving," continued Biggerstaff, "I told Corriea over the telephone that we (witness and Corey) were buying turkeys." Corriea inquired, "Who is Corey buying for?" Witness answered, "Helping me buy for Chas. Corriea." Corriea replied, "That is all right; fine and dandy." The witness then asked Corriea,

"What is the price?" to which Corriea replied, "48 cents, looking towards 53 and 55 cents, but don't pay over 45 cents."

On cross-examination, said Biggerstaff was asked if he had "rendered a bill" to Corriea for his services in buying the turkeys and he responded that, on account of the slump in the turkey market, he sent no bill to Corriea for his services, in buying the turkeys; that, after the "slump," he said to Corriea that, "we will waive all rights to what we have got coming if you will settle up everything on account," but that Corriea made no reply to that proposition. Further referring to the fact that Corriea had paid him nothing for his services, Biggerstaff said: "I was waiting for the court to settle it. The court would undoubtedly give me what was coming to me for my labor." The witness further stated, on cross-examination, that Corriea *authorized him* in the summer of 1922—either in July or August—to buy turkeys for him (Corriea). The witness produced a letter from Corriea to him, dated August 16, 1922, in reply to a letter previously addressed to Corriea by witness. The letter from Corriea to witness stated, among other things, that he (Corriea) had been too busy "to get away," but that he would endeavor "to get in your territory some time next week and we will make arrangements to buy the other turkeys you have in view, and we will talk the whole proposition at that time." There was some other testimony tending to show that A. C. Biggerstaff was employed by Corriea to act as the latter's agent in the transactions. It is not necessary to give a statement of the testimony referred to herein.

The plaintiff and her assignors testified that they did not know for whom Biggerstaff and Corey were buying turkeys at the time that they sold their turkeys to them. The plaintiff, though, it should be stated, did say that she "understood" that A. C. Biggerstaff and Corey were buying turkeys for Corriea, but that part of her testimony was stricken out.

It is not necessary to refer herein to the testimony presented by the appellant. It will suffice to say that the testimony so presented tended to show that the agreement between A. C. Biggerstaff and Corriea was that the former was to ship turkeys to the latter on consignment, and that Corriea was to sell the same for Biggerstaff for the usual commission for such services.

It will be noted, from the testimony of A. C. Biggerstaff, as hereinabove given, that the sole claim of the plaintiff at the trial, as it is her sole contention on this appeal, was that in purchasing and shipping the turkeys to Corriea, said Biggerstaff acted as the agent of the latter. This being so, and there being no evidence which supports the theory upon which the decision and the judgment appear to proceed, to wit, that the

relation between the defendants in the transactions involved herein was either that of a partnership or a joint adventure, the findings and the judgment have nothing to support them and cannot, consequently, be upheld.

[4] There are, however, certain considerations which, in view of a retrial of the issue as to the character of the relation between defendants, pertinently call for notice herein. If a retrial develops the same situation, evidentially, as is presented by this record, then the findings and judgment must be in accord with the one or the other of two different and antagonistic theories, to wit: (1) That A. C. Biggerstaff and Corey represented Corriea as agents in the buying of the turkeys; or (2) that the agreement was that Biggerstaff and Corey, having purchased the turkeys for themselves or on their own account, delivered them to Corriea on consignment, to be by him sold for the former. If the evidence, in the opinion of the trial court, sufficiently shows, to justify a finding to that effect, that in the carrying on of the transactions concerned here, the relation of principal, on the part of Corriea, and agents, on the part of A. C. Biggerstaff and Corey, existed, then the appellant is entitled to have judgment entered in his favor, since the plaintiff now has an unimpeached, and, indeed, an unimpeachable judgment against the agents.

This proposition follows from the well-settled rule that in an action on a contract against a principal and his agent, through whom the contract was made on behalf of the former, the plaintiff is not entitled to judgment against both, but must, before the close of the trial, and after the relation of principal and agent between the defendants in the making of the contract has been ascertained or discovered, elect as to which of the two defendants, the principal or the agent, he desires and intends to hold liable by a judgment. The rule and the reasons supporting it are exhaustively considered in 2 Mechem on Agency, § 1750 et seq., but no more clearly than by Mr. Presiding Justice Finlayson in *Ewing v. Hayward*, 50 Cal. App. 708, 717, 195 P. 970, in a concurring opinion in which Mr. Justice Weller concurred, thus making it the decision of the court. We here quote from said opinion in extenso because it contains a singularly lucid exposition of the rule and the reasons upon which it is grounded:

"The agent is liable because credit was originally extended to him in the belief that he was acting for himself. The undisclosed principal is liable on the theory that, having received the benefit of the contract made by his agent, he should assume its burdens. There is but one contract upon which the plaintiff in such an action can bring suit. The person with whom such plaintiff has directly contracted, the agent of the undisclosed principal, may be held liable on the contract as the real obligor,

for he contracted in that capacity. Or, if the plaintiff in such an action so choose, he may treat the contract as the obligation of the undisclosed principal for whose benefit it was made, notwithstanding that, on the face of the contract, his agent appears to be the true obligor. There is, as we have said, but one contract in such cases. And though the plaintiff may elect to hold either one of two persons liable on that contract, either the agent or his undisclosed principal, he cannot make two contracts out of the one contract by seeking to hold each of those two persons liable severally as an independent obligor. Nor can he hold them both liable as joint obligors on one contract. He contracted with but one obligor, not two; and though he may elect to hold either one of the two liable as the obligor under the contract, he may not hold them both jointly liable, for to do so would be to give him two obligors where he contracted with, and for the liability of, but one. The result is that the liability of the agent and his undisclosed principal is an alternative rather than a joint or joint and several liability, and either may be so held, but not both. So we find that, according to the weight of authority, it becomes the duty of the creditor, after disclosure of the agency and the identity of the principal, to elect which of the two he will look to to carry out the agreement of the agent. Note to *Murphy v. Hutchinson*, 21 L. R. A. (N. S.) 786. It seems that if, as in the instant case, the alleged undisclosed principal denies the existence of the relation of principal and agent, the party seeking to recover on the contract may commence the action against both the alleged undisclosed principal and his agent, in order to ascertain the facts. But, though the plaintiff may bring the action against both, the rule, as I understand it, is that the plaintiff in such an action cannot have judgment against both the undisclosed principal and his agent, but, before the close of the case, must elect whether he will take a judgment against one or the other. See *Sessions v. Block*, 40 Mo. App. 569; *Pittsburg Plate Glass Co. v. Roquemore* (Tex. Civ. App.) 88 S. W. 449; *Weil v. Raymond*, 142 Mass. 206 (7 N. E. 860); *Tuthill v. Wilson*, 90 N. Y. 423; *Mattlage v. Poole*, 15 Hun. (N. Y.) 556."

Counsel for the plaintiff cites certain California cases which he claims hold that both principal and agent are liable to third parties dealing with the agent within the scope of his authority as such, and that an action may be maintained and prosecuted to judgment against both. In one of the cases cited by counsel certain language, taken by itself, might be construed as supporting that view. See *Montgomery v. Dorn*, 25 Cal. App. 666, 670, 145 P. 148. There is no dispute as to the proposition that, as the case just named states, both the principal and agent are liable under a contract executed by the latter for the former when acting within the scope of his authority as such agent; nor can it be disputed that a party may proceed against the principal and agent upon any contract so made. These propositions are clearly stated in *Ewing v. Hayward*, *supra*. But, as pointed out in that case, when, in the

course of the trial, it appears that one of the defendants was the agent of the other in the making of the contract sued on, the plaintiff must, before the close of the case, elect whether he will take judgment against the principal or against the agent. But, as to the case of *Montgomery v. Dorn*, *supra*, it will be noted that, although the plaintiff did not exercise such election as between the principal and his agent, the defendants therein, the findings and the judgment acquitted the agent of liability on the contract sued on, but held the principal as solely liable. The agent, having been exonerated, suffered no prejudice, and therefore had no occasion to appeal and did not appeal. The principal was by the judgment merely required to perform the terms of his own contract. It was not, under the circumstances, for him to complain that an election had not been made as between him and his agent. The discussion of the question in that case was, therefore, academic.

In the present case, while it is true, as we have said, that the contractual relation between the defendants, whatever may have been the nature thereof, may be shown under the complaint, still, as stated, that pleading appears to proceed upon the theory of the joint or joint and several liability of the defendants, and it may be assumed therefrom and also from the testimony of A. C. Biggerstaff, that the plaintiff did not definitely know the true relation between the defendants in the buying of the turkeys until said Biggerstaff gave his testimony at the trial—at any rate, not until after the complaint had been filed. But whether this was true or not true, or, even if the plaintiff assumed from the beginning that the relation between defendants was that of principal and agents, and proceeded in the presentation of her case according to that theory, it was still her duty, before the close of the case, to have made an election as to which of the defendants, Corriea, as principal, or A. C. Biggerstaff and Corey, as agents, she intended to fix liability upon.

[5] But, assuming that, on another trial, the evidence is as it appears in this record, and that the court should find that A. C. Biggerstaff and Corey bought the turkeys for Corriea as the latter's agent, the situation is that there is in existence now an unimpeachable judgment against the agents. The action being on contract, and the judgment reciting that the Biggerstaffs defaulted, and that their default was duly and regularly entered, the presumption is that said default, with its essential consequences, was entered upon the application of the plaintiff (Code Civ. Proc. § 585, subd. 1).

[6] The action, as we have seen, was prosecuted to judgment against Corey. Thus the question arises: Were the act of applying for and securing a default judgment against Biggerstaff and the fact of prosecuting the

action to judgment against Corey the equivalent of an election as a matter of law? Mr. Mechem, in his work on Agency, vol. 2 (2d Ed.) § 1759, says:

"Prosecuting the action to judgment against the agent, after discovery of the principal, has been held in several cases to constitute an election as a matter of law. As a mere matter of ordinary election, this is undoubtedly sound; as a matter of a possible merger it may also be sound; but if election be treated in the manner which has been suggested it cannot well be said that changing the form of the agent's obligation, or putting it into a condition in which it can be more readily enforced, is inconsistent with an intention to proceed against the principal also. Nothing short of satisfaction of the judgment against the agent would then release the principal as a matter of law, and some cases have so held."

Authorities supporting both views of the proposition, as indicated in the text, are cited in the footnotes. It seems to our minds, however, that the stronger position is that taken by the cases holding that when a plaintiff prosecutes his action to judgment as against a party, after he learns that such party was acting as an agent only of another in the transactions upon which the action is based, the course thus pursued by him constitutes an election as a matter of law, and that he must stand upon such election regardless of whether the judgment is or may be satisfied by the judgment debtor.

It may incidentally be suggested that perhaps the above rule would not apply where a judgment had been taken by default before the plaintiff knew that the relation between the defendants was that of principal and agent. In such case, the default judgment might be set aside upon motion and a showing that the relation of principal and agent was not known to the plaintiff until after the default was taken.

In returning the case to the court below, however, it is well to suggest that if the question referred to be retried, a specific finding should be made as to the relationship of the defendants in the transactions. Obviously, if it be found that A. C. Biggerstaff and Corey were the agents of Corriea in the purchase of the turkeys, then the latter, as we have stated, is entitled to a judgment, since plaintiff already has a judgment against the former. If the finding is that of a joint adventure or copartnership between the defendants in such purchase, then, of course, Corriea would be jointly liable and may be so adjudged.

It may with no impropriety be suggested that if it be found that the relation between the defendants was that of principal and agent, then upon the satisfaction of the judgment by the agents, there would thereupon accrue to the latter a right of action for indemnity or recoupment against Corriea. But be that as it may, for the reasons hereinabove given, the judgment must be reversed,

in so far as the appellant is concerned, and accordingly it is so ordered, with directions to the trial court to be governed in another trial of the case by the views herein expressed.

We concur: FINCH, P. J.; PLUMMER, J.

On Petition for Rehearing.

HART, J. The appellant petitions for a rehearing, claiming as he claimed in his briefs, that the record supports no other course by this court than that of ordering the court below to enter judgment in his favor. We thought our position on the proposition was made sufficiently clear in the former opinion. However, the case presents rather an unique situation and that there may be no misapprehension as to our views regarding the points discussed in the original opinion and renewed by the appellant in his petition, we will take the pains to restate them here.

As pointed out in the opinion originally filed herein, the complaint is in the form of a common count as to all the several causes of action therein set forth as for "goods, wares, and merchandise" sold and delivered to defendants. The averments of the complaint are therefore general in their nature, or not specific as to the contractual relation existing between the defendants in the transactions involving the purchase and sale of "goods," etc. As also likewise shown, the findings are substantially in the language of the complaint, and are not therefore specific as to the nature of the business relation between the defendants in the business of purchasing the turkeys. It is hence impossible to determine from the findings themselves the theory upon which the case was decided as to such relation. The conclusions of law and the judgment, however, fix the liability of the defendants as joint and several, from which the conclusion would seem fully justified that it was not the theory of the trial court that the contractual relation between the defendants in the transactions involved in the controversy was that of principal and agent.

[7] The theory of the decision, as indicated by the conclusions of law and the judgment, is that the relation was of that nature which made the defendants jointly and severally liable; and the only legal relation between two or more persons combined together to carry on a business or some particular transaction is either that of a partnership or a joint adventure. Hence, the only permissible conclusion from the conclusions of law and the judgment is that the court proceeded upon the hypothesis that the business of buying the turkeys was conducted by the defendants either as partners or joint adventurers, albeit the law in this state is that the liability of partners is joint, and not joint and several (Civ. Code, § 2442; *Iwanga v. Hagopian*, 39 Cal. App. 584, 179 P. 523;

Berringer v. Krueger [Cal. App.] 232 P. 467), which, however, is a matter of no consequence to this discussion, since the judgment does not hold the defendants to the liability arising from the relation of principal and agent. The findings not being specific as to the nature of the relation between the defendants, or, in other words, being entirely silent on that subject, the presumption must be indulged that they support the judgment even though it is true, as stated in the former opinion, that there is no evidence in the record which would support a specific finding that the contractual relation between the defendants was such as to make their liability either joint, or joint and several. This being the situation, it is beyond the province of this court to order the court below to enter or cause to be entered judgment for and in favor of appellant. While it is true that a case will be reversed where it appears that findings vital to the judgment are devoid of sufficient support from the evidence, or that an appeal court may, where justified or required from the very character of the findings, order the trial court to enter judgment upon the findings different from the one entered, it is equally true that a reviewing court is wholly without legal authority to make a finding, even where it is clear that the evidence would support such findings only as would in legal effect be diametrically opposed to those made. *Sprague v. Walton*, 145 Cal. 228, 234, 78 P. 645.

The case of *Ewing v. Hayward*, 50 Cal. App. 708, 195 P. 970 (referred to in our original opinion) is no authority, as counsel seem to intimate in their petition, for the course which it is insisted should be pursued in the present case, to wit, reversing the judgment as to appellant and directing the court below to enter judgment for and in his favor. In that case the finding was that the defendants were jointly liable. The evidence clearly showed, according to the opinion therein, that the defendants, in the transaction which was the subject of the action, sustained the relation of principal and agent. The opinion of Mr. Justice Thomas reversed the judgment as to one of the defendants, while the opinion of Mr. Presiding Justice Finlayson, concurred in by Mr. Justice Weller, merely stated:

"The lower court, instead of requiring plaintiff to make an election at the close of the case to take judgment against the agent or * * * the * * * undisclosed principal, * * * entered judgment against both. This, I think, is ground for reversal."

Thus it will be seen that the order of Mr. Justice Thomas reversing the judgment was concurred in by his associates, but for reasons different from those for which the former conceived that the judgment should thus be nullified. The judgment of reversal contained no specific directions to the trial court

as to the course it should follow. In other words, the trial court was not ordered to enter judgment for the defendant victorious on the appeal upon the findings as made. Indeed, the effect of the judgment in that case was merely to reverse the judgment below on the ground that there was no evidence which supported the finding that the defendants were jointly liable. The judgment of this court in this case amounts to the same thing, no more and no less, adding the suggestion, however, that on a retrial, if there be one, a specific finding as to the nature of the contractual relation between the defendants in the transactions concerned here be made.

Counsel, in their petition, also complain that, in considering and disposing of the case originally, we overlooked certain evidence which they claim unquestionably sustained the position of their client at the trial and here, that the understanding was that A. C. Biggerstaff was to purchase the turkeys on his own account, and thereupon ship them to Corriea to be by him sold for the former in consideration of the commissions usual in such transactions. We did not, in the original examination of the case, overlook the evidence referred to or any other evidence disclosed by the record. There were, however, unimpeachable reasons for not making specific reference to said evidence in the original opinion. Although a matter of no legal significance here, under the peculiar circumstances of this case, it is to be observed that the effect of the evidence referred to by counsel was merely to create a substantial conflict in the evidence as to the nature of the contractual relation existing between appellant and his codefendants in the prosecution of the transactions involved herein. But the omission to consider specifically said evidence in the former opinion was clearly justified upon the reason first hereinabove explained, to wit, that even if the evidence had shown without conflict that the understanding between A. C. Biggerstaff and Corriea was that the former should purchase the turkeys on his own responsibility and ship them to the latter on consignment, it would still be in excess of the power or province, legally, of this court to order judgment for the appellant on the finding, as presumptively made, that he was jointly and severally liable with his codefendants.

[8, 9] Counsel further state that the expense of a retrial should not be had, since it is manifest that the evidence introduced at another trial of the case must necessarily be precisely the same evidence introduced at the trial with which we are here concerned. We cannot assume that such will be the case. Conceding, though, that the evidence received on a retrial of the action will be precisely the same as that received at the first trial, yet that consideration does not and cannot

alter the situation. If the theory of principal and agents in the carrying out of the transactions is still maintained by plaintiff on a retrial, and the evidence is the same and the trial court so accepts it, then there would be left open to the court below no other course than to enter judgment for the appellant, exonerating him from liability to the plaintiff, upon the proposition, as fully gone into in the former opinion, that the plaintiff, having already a judgment against the agents, cannot also have one against the principal. But, whatever may be the decision of the court below upon the question of the contractual relationship between the parties in the transactions here concerned, the findings should clearly and specifically set forth such relationship so that there can be no question from the decision as to the legal nature thereof. Of course, the parties to the action could enter into a stipulation to the effect that such findings may be founded upon the evidence as already received. This manifestly would save the expense of a retrial. This, however, is obviously a mere suggestion which the parties themselves may or may not adopt.

The petition for a rehearing is denied.

We concur: FINCH, P. J.; PLUMMER, J.

70 Cal. App. 390

**PENINSULA RAPID TRANSIT CO. v.
SANTA CLARA VALLEY LAND CO.**
(Civ. 5051.)

(District Court of Appeal, First District, Division 2, California. Dec. 26, 1924.)

1. Landlord and tenant ⇨230(1)—Complaint in action for rent held not demurrable for failure to specifically allege defendant had leased premises involved.

Petition, in action for rent due under lease, which alleged that defendant "as lessee" entered into lease, held not demurrable for failure to specifically allege that defendant leased premises involved from plaintiff.

2. Landlord and tenant ⇨230(1)—In action for rent due under lease, it is not necessary that complaint allege defendant ever had possession.

In action for rent due under lease, it is not necessary that complaint allege defendant ever had possession of premises.

3. Landlord and tenant ⇨230(1)—Complaint in action for rent held not demurrable for failure to allege defendant's promise to pay.

Complaint, in action for rent due under lease, reserving a specified rent, held not demurrable for failure to allege defendant had promised to pay rent reserved; such promise being implied from lease containing no provision obligating third person to make such payment.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by the Peninsula Rapid Transit Company against the Santa Clara Valley Land Company. Judgment on demurrer for plaintiff, and defendant appeals. Affirmed.

Edward F. Treadwell, of San Francisco (R. S. Laughlin, of San Francisco, of counsel), for appellant.

W. A. Johnston and F. L. Johnston, both of San Jose, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against it in an action for rent due under a lease. The judgment followed the entry of defendant's default. A general demurrer was interposed to the complaint and overruled. The defendant failed to answer and contends, upon appeal, that the demurrer was improperly overruled. The only point presented is as to the sufficiency of plaintiff's pleading.

The points urged in support of the demurrer are that the complaint contains no allegations that the defendant leased the premises from plaintiff; that the defendant was ever in possession of the premises or ever promised or agreed to pay the rent reserved in the lease.

The complaint alleges:

"That on or about the 31st day of March, 1923, plaintiff * * * as lessor, and defendant * * * as lessee, entered into an indenture of lease wherein and whereby the plaintiff demised and let to defendant a certain store room known as No. 3 in the Union Stage Depot located on the west side of Market street, between Santa Clara street and Post street, in the city of San Jose, county of Santa Clara, state of California, being the second most northerly store room on the ground floor in said Union Stage Depot and known as No. 25 South Market street in the city of San Jose, for the term of three years after date of completion of the building in which said room is situated, at and for the monthly rental of \$200 per month, payable monthly in advance; that said building was completed and the time of commencement of said term of said lease was May 1, 1923; that no rent has been paid under said lease since January 1, 1924, and there is now due plaintiff from the defendant rent from January 1, 1924, to May 1, 1924, in the sum of \$800, which is unpaid."

[1] Certainly this complaint is not a model of good pleading, but we do not think its deficiencies are such as to compel a reversal of this judgment. While there is no allegation, in so many words, that the defendant leased the store from plaintiff, there is an allegation that defendant, as lessee, entered into the lease. This is admitted by the demurrer, and defendant could not be the lessee under a lease unless it leased the store from plaintiff.

[2] It is not necessary for the complaint to contain an allegation that the defendant ever had possession of the premises. If the premises were leased to it, it had the right to possession and the actual possession is immaterial in an action like the one before us. 15 Cal. Jur. 838; *O'Meara v. Hables*, 163 Cal. 240, 124 P. 1003.

[3] The only remaining objection is that there is no allegation that the defendant promised to pay the rent reserved in the lease. If defendant was the lessee under a lease in which the rental reserved was a specified sum, a promise by it, as lessee, to pay said sum would be implied even if not expressed in the lease, where the lease contained no provision obligating a third person to make such payment. It was alleged that the premises were leased to defendant for a monthly rental of \$200, which is equivalent to saying that they were leased in consideration of the payment of such rental. The lease was pleaded in its legal effect. The demurrer admitted the truth of the allegations, so we must assume there was no other material provision in the lease which would change the legal effect of the same as pleaded, and therefore that there was no third person who had assumed the payment of the rental. It follows that the obligation of the lessee named in the lease to pay the rent would be implied.

The judgment is affirmed.

We concur: **NOURSE, J.; STURTEVANT, J.**

70 Cal. App. 334

Ex parte BRAIN. (Cr. 1225.)

(District Court of Appeal, First District, Division 2, California. Dec. 22, 1924.)

1. Criminal law ☞273—Plea of guilty by defendant's counsel held insufficient.

In view of Pen. Code, § 1018, specifically providing that a plea of guilty can be put in by defendant himself only in open court, a plea of guilty by defendant's attorney, there being no showing of defendant's express consent, was not a proper plea.

2. Criminal law ☞1186(4)—Court cannot determine whether substantial justice done to defendant whose counsel pleaded guilty for him, where record contains no evidence.

Where record contains no evidence as to guilt of defendant, appellate court cannot determine whether substantial justice has been meted out to defendant, whose counsel pleaded guilty for him, and hence Const. art. 6, § 4½ cannot be applied.

3. Criminal law ☞980(1)—Where no plea entered, no valid judgment can be rendered against defendant.

Where counsel pleaded guilty for defendant, it is the same as no plea, and hence no

valid judgment against defendant could be entered.

Application by Eugene A. Brain for writ of habeas corpus, prayed to be directed to the Warden of San Quentin Prison, to secure release of petitioner on the ground that no plea was entered. Writ granted.

H. E. Manning, of Vallejo, for petitioner.
U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for respondent.

LANGDON, P. J. This matter comes before us upon an application for a writ of habeas corpus. Petitioner contends that his confinement in the state prison at San Quentin, Cal., is illegal, because the judgment of conviction of the crime of burglary, by reason of which he is being restrained of his liberty, was based upon a plea of guilty, and that no such plea was ever entered by said petitioner.

From the transcript of the proceedings in the trial court, it clearly appears that the petitioner did not plead guilty, but that his attorney stated to the court:

"I believe the information has been read, if not, we will waive the reading of the information and enter a plea of guilty and make application for probation."

[1] We think this was not a proper plea in the face of the statute, which specifically provides that a plea of guilty can be put in by the defendant himself only in open court. Section 1018, Pen. Code. In the case of *People v. McCrory*, 41 Cal. 461, it was said:

"A plea confessing himself to be guilty of crime should not be entered except with the express consent of the defendant, given by him personally, in direct terms, in open court. Nothing should be left to implication, and his confession of guilt should be explicitly made by himself in person in the presence of the court."

[2] Respondent takes the position that the foregoing decision is inapplicable here because of the subsequent enactment of section 4½ of article 6 of our Constitution, which section respondent contends covers the omission in the instant case. We do not agree with this position. The record before us contains no evidence whatsoever upon the question of the guilt of petitioner, and it is impossible, therefore, to say that substantial justice has been meted out to the defendant. Section 4½ of article 6 of the Constitution could not be applied in the instant case even though we considered the error a procedural one, because of the absence of any record upon which we might judge of the guilt or innocence of the petitioner. In this respect, the instant case differs from the cases of *People v. McCalla*, 63 Cal. App. 783, 220 P. 436, and *People v. Tomskey*, 20 Cal. App. 679, 130 P. 184, wherein the defendant were tried

upon the theory that pleas of "not guilty" had been entered, when in reality no pleas had been entered. In those cases, naturally, the evidence was fully gone into, and was before the court upon appeal, so that section 4½ of article 6 of our Constitution was able to function. But here there is no plea and no evidence upon which to base a judgment of conviction.

[3] There being no plea, no valid judgment against the defendant could be entered. *People v. Corbett*, 28 Cal. 331; *People v. Gaines*, 52 Cal. 479; *People v. Monaghan*, 102 Cal. 229, 36 P. 511. In the case last cited it was said:

"That the defendant has been afforded an opportunity to plead is one of the facts in the process of the conviction of a criminal which our law, in its regard for life and liberty, requires to be expressly shown. * * *"

The petitioner is remanded to the custody of the sheriff of Ventura county for further proceedings.

We concur: NOURSE, J.; STURTEVANT, J.

70 Cal. App. 408

McADOO v. MOORE. (Civ. 4990.)

(District Court of Appeal, First District, Division 2, California. Dec. 29, 1924. Hearing Denied by Supreme Court Feb. 26, 1925.)

1. Brokers ⇨54—Broker's commission generally earned when producing purchaser according to terms of contract.

Generally a broker earns his commission when he produces a purchaser ready, able, and willing to purchase according to terms on which he was employed to sell.

2. Brokers ⇨57(1)—Broker negotiating conditional contract of sale must show that condition converting conditional sale into actual sale has occurred.

Where broker is employed to negotiate a sale and he negotiates a contract of conditional sale, he must show that condition has occurred which converts conditional sale into an actual sale before he is entitled to recover his commission.

3. Brokers ⇨57(1)—Broker held not entitled to commission on sale subject to buyer's approval where not given.

Broker, who was employed to negotiate a sale of goods, and who negotiated a contract by which goods were sold subject to buyer's approval of a sample to arrive weeks later, and which on arrival was found not to be satisfactory, and was not approved, was not entitled to his commission.

4. Brokers ⇨85(1)—Exclusion of evidence that sale had not been completed held error.

Where broker, who was employed to negotiate sale between defendant and buyer, made

sale "subject to approval of sample," exclusion of defendant's evidence in action for commissions that samples were unsatisfactory to purchaser, who thereon refused to purchase goods, was error.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by A. McAdoo against Harold Moore, doing business under the name of the Fenton Company. Judgment for plaintiff, and defendant appeals. Reversed.

Thomas, Beedy & Lanagan, of San Francisco, for appellant.

Goldman & Altman, of San Francisco, for respondent.

LANGDON, P. J. Plaintiff, as assignee of Lillenthal-Williams Company, brokers, brought this action to recover from the defendant certain commissions claimed to be due said brokers for services rendered by them in negotiating contracts of sale of merchandise, in which the defendant was the seller. The complaint contained two causes of action, but the plaintiff dismissed the first cause of action, and recovered judgment upon the second count.

There is no dispute about the facts, many of them being covered by stipulation of the parties. It was stipulated that Lillenthal-Williams Company was employed as broker to negotiate a sale between the defendant and L. H. Butcher Company. The brokers' memorandum of the transaction was introduced in evidence. It called for "35 long tons Australian Buttermilk Lactic Casein." The pertinent portion of the memorandum upon appeal is the statement that the sale was made: "Subject to approval sample shipped." The agreement between the buyer and seller (Butcher Company and the defendant) covering this transaction was dated April 2, 1923, and contained this statement: "Special conditions. Subject to approval of sample now in transit. Shipment guaranteed to be equal to said sample. Inspection allowed."

The plaintiff proved the execution of this contract for a conditional sale; that the merchandise called for was never delivered, and that the Butcher Company was ready, willing, and able to furnish a letter of credit as called for by the contract of sale, and the manager of this company stated that the company did not refuse to carry out its part of the contract, but he also stated that he did not know whether or not a sample of the merchandise was ever submitted to the company. The defendant offered testimony to the effect that samples of the merchandise were submitted by the defendant to the Butcher Company. Further testimony along this line was objected to and the objections

sustained. The defendant then offered to prove that the samples to be submitted to the purchaser under the conditional contract arrived by boat about April 24, 1923, 20 days after the agreement was entered into; that the samples were submitted to the representative of Butcher Company, who had been dealing with the defendant, and were refused by him as being unsatisfactory, and he thereupon refused to purchase the goods.

The trial court refused to admit evidence upon these matters, taking the position that, as the broker had negotiated a contract between the parties, the commission was earned regardless of whether or not the contract was ever performed. It is this ruling which is assigned as error, and which is vital to the rights of the parties hereto.

[1-3] We think the appellant's position is well taken. While it is true, generally speaking, that a broker earns his commission when he produces a purchaser ready, able, and willing to purchase according to the terms upon which he was employed to sell, a different legal situation arises where a broker is employed to negotiate a sale, as in the instant case, and negotiates a contract of conditional sale. He then is bound to show that the condition has occurred which converts the conditional sale into an actual sale—a binding contract between the parties. The contract before us is, in effect, as characterized by appellant, nothing more than an offer. This is not a case where samples were presented to the purchaser which were acceptable to him, and the goods warranted to be equal to sample. In such a case, the purchaser would have no choice but to accept the goods if they conformed to the sample. But here we have a case where the goods were sold subject to approval of a sample to arrive weeks later. When the sample arrived it was not satisfactory and was not approved. The purchaser was not bound to take the goods, and there was no valid, enforceable contract of sale and purchase between the parties.

The case, in principle, is precisely like the recent case of *Ball v. California Conserving Co.*, 189 Cal. 326, 207 P. 1011. That was an action to recover broker's commission for negotiating a sale of "tomato paste," the contract of sale containing the following provisions: "Subject this year's delivery meeting buyer's approval"; "2½ per cent. brokerage to Ball-Lockhart." The Supreme Court said:

"Appellant herein contends that as to the Russo & Co. sale the goods offered by the seller did not meet with the buyer's approval, and hence that the condition in the contract of sale in that respect not having been fulfilled, and the contract for that reason having been canceled, the plaintiff was not entitled to recover any commissions upon such sale.

"We see no answer to this contention.

"The memorandum of sale upon which the plaintiff relies for a recovery contains the express provision that the goods must meet the buyer's approval. This provision renders it an executory contract of sale upon a condition subsequent, without the fulfillment of which there could have been no completed sale under said contract. The right of the broker to recover commissions must be held to have depended upon a completed sale; and this not having been consummated it follows that the right of the plaintiff to recover his commissions under the contract with Russo & Co. must fail."

Likewise, in the instant case, there was no completed sale until the sample to be submitted to the purchaser was approved and accepted. The employment of the broker being, according to plaintiff's stipulation, to negotiate a sale, the commission was not earned by negotiating a conditional sale, the condition of which was never fulfilled.

[4] It appearing that the rejected evidence was vital to the defendant's case and determinative of its rights, its exclusion compels a reversal of the judgment.

The judgment is reversed.

We concur: NOURSE, J.; STURTEVANT, J.

70 Cal. App. 495

MOORE SHIPBUILDING CO. et al. v. INDUSTRIAL ACC. COMMISSION et al.
(Civ. 5060.)

(District Court of Appeal, First District, Division 2, California. Jan. 2, 1925. Hearing Denied by Supreme Court March 2, 1925.)

1. Master and servant ⇨416—Award apportioning compensation for disease held unauthorized for want of finding.

Finding that award for lead poisoning should be apportioned between insurance carrier for former employer and carriers for latter employer, in proportion to time employed under exposure to lead by each, held improper, where finding was that disease was contracted during latter employment, and where there was no finding that any stage of disease existed during prior employment.

2. Master and servant ⇨412 — Commission may apportion compensation only on finding disease was aggravated during each employment.

In view of requirement of Workmen's Compensation Act 1917, § 20, that Commission make findings upon all facts involved, Commission has jurisdiction to apportion compensation for occupational disease among several employers only upon finding that disease constituting the injury, as defined in section 3, subd. 4, as amended by St. 1919, p. 911, existed and was aggravated during each employment.

Proceeding under the Workmen's Compensation Act by Charles Simmons, opposed by the Moore Shipbuilding Company, employer,

and the Aetna Life Insurance Company, insurance carrier. From an order of the Industrial Commission granting an award, employer and insurance carrier bring certiorari. Award annulled.

Hearing denied in Supreme Court. All concur; LAWLOR, J., confining his concurrence to the first point discussed in the opinion, the failure to make a finding.

E. L. Stockwell and James M. Wallace, both of San Francisco, for petitioners.

Warren H. Pillsbury, of San Francisco, for respondents.

NOURSE, J. [1] This is an original proceeding in certiorari to review an order of the Industrial Accident Commission awarding compensation to Charles Simmons. The facts of the case are that for about two months immediately prior to March 6 or 7, 1924, the applicant was employed as a burner of armor plate by the petitioner Moore Shipbuilding Company. From March 7 to March 10, 1924, he was not employed, and on the latter date he entered the employ of the General Metal Supply Company for which he worked as a burner until he was disabled by lead poisoning on March 21, 1924. The petitioner Aetna Life Insurance Company was the compensation carrier for its copetitioner during the entire period of the applicant's employment by that company, and two other insurance companies were successively carriers for the General Metal Supply Company during his employment by that concern. A hearing was had before the respondent Commission, on the application of the employee for compensation, and as a result of that hearing the respondent found that, while employed as a burner by the General Metal Supply Company, the applicant "contracted lead poisoning due to exposure of fumes containing lead in the course of his work." The further finding was made that the liability for the compensation awarded to the applicant should be apportioned in accordance with the time worked by the employee "under exposure to lead," and that, the employee having worked 46 days for the Moore Shipbuilding Company and 11 days for the General Metal Supply Company, it was determined that the petitioner, Aetna Life Insurance Company, as carrier of the Moore Shipbuilding Company, should be held liable for 46.57 per cent. of the total compensation awarded.

[2] The attack of the petitioner upon the award is that it is wholly unsupported by the findings on the part of the Commission.

The point is that the jurisdiction of the Commission to apportion compensation among several employers where an employee has contracted an occupational disease during the course of the several employments can be sustained only upon a finding that the disease which constituted the "injury" defined in subdivision 4 of section 3 of the Workmen's Compensation Act (St. 1917, p. 831), as amended in Statutes 1919, page 911, existed at some stage of each prior employment. That is to say, that the power of the Commission to apportion the liability among several employers under the terms of the section cited is limited to a "case of aggravation of any disease existing prior to any such injury."

The petitioners set forth in their petition extracts of the evidence which was heard by the respondents covering the subject of the injury to the applicant, and the respondent concedes that this evidence is correctly stated. From the petition it appears that there was no evidence of any nature tending to show that the applicant had incurred or had shown any symptoms of the disease while employed by the petitioner Moore Shipbuilding Company, and the absence of such evidence was apparently in the minds of the members of the respondent Commission, when they failed to find on that fact. On the other hand, the findings are that the applicant sustained injury while employed by the General Metal Supply Company, and the apportionment of the award against the petitioner was based solely on the conjecture that, while employed by petitioner, the applicant might have contracted the disease to some extent. But the direct testimony of the applicant showed that he had no symptoms of the disease while in the employ of the petitioner.

The Commission is required to make findings upon all facts involved in the controversy (section 20, Workmen's Compensation Act of 1917), and a failure to find that an injury was sustained or that a disease was contracted during a particular employment will not support an award against the one who was the employer during that period. In this case the jurisdiction of the Commission to apportion the award rests upon a showing that the disease was contracted while in the employment of the Moore Shipbuilding Company. In this respect there is a failure in both proof and finding. It follows that the Commission exceeded its jurisdiction.

Award annulled.

We concur: LANGDON, P. J.; STURTEVANT, J.

70 Cal. App. 432

TURGEON v. BARNEY. (Civ. 5037.)

(District Court of Appeal, First District, Division 2, California. Dec. 30, 1924.)

1. Appeal and error ⇨1071(4)—That finding placed under wrong heading held not of itself ground for reversal of judgment.

Fact that finding of trial judge as to damages was placed under conclusions of law held not of itself ground for reversal of judgment.

2. Appeal and error ⇨907(2)—Presumed, in absence of evidence, that findings supported by evidence and that additional findings would be adverse to appellant.

The appellate court will presume, in the absence of evidence, as on an appeal on the judgment roll alone, that the trial court's findings of fact are supported by evidence and that additional findings, if made, would have been adverse to appellant.

3. Appeal and error ⇨1032(1)—Appellant must show claimed error was prejudicial.

Appellant must show claimed error was prejudicial.

4. Appeal and error ⇨1071(6)—Failure to find further not reversible, where further findings would be adverse to appellant.

Failure to find further is not reversible error, where further findings would be adverse to appellant's contentions.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by A. Turgeon against F. E. Barney. Judgment for plaintiff, and defendant appeals. Affirmed.

Fitzgerald & Johnson, of Gilroy, for appellant.

E. L. Nicholson, of San Jose, for respondent.

NOURSE, J. Plaintiff sued for damages for the alleged failure on the part of the defendant to use due care in the repair of an automobile. He recovered judgment in the sum of \$363, and from this judgment the defendant has appealed upon the judgment roll alone.

The points urged on the appeal are that the findings of fact are insufficient to justify the conclusions of law and judgment, and that the trial court omitted to find upon material issues. Paragraph 2 of the complaint alleged that the defendant undertook to use due care and skill in repairing the automobile. Paragraph 3 alleged that he did not use due care and skill, but, on the contrary, did his work in a careless and unworkmanlike manner and placed defective parts therein, to wit, worn gears which broke and were rendered useless within a period of two weeks thereafter. The remaining paragraphs of the complaint set out specific items of damage resulting from the alleged care-

lessness and the unworkmanlike manner in which the repairs were made. The answer denied all the allegations of the complaint, including the allegation that the defendant conducted a shop of any kind for the repair of automobiles at the time the alleged automobile was left with him for the purpose of repair, and that he then and there or at any other time undertook to use due care or skill or any care or skill in the repairing of said automobile.

The cause was tried before the court without a jury, and the trial court found in accordance with the allegations of the complaint that the defendant did conduct a shop for the general repair of automobiles, and on the day alleged he received an automobile from plaintiff to be overhauled and repaired, and that at that time he undertook to repair said automobile and to use due care and skill on the same; that he did not use due care and skill and did his work in a careless manner so that plaintiff received no benefit for the work done by the defendant and was compelled to have the said work redone. The trial court further found that as a result of the negligent work done by the defendant, the plaintiff had been deprived of the use and benefit of said automobile and had sustained damage thereby. As a conclusion of law, it was then found that plaintiff was entitled to the sum of \$363.

[1] If we understand appellant's point correctly, it seems to be that the findings are insufficient because there is no finding of fact on the money value of the damage suffered by the respondent, but that the finding on this issue is found in the conclusion of law.

"The mere fact that one finding was placed under the wrong heading would be a very feeble reason for the reversal of a judgment." *Burton v. Burton*, 79 Cal. 490, 495, 21 P. 847, 848.

[2] The other point raised by the appellant is that the trial court failed to find on the specific allegations relating to the placing of worn gears in the automobile, and that said gears broke or were rendered useless and upon the specific allegation of the money value of the alleged damage arising through the particular items which the respondent was required to pay out as the result of the appellant's alleged carelessness. The appellant has prosecuted this appeal upon the judgment roll alone. He has not, therefore, given us the benefit of any of the evidence which was before the trial court. We may therefore fairly assume that this evidence would be adverse to him upon the points urged because if it had been favorable he would have placed the facts before this court so that we would have been in a position to make an intelligent review of the issues involved. In the absence of a showing to the contrary, we must presume, therefore,

that the trial court found in accordance with the evidence that was before it, and that if more complete findings had been made they would have been adverse to the contentions of the appellant.

[3, 4] When an appeal is prosecuted on the ground that the trial court has made some error, it is essential that the appellant point out to the appellate court that he was prejudiced to his injury by the claimed error. All that is said on this appeal is that the trial court failed to find this and that. It is not claimed that the judgment was excessive or unsupported by the finding of general damages. So far as appears from anything in the record before us, if findings were made upon the particular items stressed by the appellant, such findings would have been adverse to his contentions, and a failure to find thereon is not, therefore, a ground for reversal. *Hulen v. Stuart*, 191 Cal. 562, 217 P. 750, 754.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

70 Cal. App. 515

PEOPLE v. CROTTY. (Cr. 1152)

(District Court of Appeal, Second District, Division 2, California. Jan. 7, 1925. Hearing Denied by Supreme Court March 5, 1925.)

1. Larceny ☞64(2)—Possession of stolen goods not of itself sufficient to sustain conviction.

Proof of possession of stolen goods is not of itself sufficient to sustain conviction of one charged with having stolen them.

2. Larceny ☞64(7)—Possession of stolen goods and slight additional evidence sufficient to sustain conviction.

Proof of possession of stolen goods, together with slight additional evidence, connecting accused with theft, is sufficient to sustain conviction.

3. Larceny ☞64(7)—False testimony may be considered as indicative of consciousness of guilt.

In determining whether evidence is sufficient when considered with proof of possession of stolen goods, to warrant conviction of larceny it is proper for jury to consider false testimony of defendant as indicative of consciousness of guilt.

4. Larceny ☞64(7)—Evidence in addition to proof of possession held to warrant conviction.

Where defendant contended that he found purse on street car, evidence in addition to proof of possession of stolen purse held sufficient to warrant conviction of larceny.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Charles W. Crotty was convicted of grand larceny, and he appeals. Affirmed.

Frank Allendar, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and John L. Flynn, of Los Angeles, for the People.

CRAIG, J. Appellant was convicted of grand larceny upon an information which charged that on or about the 14th day of May, 1924, in Los Angeles county, Cal., he did steal, take, and carry away from the person and immediate presence of one Carl Peterson a wallet containing \$9 in money. The sole ground of this appeal is an alleged insufficiency of evidence to sustain the judgment.

It appears that on said date, at about 6 o'clock in the afternoon, Peterson visited a market on Main street, in Los Angeles, where he purchased about 60 cents' worth of meat, for which he paid with a \$10 bill, and received change in silver which he placed in his pocket, and \$9 in currency, which he inserted in a wallet; the wallet was then placed in his hip pocket, which he buttoned before leaving the market. Peterson then walked to Third street and over Third street to Spring street, where he boarded a north-bound "W" car for his home at Eagle Rock. He testified that the car was somewhat crowded, and that he was compelled to stand about half the way home, but that he finally obtained a seat which he occupied until he arrived at the end of the line, at Annandale boulevard and Oak Grove avenue, and then when he alighted he first learned that his wallet was gone. He did not remember having seen any one on the car whom he knew. He had never known the defendant, and did not know whether or not the latter was at any time on the same car. Peterson also testified that in the wallet with the bills were some postage stamps, a receipt from the Standard Woolen Mills to which was pinned a sample of cloth, and a post office registry receipt, all of which were produced upon trial, and identified by him as the property which he lost. On the following day an officer called at Peterson's place of business with the articles above mentioned, and informed him that he had found the man who had them; there was no showing that Peterson had notified the police department of his loss.

One O'Brien, a police officer, testified that he had known the defendant for some four or five years; that he was riding in an automobile with another officer, and noticed the defendant standing in a crowd at the southeast corner of Third and Main streets,

whereupon the officer left the automobile and shadowed the defendant until the latter's arrest. He said that the defendant crossed Main street and walked in a southerly direction; the officer boarded a south-bound street car, and as it approached Fourth street the defendant got on and sat immediately back of the officer; at Fifth and Main streets both alighted, and the defendant walked westerly to Spring street, where he ran and boarded a north-bound street car; the officer followed him on the same car to First and Spring streets, where the defendant crowded through between the passengers and stepped down to the street, and crossed to the westerly side, where he took the first south-bound car. O'Brien boarded this latter car and followed the defendant through to the front open section, where he found the defendant seated with an open purse in his hands; he reached over the defendant's shoulder and took the purse from him, and as he did so the defendant had some papers and currency, which the latter threw over the rail to the street, in the middle of the block. O'Brien arrested him and took him off the car at the next corner, walked back with him, and picked up the papers, which proved to be the receipts heretofore mentioned, bearing Peterson's name. The officer testified that he did not know that the defendant had noticed him until he spoke to him on the car and arrested him.

Appellant claimed that he saw O'Brien at Third and Main streets and knew that the officer was following him from that time on until the arrest; Crotty denied that he was on Fifth street, but swore that he walked down Main street to Fourth, thence through to Spring street, boarded a north-bound car and rode to First and Spring streets, then walked to Second and Spring streets; that he had an appointment with one Joe Keating, but had forgotten at which corner he was to meet him, and that when he did not see him he boarded a south-bound car on Spring street, took a transfer, and was going home. He testified that he lived at 2037 East Seventy-Eighth street, with his mother and father; when asked upon cross-examination if he was not living at 3212 South Main street with a man named Kedion, he stated that it was not his residence, but that he went there frequently, and may have been registered at that address. He denied that he had ever seen Peterson before the preliminary examination, and claimed that as he took his seat on the car last mentioned he found the wallet in question lying on the floor near his seat, but that he had not opened it, and had not known what it contained until it was produced in the courtroom.

Crotty also testified that as he walked back after leaving the car with the officer he saw the latter stop, but did not know that he picked up anything, and he denied that he threw anything from the car except his transfer.

[1-4] The jury found the defendant guilty; hence they must be assumed to have believed the officer's testimony, and to have branded Crotty's story as untrue. In determining whether or not the evidence above recited is sufficient to sustain the verdict, the legal principles applicable are that the proof of possession of stolen goods is not in itself sufficient evidence upon which to sustain a conviction of one charged with having stolen them. *People v. Gibson*, 16 Cal. App. 347, 116 P. 987; *People v. Luchetti*, 119 Cal. 501, 51 P. 707; *People v. Childs*, 127 Cal. 363, 59 P. 768. Some evidence other than possession of the articles stolen must be produced to connect the accused with the theft; however, such additional connecting evidence may be slight, and, if it exists, the decision of the jury will not be disturbed. *People v. Vidal*, 121 Cal. 221, 53 P. 558; *People v. Cataline*, 54 Cal. App. 36, 200 P. 1060; *People v. De Vaughn*, 63 Cal. App. 513, 218 P. 1020. The giving by the defendant of false testimony may well have been regarded by the jury as in itself indicative of a consciousness of guilt. *People v. Davenport*, 17 Cal. App. 557, 120 P. 451. Appellant testified that he had seen Keating on the morning of the arrest; that the two had made an appointment to meet on Spring street just before the former was arrested; and that this man had since called upon him at the jail. However, Keating was not called as a witness to corroborate these statements. If his testimony be true that he saw O'Brien, the jury may have considered this as mitigating against him, and that his reason for boarding the different street cars was prompted by the fact that he had robbed Peterson at Third and Main streets and was attempting to elude the officers. The jury were justified in believing that the defendant threw away the papers and currency when accosted on the car, and this in itself would tend to indicate that he was guilty, and to prove that he had opened the purse and abstracted the contents, which he testified that he did not do.

We think these circumstances were sufficient to warrant the jury's conclusion that the defendant took the pocketbook from Peterson, and that he did not acquire it in the manner in which he claimed, by finding it on the street car.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

70 Cal. App. 277

FABRICIUS v. VIEIRA et al. (Civ. 2886.)

(District Court of Appeal, Third District, California. Dec. 17, 1924.)

Highways $\hookrightarrow$ 184(2, 3)—Evidence held to show driver of truck negligent in striking plaintiff, and not to show plaintiff guilty of contributory negligence as matter of law.

Evidence held to show that driver of truck was guilty of negligence in striking plaintiff, who had parked his car approximately three feet from edge of pavement, and was adjusting carburetor, and not to show as matter of law that plaintiff was guilty of contributory negligence.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Neils P. Fabricius against Antone Vieira and another. Judgment for plaintiff, and defendants appeal. Affirmed.

John J. Allen and Allen C. Cunha, both of Oakland, for appellants.

Pierce & Carlson, of Richmond, for respondent.

FINCH, P. J. The plaintiff was given judgment against the defendants for damages on account of personal injuries sustained by being struck by a truck owned by the defendant corporation, and driven by its employee, defendant Vieira, in the course of his employment. The defendants have appealed.

On a Sunday afternoon at about 3 o'clock the plaintiff, who was driving in a northerly direction along San Pablo avenue in Contra Costa county, turned off the paved part of the highway to the right and stopped his automobile. The distance from the left side of the automobile, as it stood there, to the edge of the pavement was not less than 18 inches nor more than 4 feet, according to the estimates of the witnesses at the trial. The defendant Vieira estimated the distance to be "3 feet—from 2½ to 3 feet, not over that." The plaintiff stood in a stooping position at the left side of his automobile for a few minutes adjusting the carburetor thereof, and, while he was in that position, the defendants' truck, also traveling in a northerly direction, struck the plaintiff and caused the injuries of which complaint is made. The only grounds urged for a reversal of the judgment are that the evidence does not show that the defendants were guilty of actionable negligence, and that it conclusively appears that the plaintiff was guilty of contributory negligence.

The pavement is 18 feet wide at the scene of the accident. It appears that there was nothing to have prevented the plaintiff from parking his automobile at a greater distance from the pavement, and that he made no effort to observe approaching vehicles while he

was adjusting the carburetor. Had he attempted to watch for approaching machines, he probably could have done little else, because the evidence shows there were many automobiles traveling along the pavement in either direction. Some of the witnesses testified that the truck veered to the right as it neared the plaintiff, the right front wheel leaving the pavement, and one witness, the wife of plaintiff, testified that "the truck scraped our machine as it was driving along and went off the highway." The body of the truck did not extend to either side beyond the outer line of the fenders.

There is no doubt as to the sufficiency of the evidence to show that the driver of the truck was guilty of actionable negligence which was the proximate cause of the injury. It is equally clear that the evidence does not show, as a matter of law, that the plaintiff was guilty of contributory negligence. These conclusions so clearly appear from a mere statement of the evidence that further discussion is deemed unnecessary.

The judgment is affirmed.

We concur: **HART, J.; PLUMMER, J.**

70 Cal. App. 400

WILLIAMS v. COLEMAN et al. (Civ. 4809.)

(District Court of Appeal, First District, Division 1, California. Dec. 29, 1924. Hearing Denied by Supreme Court Feb. 26, 1925.)

1. Pleading $\hookrightarrow$ 214(1) — Allegations of complaint deemed true on demurrer.

Allegations of complaint must be deemed true on demurrer.

2. Specific performance $\hookrightarrow$ 21, 24—Maker of note held entitled to specific performance of third person's agreement to pay note and hold maker harmless from loss thereon.

Where maker executed bill of sale to third person in consideration of his agreement to pay note, and to hold maker harmless from loss thereon, and third person thereafter fraudulently conveyed his property to his wife to avoid performance of obligation so assumed, and where wife was a party to the fraud, maker was entitled to specific performance in action against the wife individually and as third person's executrix.

3. Principal and surety $\hookrightarrow$ 179—Specific performance $\hookrightarrow$ 16—Maker held entitled to specific performance of third person's agreement to pay note and hold maker harmless from loss thereon without rendition of judgment against maker or payment of note by maker.

Maker, who executed bill of sale to third person in consideration of third person's agreement to pay note, and to hold maker harmless from loss thereon, could in view of Civ. Code, § 2846, sue for specific performance of agreement, though no judgment had been obtained against maker on note, and though maker had not paid note, under section 2778, subd. 1, notwithstanding subdivision 2, since third

person became, as to maker, the principal debtor with maker the surety.

4. Specific performance Ⓒ3—Rule as to granting of specific performance when no actual injury has been sustained stated.

Equity will decree specific performance of express contracts when no actual injury has as yet been sustained, but is only apprehended from the peculiar relations of the parties.

5. Specific performance Ⓒ114(1)—Complaint held one for specific performance and not creditor's bill.

Complaint against surviving wife individually and as executrix, alleging husband's agreement to pay note executed by plaintiff, and to hold plaintiff harmless from loss thereon, and husband's fraudulent conveyance of all of his property to the wife to evade performance of such agreement, and wife's title in trust for estate of deceased husband, held a complaint for specific performance of such agreement, and not a creditor's bill stating separate causes of action.

6. Pleading Ⓒ251—Amended and supplemental complaint held not defective because amended and supplemental portions were not separately stated.

Amended and supplemental complaint filed against wife individually and as executrix of husband was not defective because amended and supplemental portions were not separately stated, particularly where it was evident therefrom that supplemental portion was confined to facts occurring after husband's death.

Appeal from Superior Court, Santa Clara County; W. A. Beasley, Judge.

Action by Edwin H. Williams against Frances E. Coleman, individually and as executrix of the last will of Robert L. Coleman, deceased. Judgment for defendants, and plaintiff appeals. Reversed, with directions.

Edwin H. Williams, of San Leandro, for appellant.

Waldo F. Postel, of San Francisco, for respondents.

KNIGHT, J. Defendants' demurrers to plaintiff's second amended and supplemental complaint were sustained, with leave to amend. Plaintiff declined to amend, and thereafter judgment was entered in favor of defendants, from which judgment plaintiff has appealed.

The action was originally commenced against Robert L. Coleman and Frances E. Coleman, his wife. Subsequently Coleman died, and his wife, who was appointed executrix of his will, was, as such executrix, brought in as a party defendant.

The facts, as alleged in the second amended and supplemental complaint, are in substance as follows:

On January 1, 1916, appellant executed and delivered his promissory note to one Max Mamlock for the sum of \$11,000, payable in monthly installments of \$200, without

interest. Thereafter, on January 25, 1916, Coleman executed and delivered to appellant the following instrument:

"San Francisco, January 25, 1916.

"For and in consideration of the execution to me of a bill of sale of even date herewith I hereby undertake and agree that I will pay to Max Mamlock that certain promissory note, dated January 1st, 1916, in the principal sum of eleven thousand dollars (\$11,000.00) and signed by Edwin H. Williams, and that I will hold Edwin H. Williams harmless from any and all loss, damage or expense by reason of his having executed said promissory note in favor of Max Mamlock. A copy of said note is hereto annexed and made a part hereof.

"[Signed] Robert L. Coleman."

Coleman paid the monthly installments of the Mamlock note as they fell due for 18 months, paying in all the sum of \$3,600, but thereafter failed to make payments. On September 13, 1917, Mamlock commenced suit against appellant and Coleman, to collect the balance due on the note, and both defendants were served with summons. Two days after the commencement of that suit, to wit, on September 15, 1917, appellant served Coleman with written notice, apprising him of the commencement of said suit and demanding that he (Coleman) "appear and defend the same on behalf of the undersigned." Said notice further stated:

"In the event of your failure so to do you will be held responsible for all damages resulting from your negligence."

It is then alleged in said complaint that Coleman refused and neglected to defend said action on behalf of appellant "but up to the time of his death * * * sought by demurrer to have said action dismissed as to said defendant, decedent, Robert L. Coleman, and continued as to this plaintiff (appellant) only," and that since Coleman's death his widow, as such executrix, has followed a like course. Allegations are then made relating to the death of Coleman, the admission of his will to probate, and the appointment of his wife, Frances E. Coleman, as the executrix thereof; also that in the petition for probate of the will "it was falsely and fraudulently alleged that said Robert L. Coleman left estate valued at less than \$100"; that appellant in due course presented a claim against said estate, and upon information and belief it is alleged that the claim was rejected. Said complaint then charges that following the execution and delivery of the "indemnity agreement" of January 25, 1916, Coleman transferred the property standing in his name to his wife, "without any consideration," and "for the purpose of concealing and sequestering the same," so as to leave no assets with which to meet his obligations, and "so that it would be impossible to enforce any money judgment which might be rendered against him," and

particularly for the purpose of defeating the Mamlock indebtedness; that after said transfers were made the said Coleman "became, and was and up to the time of his death remained, insolvent." Averments then follow:

"That said Frances E. Coleman at the time of the death of said Robert L. Coleman and at all times herein mentioned held in trust for said Robert E. Coleman, for said purposes, real property situate in the county of Santa Clara" which is particularly described in said complaint; that the interest of said Coleman, in said property, at the time of his death and prior thereto, amounted, in value, to upwards of \$15,000, "and that said property was at the time of his death held for him by said Frances E. Coleman for the purpose of avoiding and defeating the claims of creditors and particularly the claim of plaintiff against him."

It is also further alleged that since January 25, 1916, Coleman transferred, to his wife, without consideration, "large amounts of personal property with intent and purpose to hinder, delay, and defraud the creditors of said Robert L. Coleman, and especially plaintiff; that among other items of personal property so transferred" was the sum of \$15,000, received as the proceeds of a sale of a taxicab business; that for like purpose Coleman from time to time deposited large sums of money in the bank, believed by plaintiff to be \$15,000, to the credit of his wife's account, and that she received, accepted, converted, and used the same. Plaintiff then goes on to allege, upon information and belief, that, unless the said Frances E. Coleman is restrained by the order of court from doing so, she will "transfer and incur the property so held in trust for said Robert L. Coleman and put the same beyond reach of his creditors, and that plaintiff has no adequate remedy at law." Lastly, plaintiff alleges that he has incurred attorneys' fees in said matter which he alleges are of the reasonable value of \$250.

The prayer of said complaint is that, the court decree, first, that said "Frances E. Coleman, executrix, * * * exonerate plaintiff from the said liability of the said Max Mamlock, and direct said Frances E. Coleman, executrix, to pay the said amount due on said instrument of indemnity, and to pay the installments" that shall thereafter become due. Second, that said Frances E. Coleman be directed "to promptly pay each and all the installments of said note as the same come due, and in that behalf to render the plaintiff herein good and ample security for the faithful performance" of said obligation. Third, "that said Frances E. Coleman, individually be declared trustee of said Frances E. Coleman, executrix * * * and she be restrained from transferring, incumbering, or taking out of the jurisdiction of the court, any of the property held by her in trust for said Robert L. Coleman." Fourth, for general relief, and costs.

The defendant Frances E. Coleman interposed two demurrers, substantially the same in form; one being filed as an individual defendant, and the other in her capacity as executrix. The demurrers are lengthy, embodying 12 separate general grounds besides 11 assignments of ambiguity. The record does not disclose the particular grounds upon which the demurrers were sustained, but we assume they were the ones now stressed by respondent on appeal, and to those grounds we have given our attention.

[1, 2] We believe the demurrers should have been overruled and the defendant required to answer. In a proceeding on demurrer, such as this, the allegations of the complaint must, of course, be deemed to be true. Considering the facts alleged from that viewpoint, it appears that plaintiff made a bill of sale to Coleman in consideration for which Coleman agreed in writing to relieve plaintiff from the payment of the Mamlock debt. Afterwards Coleman, for the very purpose of avoiding such written obligation, fraudulently disposed of and sequestered all his property by transferring the same to his wife, who was a party to the fraud, and who at the time of the commencement of this action still held title to the same. Coleman then ceased making further payment on the Mamlock debt, and Mamlock sued to collect the balance due. Although obligated in writing to hold plaintiff harmless from said debt, Coleman, so the complaint alleges, attempted to relieve himself from the effect of the Mamlock suit and fasten the responsibility thereof upon plaintiff. Surely, under such circumstances, plaintiff was entitled to relief, and, if unable to secure it through an action at law, was justified in resorting to equity to compel the specific performance of the Coleman contract.

[3, 4] Respondent contends that plaintiff was not legally authorized to commence proceedings against Coleman until Mamlock had obtained a judgment against plaintiff, or until plaintiff had paid the debt. The law does not uphold such contention. Coleman having assumed the payment of the Mamlock debt became, so far as plaintiff was concerned, the principal debtor, and plaintiff the surety (Roberts v. Fitzallen, 120 Cal. 482, 52 P. 818; Hopkins v. Warner, 109 Cal. 133, 41 P. 868; Tulare Bank v. Madden, 109 Cal. 312, 41 P. 1092; 1 Jones on Mortgages, § 11), and plaintiff as surety was empowered to compel Coleman as principal to perform the obligation when due (section 2846, Civ. Code), and was not required to defer action until Mamlock had obtained judgment against plaintiff (5 Pomeroy's Eq. Jur. § 2342; White v. Schader, 185 Cal. 606, 198 P. 19, 21 A. L. R. 499), or until plaintiff had paid the debt (Kreling v. Kreling, 118 Cal. 413, 50 P. 546; Abell v. Coons, 7 Cal. 105, 68 Am. Dec. 229). It is a well-established principle that equity will interpose to decree specific performance of ex-

press contracts when no actual injury has as yet been sustained, but is only apprehended from the peculiar relations of the parties. Story, Eq. Jur., vol. 2, § 1011 (14th Ed.). Furthermore, the Civil Code expressly provides (section 2778, subd. 1) that:

"Upon an indemnity against liability, expressly, or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable."

Plaintiff in this action is not seeking a money judgment against defendants for the amount of the Mamlock debt, but asks only that the contract be performed by Coleman; consequently subdivision 2 of said section 2778 of the Civil Code, to which we have been cited by respondent, is not applicable.

[5] We are also of the opinion that the inclusion in the complaint of the charges of the fraud regarding transfer of the real and personal property, and the allegations that Frances E. Coleman held a trust title to the real property, and of the averments that said property constituted a part of the estate of her deceased husband, do not have the effect of converting the form of action into a creditor's bill nor set up new and separate causes of action. There is but the one cause of action stated—an equitable proceeding—having for its sole object the enforcement of the plain obligation of an express contract, and to subject the promisor's property, which it is claimed was fraudulently diverted from the promisor's estate, to the fulfillment of that obligation. The form of action here followed was upheld in *Raisch v. Warren*, 18 Cal. App. 655, 124 P. 95. While that case differs from the instant one in that the proceeding there was primarily for an accounting and in which there was no fraud charged concerning the transfer of the property, these differences are not material. Both proceedings are equitable ones, brought to cause the property belonging to deceased persons to be subjected to the payment of their debts. Indeed, the element of fraud in the instant case adds more support to plaintiff's cause of action. Quoting approvingly from *Encyclopedia of Pleading and Practice*, and from *Cyc.*, the court in *Raisch v. Warren* says:

"Where the claim of complaint is purely equitable, and such as the chancellor will take cognizance of in the first instance, he will go the entire extent and inquire into obstructions in the road of enforcing the demand, and the complainant therefore, when he goes into equity to assert and liquidate his claim, may, in addition to the assertion of his claim, ask relief against the fraudulent acts of the debtor in attempting to place his estate beyond the reach of creditors.' 5 Ency. of Pl. & Pr. p. 463. The rule 'is not so strict as to deny to a party the interposition of the equity power of the court when the situation is such as to render impossible the aid of a court of law in taking the preliminary steps ordinarily treated as a condition precedent to the application for equitable relief.' 20 Cyc. pp. 692, 701."

The principles stated in that case also dispose of respondents' contention that plaintiff's suit is not maintainable until his claim has been reduced to judgment.

The allegations of fraud and of the creation of a trust title in Mrs. Coleman we think are sufficient for the purposes for which they are made. Plaintiff does not seek as the ultimate object of this suit to set aside deeds and other transfers, nor to create a trust in the technical sense represented by respondents, but, as before stated, demands that the defendant, individually, as the present title holder of the property, and as party to the fraud, and as executrix of the will of her deceased husband, subject the property now held by her, which it is claimed legally and morally belongs to, but was fraudulently diverted from, the decedent's estate, to the fulfillment of the decedent's legal obligations. What disposition the court may require defendant to make of said property, in the event that plaintiff's suit prevails, is a question that need not be answered at this time. As was said in *Raisch v. Warren*, supra.

"When a court of equity has once obtained jurisdiction, it will do complete justice by deciding the whole case.' *Watson v. Sutro*, 86 Cal. 500, 528 (24 Pac. 172, 25 Pac. 64); *Van Zile on Equity Pleading and Practice*, § 11. Just what course the court may pursue, in its disposition of the said corporation shares, after having found that they belong to the estate, need not be anticipated. It may order their sale and the proceeds to be paid to the administrator to be applied to the payment of creditors of the estate (*Emmons v. Barton*, 109 Cal. 662, 668 [42 Pac. 303]; *Shiels v. Nathan*, 12 Cal. App. 604 [108 Pac. 34]); or it may direct the defendant, administrator of the estate, to take possession of them as property of the estate and dispose of them for the benefit of the creditors of the estate."

[6] Nor do we think the complaint is defective as respondent contends because the amended and supplemental portions thereof are not separately stated, particularly in view of the fact that it is evident from the complaint that the supplemental portion thereof is confined to those facts occurring after the death of Coleman. Of course the success of plaintiff's case ultimately depends upon the amount and value of proof he may offer upon trial, and upon the extent of relief the trial court in the exercise of its judgment, sitting as a court of equity, may grant. But, as the complaint now stands, we think it legally sufficient in substance and form to entitle plaintiff to a trial thereon.

The judgment is reversed, with directions to the trial court to overrule the demurrers, and to take such further proceedings as may be necessary to a final disposition of said action.

We concur: TYLER, P. J.; ST. SURE, J.

70 Cal. App. 444

PEOPLE v. BUTTULIA. (Cr. 1195.)

(District Court of Appeal, First District, Division 2, California. Dec. 31, 1924.)

1. Criminal law ⇨1186(4)—Information failing to negative uses excepted in Volstead Act held not to require reversal.

Information which charged illegal possession of intoxicating liquor, but failed to negative the excepted uses mentioned in Volstead Act (U. S. Comp. St. Ann. Supp. 1923, § 10138¼ et seq.), *held* not to require reversal in view of Const. art. 6, § 4½, where the sole defense was an absolute denial of the possession of the liquor; no claim being made of legal possession.

2. Intoxicating liquors ⇨224—Burden rests upon prosecution to prove illegality of possession.

Illegality of possession of intoxicating liquors is a material element of offense, and burden rests upon prosecution to prove that element, in view of fact that Wright Act adopted only penal provisions of Volstead Act (U. S. Comp. St. Ann. Supp. 1923, § 10138¼ et seq.); provision making possession *prima facie* evidence of illegality being a procedural one.

3. Intoxicating liquors ⇨238(2)—Whether accused buried liquor on vacant lot adjoining his home held for jury.

Whether accused buried liquor on the vacant lot adjoining his home *held* for jury.

4. Criminal law ⇨371(10)—In prosecution for unlawful possession, evidence of sales held admissible to show constructive possession for illegal purpose.

In a prosecution for unlawful possession, where it appeared that the liquor was found buried in a vacant lot adjoining accused's home, evidence of sales of liquor by him to various persons on day mentioned in information and other dates not far removed *held* admissible to show accused's constructive possession for illegal purposes.

5. Criminal law ⇨1037(1)—Alleged misconduct of district attorney held not available as error, in absence of assignment below.

Alleged misconduct of district attorney in his closing argument to jury *held* not available as error on appeal, where accused did not assign such misconduct at the trial.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Sam Buttulia was convicted of illegally possessing intoxicating liquors, and he appeals. Affirmed.

William G. Hunt, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal by the defendant from a judgment entered upon a verdict of a jury finding him guilty of illegally possessing intoxicating liquor on the

11th day of April, 1924. Defendant admitted the charge of prior convictions of the same offense.

[1] The first point made upon appeal is that the information fails to charge a public offense because it fails to negative the excepted uses mentioned in the Volstead Act (U. S. Comp. St. Ann. Supp. 1923, § 10138¼ et seq.), in that it does not state that the liquor was not possessed by defendant in his private dwelling, occupied by him, and possessed merely for his personal use and consumption. No demurrer was interposed to the information upon this ground, and the objection is made for the first time upon appeal. We shall not attempt to differentiate this case from the federal cases relied upon by appellant any further than to point out that upon the present situation there operates the wholesome provision of section 4½ of article 6 of our Constitution. It is clear that even though the contention of appellant be upheld, the defendant was not prejudiced by the defect in the information, because his sole defense was an absolute denial of the possession of the liquor and there was no contention made that the liquor was legally possessed by him. A case similar in principle is the case of *People v. Bonfanti*, 40 Cal. App. 614, 181 P. 80. There the court discussed an information charging an assault with intent to commit rape which omitted to allege that the woman assaulted was not the wife of the defendant. While such an information did not state a public offense, it was held that after trial and conviction, where the evidence showed that the victim was not the wife of defendant, the defect in the information would not warrant a reversal of the judgment. The court said:

"An examination of the record immediately discloses that the omission in question affected the trial not at all; in fact, the trial proceeded as if the allegation were there. * * * It could not be contended, even by the defendant, that if the information had contained the statement that the victim of the assault was not his wife, the trial would have proceeded with one iota's difference from the course it took, or that the verdict of the jury or the judgment of the court would have been other than it was."

Likewise, in the instant case, we have a situation where no prejudice resulted from the error, if any, in the information, and the entire record discloses that substantial justice has been done by the verdict and judgment.

[2-4] Other specifications of error arise in various ways from the contention of the appellant that error was committed in admitting evidence of numerous sales of liquor by the defendant to various persons, at various dates not far removed from the day mentioned in the information, and of several such sales upon said day. The circumstance-

es of this case were somewhat unusual, in that the liquor was not found in the home of defendant, but a large quantity of it was found buried in a vacant lot adjoining his home, some of it buried a few feet outside the wall surrounding his premises. There was no other dwelling place close to the spot where the liquor was buried. Whether or not the liquor had been placed there by the defendant was a question for the jury, and in an attempt to prove constructive possession of defendant and illegality of such possession, if found by the jury, the prosecution introduced evidence of numerous sales, some of them on the day charged in the information, from which the jury was asked to infer that defendant possessed the liquor, exercised control over it, and did so for an illegal purpose. But it is the position of appellant that as the Volstead Act makes possession alone prima facie evidence of illegality and shifts the burden to the defendant to show legal possession, the state had no burden of showing more than possession, and therefore the evidence complained of had no legitimate purpose in the record. This position is destroyed, basically, by the decisions in *People v. Mattos* (Cal. App.) 227 P. 974, and *People v. Silva* (Cal. App.) 227 P. 976, wherein it is held that as the Wright Act (St. 1921, p. 79) adopted only the penal provisions of the Volstead Act and as the provision making possession prima facie evidence of illegality is a procedural one, it is not the law of this state. In California, therefore, the burden rests upon the prosecution to prove the illegality of possession of intoxicating liquor and that is a material element of the offense. This case being peculiar, in that the liquor was not found in the home of the defendant, but adjoining the same, and there being no direct proof available on the question of possession, the prosecution relied upon circumstances to prove the possession and illegality thereof. It is clear that if the defendant was making a practice of selling liquor, that fact would tend to show that he was responsible for placing the liquor where it was found, adjoining his home, and would also tend to prove that his constructive possession of such liquor was for an illegal purpose.

The contention that the evidence is insufficient to warrant the verdict of the jury is without merit. It is true the verdict is based partly upon circumstantial evidence; but there are a great many circumstances, and they are convincing in effect, and there is nothing in the record which casts doubt upon the inference to be drawn from them.

[5] The contention that error was committed by the district attorney in making certain statements in his closing argument to the jury is not available to the appellant upon this appeal. No assignment of misconduct was made by defendant at the time of

the trial so as to enable the trial judge to remedy the matter by appropriate instructions, and it has been repeatedly held that under such circumstances such errors will not warrant a reversal upon appeal. *People v. Kiser*, 24 Cal. App. 540, 141 P. 1078; *People v. Stein*, 23 Cal. App. 108, 137 P. 271; *People v. Mancuso*, 23 Cal. App. 146, 137 P. 278.

The judgment is affirmed.

We concur: STURTEVANT, J.;
NOURSE, J.

70 Cal. App. 452

SUNSET PUB. HOUSE v. COTTAGE GARDENS NURSERIES et al. (Civ. 5012.)

(District Court of Appeal, First District, Division 2, California. Dec. 31, 1924.)

Dismissal and nonsuit $\Leftrightarrow$ 60(6)—Dismissal for want of prosecution held not warranted.

Delay in prosecuting action held reasonably accounted for by attorney's affidavit, showing that it was at request, and for benefit, of defendants, who admitted indebtedness and failed to answer complaint, so that court abused discretion in dismissing action.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action by the Sunset Publishing House against the Cottage Gardens Nurseries and G. Vanden Abeele, as receiver thereof. From an order dismissing the action for want of prosecution, plaintiff appeals. Reversed.

Nelson & Ricks, of Eureka, for appellant.
Puter & Quinn and Pierce H. Ryan, all of Eureka, for respondents.

NOURSE, J. This is an appeal from an order dismissing the action on the ground of want of prosecution. The complaint was filed in the superior court of the county of Humboldt on November 22, 1918. The cause of action was a balance due the plaintiff for work and labor performed and materials furnished to the defendant, amounting to \$1,224.45. A demurrer was filed to said complaint on December 13, 1918. About this time the defendant became financially involved, and upon proceedings duly had in the superior court of that county a receiver was appointed for the defendant.

On November 9, 1921, upon application to the superior court, permission was given to the plaintiff to prosecute an action against this defendant and said receiver. Thereafter, and on December 28, 1923, new attorneys were substituted for the plaintiff herein, and on December 28, 1923, they filed an amended complaint herein adding said receiver as a party defendant. To this amended complaint the defendants demurred on January 24, 1924, and at the same time filed a motion to dismiss this action on the

ground that the plaintiff had failed to prosecute it with due diligence. The affidavit of the attorney for the defendants in support of this motion sets forth facts substantially as just recited. In answer thereto the plaintiffs filed the affidavit of their original counsel who acted as such until December 28, 1923. From this affidavit it appeared that from the 4th day of April, 1919, when the receiver was appointed, counsel for the defendants herein acted as his attorney, while the affiant acted as the attorney for the plaintiff, and that numerous meetings of the creditors of said company were called at the request of its attorneys, and that at each of said meetings plaintiff's counsel appeared and was assured by the receiver and by defendants' counsel that the receiver would soon render his report and account; that payments would be made to the creditors on account of their various claims; and that the prosecution of legal proceedings, including this action, would be unnecessary. It also appeared from said affidavit that the delay in prosecuting this proceeding was caused by the actions, conduct, and representations of counsel for said receiver, and that the defendant had not been prejudiced by the delay, but, on the other hand, it had been benefited thereby; that at each of the meetings referred to the obligation involved in this action had been repeatedly admitted, and said receiver and his counsel had repeatedly assured the plaintiff that it would be paid and satisfied. All these facts stand in the record uncontradicted. No answer has been filed to the original or amended complaint, and the debt has not been denied at any time. Upon this showing alone the trial court made its order dismissing the action from which the appeal is prosecuted. The question involved on the appeal is whether the trial court abused its discretion in dismissing the action.

From the facts recited it is apparent that the delay in prosecuting the action was caused wholly by the respondents; that, in fact, it was upon respondents' request and for their benefit that the action was not prosecuted. This fact, taken with their admission of the indebtedness upon which the suit is based and their failure to answer the allegations of the complaint, brings the case under the rule of *Ferris v. Wood*, 144 Cal. 426, 429, 77 P. 1037, where the Supreme Court say:

"It seems to us that the delay was reasonably accounted for and excused, and that the order of the court did not tend to subserve, but rather to impede or defeat, the ends of substantial justice."

In that case, as here, the debt was admitted and the delay was caused by the effort to bring about a compromise. To the same

effect is *Herman v. Pacific Jute Manufacturing Co.*, 131 Cal. 210, 63 P. 344.

Order reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

70 Cal. App. 412

EMPIRE SECURITIES CO. v. COUNTRYMAN et al. (Civ. 4967.)

(District Court of Appeal, First District, Division 2, California. Dec. 29, 1924. Hearing Denied by Supreme Court Feb. 26, 1925.)

1. Municipal corporations $\S$ 533 — Personal demand for payment of assessment against "unknown" owners unnecessary.

Where assessment for street work is made against "unknown" owners under San Francisco street improvement ordinance 1913, $\S$ 20 (No. 2439, N. S.), personal demand is not essential to validity of judgment foreclosing lien.

2. Municipal corporations $\S$ 533—Affidavit of demand for payment of assessment need not show hour and other details of demand.

Under San Francisco street improvement ordinance 1913 (No. 2439, N. S.), affidavit of person making demand for payment of assessment on premises of unknown owners need not disclose hour when demand was made or portion of premises and other details.

3. Constitutional law $\S$ 55 — Municipal improvement ordinance, declaring assessment, prima facie evidence of regularity, not unconstitutional.

San Francisco street improvement ordinance 1913 (No. 2439 N. S.), declaring that warrant, assessment, diagram, etc., shall be prima facie evidence of regularity and correctness of assessment and prior proceedings, is not unconstitutional as legislation on matters of evidence.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Suit by the Empire Securities Company against Jennie A. Countryman and Robert H. Countryman to foreclose street assessment lien. Decree for plaintiff, and defendants appeal. Affirmed.

Robert H. Countryman, of San Francisco, for appellants.

Randolph V. Whiting, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment foreclosing a lien for street work upon certain real property in the city and county of San Francisco belonging to said defendants. The action was brought by an assignee of the contractor who did the street work. One of the issues at the trial was whether the demand for payment made by the agent of the assignee on December 8, 1916, was made before or

after the assignment of the claim to plaintiff. Appellants contend that the evidence indicates that the assignment of the claim was made on December 14, 1916, six days after the demand was made, and therefore the demand was ineffective. There is no necessity to review in detail the evidence upon this question. It is sufficient to state that there was a conflict in said evidence and that the trial court found the assignment was made and filed with the board of public works of the city and county of San Francisco on December 8, 1916. There is abundant evidence in the record to support these findings, and therefore the arguments upon this point contained in the appellants' brief are useless upon an appeal.

[1] Appellants object to the judgment because no personal demand for payment was shown to have been made upon them. But the record discloses that the assessment in question was made to "unknown" owners, and section 20 of the San Francisco street improvement ordinance of 1913 (Ordinance No. 2439, N. S.) provides that, when the owner of the lot is stated as "unknown" upon the assessment, said contractor or his assignee, or some person on his or their behalf, shall publicly, in an audible tone of voice, demand payment on the premises assessed. Personal demand was therefore unnecessary. *Whiting v. Townsend*, 57 Cal. 515; *Macadamizing Co. v. Williams*, 70 Cal. 534, 12 P. 530.

[2] Appellants' contention that the affidavit of Stefani, who made the demand upon the premises, should have disclosed at what hour the demand was made and upon what portion of the premises and other details is without merit. We think these details were unnecessary. The ultimate fact is whether or not a demand was made as required by the ordinance. In *Bienfeld v. Van Ness*, 176 Cal. 585, 169 P. 225, it was said:

"The requirement as to the nature and character of the demand refers to the question whether the demand is personal, that is, upon the owner or his agent, or constructive, that is, by outcry upon the premises."

But, even though there had been defects in the affidavit of demand and nonpayment, such defects would not have invalidated the proceedings because of curative provisions of the ordinance, as pointed out in *Bienfeld v. Van Ness*, supra, wherein it is said:

"* * * The objection to the formal sufficiency of the assessment and return, or affidavit of demand and nonpayment, are all disposed of by the following provision of the ordinance: 'No assessment, warrant, diagram or affidavit of demand and nonpayment after the issue of the same, and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality or other defect in the same, where the resolution of intention of the

board of public works to recommend to the supervisors the ordering of the improvement has been actually published and posted and the notices of improvement posted as in this ordinance provided.' * * * The effect of the above curative clause of the ordinance is to make the other provisions of the ordinance respecting the form of the affidavit of demand and nonpayment of the assessment or warrant, directory only, and to prevent a failure to observe the same from having the effect of invalidating the lien upon the property."

[3] It is also contended that the ordinance involved here is unconstitutional in so far as it provides that the warrant, assessment, diagram, etc., shall be prima facie evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the board of public works and of the supervisors upon which said warrant, assessment, and diagram are based. It is urged that the charter of the city and county of San Francisco does not grant to the supervisors the power to legislate upon matters of evidence. This contention is disposed of by the cases of *Mardis v. McCarthy*, 162 Cal. 94, 100, 121 P. 389; *Federal Construction Co. v. Wolfson*, 186 Cal. 267, 276, 199 P. 512, 29 A. L. R. 1098.

There are no other matters requiring discussion, and the judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

70 Cal. App. 454

HUMBOLDT OIL CO. et al. v. HOAGLAND et al. (Civ. 5049.)

(District Court of Appeal, First District, Division 2. California. Dec. 31, 1924.)

1. Corporations —Presentation to secretary of separate signed slips containing printed call for stockholders' meeting held to comply with statute; "addressed."

Where majority of stockholders of corporation having determined necessity of meeting to remove directors, upon refusal of officers to call meeting proceeded to make a call by signing slips containing printed call and mailing them to chairman of committee elected for purpose, who presented them to secretary with demand that he call meeting, call held to comply with requirements of Civ. Code, § 310, that call be in writing and addressed to secretary; word "addressed" not requiring that secretary be formally named as addressee.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Address.]

2. Corporations —Publication of notice of stockholders' meeting need not be preceded by order of acting president.

Civ. Code, § 310, when read with section 301, does not require publication of notice of stockholders' meeting to be preceded by order of acting president; therefore meeting held legal where, on refusal of officers to call it,

notice of meeting was caused to be published by stockholders without being preceded by such order.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Proceeding for writ of mandate by the Humboldt Oil Company and others against W. W. Hoagland and others. From a judgment granting the writ, respondents appeal. Affirmed.

Wm. Kehoe and A. P. Black, both of San Francisco, for appellants.

Corbet & Selby, of San Francisco (John H. Riordan, of San Francisco, of counsel), for respondents.

NOURSE, J. The petitioners commenced this proceeding in the superior court for a writ of mandate to compel the respondents to deliver the corporation seal, the corporation books, the office furniture, money on hand, and all other property of the corporation into the possession of the petitioners. The petition was resisted by the respondents on the ground that the petitioners were not entitled to bring the action because they were not legally elected to the office of directors of the company. All the issues of fact involved were found in favor of the petitioners, and a peremptory writ of mandate was issued. From this judgment the respondents have appealed under section 953a, Code of Civil Procedure.

The only ground urged on the appeal is that the meeting of the stockholders held on November 30, 1923, was not a legal meeting because it had not been called in the manner provided by law. The facts pertinent to this appeal are that a majority of the stockholders of the corporation, having determined the necessity of holding a meeting for the purpose of removing the directors of the corporation, and the officers of the company having refused to call such a meeting, proceeded to make a call by attaching their signatures to separate pieces of paper containing a printed call for such a meeting and mailing these to the chairman of the committee of the stockholders elected for that purpose, who in turn presented them to the secretary with a demand that he call a meeting as requested by the stockholders. The secretary refused to give notice of the meeting, basing his refusal upon the ground that the call did not comply with the terms of section 310 of the Civil Code. The stockholders thereupon published due notice of the meeting to be held on November 30th, and at the meeting held in accordance with this notice more than 80 per cent. of the stockholders holding about 80 per cent. of the capital stock of the corporation were present. By a vote of 77,507 to 695, they removed the former board of directors and

elected in their places other directors who represent the petitioners in this action. The point of respondents on this appeal is that the call, or calls, for that meeting were not addressed directly to the secretary of the corporation as required by section 310, and that the publication of the notice of the meeting was not given by order of the acting president as required by section 301 of the Civil Code. These are the same grounds upon which the writ was resisted by the respondents before the trial court, and that court, after a full and impartial hearing, supported its judgment by a written opinion. Having read that opinion, we are unable to find anything in appellant's brief or oral argument which would cause us to disagree with the reasoning or conclusions of the learned trial judge. The reasons which he gave for the judgment are sufficient reasons for the affirmance of the judgment by this court.

[1, 2] We therefore approve and adopt as the opinion of this court the following portion of the opinion prepared by Judge Johnson:

"I have given further consideration in the above-mentioned action to the provisions of section 310, C. C., requiring a call for a meeting of stockholders to remove directors to be in writing and addressed to the secretary.

"The word 'addressed' is etymologically connected with the Latin word 'directus,' meaning straight or right; and primarily a thing is addressed when it is aimed straight or right.

"Among the definitions given in the Century Dictionary for the verb 'address' we find the following: 'To give direction to, as to aim a missile at an object; to direct to the ear or attention, to direct speech or writing to, to aim at the hearing or attention of.'

"And in the Standard Dictionary the word is defined as meaning: 'To direct spoken words to; to deliver or direct as an observation or communication.'

"The word 'addressed' thus signifies 'directed' or 'aimed'; and words addressed to a person are aimed at or spoken straight to him, indicating that they are meant expressly for him.

"So a written communication is addressed to, or aimed at, a person in order that it may reach him and be read by him.

"The purpose of section 310, C. C., in requiring a call to be addressed to the secretary is to bring the call to his attention so that he may read it and act upon it. I do not think that the term as used in the section should be so strictly interpreted as to require the secretary to be formally named in writing as the addressee on the face of the call itself. If a call were to be inclosed in an envelope, and the envelope inscribed with the name and office address of the secretary, and then mailed, or personally delivered to the secretary, it could hardly be said that such a call was not addressed to the secretary.

"In the case before us, the call, instead of being put into an addressed envelope, was delivered to the secretary in person and he was asked to publish it. This certainly aimed that

call at him and brought it in the most direct way to his notice. It passed into his hands, and he read it and knew what was demanded of him.

"This procedure fully accomplished the purposes of the statute; and I am of the opinion that the call so presented and received was sufficiently 'addressed' to the secretary. The secretary having received and retained the paper under the circumstances shown in evidence, neither he nor the other officers should be permitted on such hypertechnical grounds to disregard the function which the document was designed to perform.

"As to the publication itself, I do not think that section 310, when read with section 301, requires the publication to be preceded by the order of the acting president.

"The law contemplates that stockholders shall have the right to control their company; and a means is provided for their own publication of their call, when the secretary does not act upon their request. The reference in section 301 relating to the manner of the publication should be held to be limited to the period of publication and the paper."

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

70 Cal. App. 476

PEOPLE v. NELSON. (Cr. 1133.)

(District Court of Appeal, Second District, Division 2, California. Dec. 31, 1924. Rehearing Denied Jan. 30, 1925. Hearing Denied by Supreme Court Feb. 26, 1925.)

1. Criminal law ⇨196—Test in determining whether second information charges same offense, stated.

One test applicable to determine whether second information charges same offense as first one, is to ascertain if the evidence which is necessary to support second information, was admissible under former, and was sufficient to warrant conviction of that crime.

2. Criminal law ⇨196—Second information charging embezzlement of jewelry held not to charge same offense as first charging embezzlement of money.

Where defendant was first charged with embezzlement of money, but verdict of acquittal was directed on showing that jewelry was embezzled, a second information charging embezzlement of jewelry did not charge same offense, since evidence on second trial would not have sustained charge in first information.

3. Criminal law ⇨195(1)—Verdict of not guilty, though not stating it was because of variance, not bar to second prosecution for different offense.

Though directed verdict of not guilty did not state it was based on variance, as required by Pen. Code, § 1151, and was an acquittal on merits, where second information charged a

separate and distinct offense, such verdict did not bar second prosecution.

4. Criminal law ⇨195(1)—Failure to direct verdict because of variance, or direct that defendant be held pending new information, held not to affect legality of second prosecution for different offense.

Failure to instruct jury to acquit on ground of variance, or direct that defendant be held pending filing of new information, did not affect legality of second information and conviction thereunder, for a different and distinct offense.

5. Criminal law ⇨1172(7)—Permitting jury to determine whether variance on first trial material, if error, held favorable to defendant.

Error, if any, in permitting jury to determine whether variance on trial under former information was material, was favorable to defendant, where it was conclusively shown that information on first trial charged different offense from that shown by evidence and charged in second information.

6. Embezzlement ⇨44(1)—Evidence held to sustain conviction of embezzlement of jewelry given to defendant to sell.

In prosecution for embezzlement of jewelry given to defendant to sell, and of which he alleged he was robbed, evidence as to defendant's contradictory statements as to identity of alleged robbers and place where he was robbed, his offer of money to let him go, together with other evidence, held to sustain conviction.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Sam Nelson was convicted of embezzlement, and he appeals. Affirmed.

William M. Morse, Jr., of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

CRAIG, J. Appeal is here taken from verdicts rendered on April 11, 1924, convicting appellant of embezzlement, and finding for the people upon plea of former jeopardy.

Two informations were formerly filed in the superior court. One charged appellant with having embezzled and appropriated to his own use certain jewelry intrusted to him by one E. A. Miller. The other charged that, on or about the 28th day of June, 1923, appellant came into possession of \$1,500 lawful money of the United States of the value of \$1,500 in gold coin of the United States, of the personal property of one D. S. Maiman, which appellant, on the last-mentioned date, embezzled and converted to his own use. The two cases were consolidated and tried together, and a jury found him guilty upon the first charge of embezzlement under \$50; with that case we are not concerned on this appeal. This opinion deals with the Maiman Case only.

In the trial upon the information containing the charge of embezzlement of money, the people offered in evidence a receipt, reading as follows:

"Los Angeles, Calif., June 26, 1923.

"Received of D. S. Maiman on memorandum, one brilliant, 2.05 karat at \$450 per karat, one brill. 1.83 at \$350 per karat, and will report same not later than June 27, 1923. Sam Nelson, 433 Centennial.

"July 2, 1923, also, in addition to above received on memorandum, 3 platinum and diamond rings karat No. 11173-443500, 11643, at \$235; No. 3564-16093, 443425-11163 at \$250; No. 419-439350-11633 at \$225. One scarf pin No. 1900-4155500 at \$100. Sam Nelson, 74544."

It appeared that Nelson obtained from Maiman the two diamonds first mentioned in the memorandum for the purpose of selling them; that he returned them, but that later, on July 2d, he represented to Maiman that he had customers at Long Beach and Los Angeles, who would buy all of the jewelry described above; that Maiman thereupon delivered to Nelson the two diamonds and the other jewelry, which was then added to the memorandum. It is admitted that appellant received the jewelry, and that he agreed to sell it and pay the proceeds to Maiman or return the property. On July 4th appellant telephoned Maiman that he had been held up and robbed on the night before, and that the jewelry had been taken from him.

When the foregoing facts were presented, the trial court stated that if there had been any embezzlement, it was of property, rather than of money, and remarked that at the conclusion of the case it would direct the jury to return a verdict of acquittal on account of the variance. He then instructed the district attorney to prepare a new information conforming to the facts. It does not appear that the court instructed the jury as promised, but a general verdict was returned, in the following language: "We, the jury in the above-entitled action, find the defendant not guilty of embezzlement." Following that trial the appellant apparently remained in custody, a new complaint was sworn to and filed in the justice's court, and, following a preliminary examination thereon, he was again held to answer to the superior court, this time charged with having embezzled the jewelry of Maiman. A new information charging embezzlement of the jewelry was later filed, and the defendant was tried thereunder, upon the same evidence, and convicted.

On this appeal the principal grounds relied upon are alleged former jeopardy, that the verdict of not guilty returned in the former trial was not rendered specifically upon the ground of variance as required by section 1151 of the Penal Code, and that the trial

court erred in its instructions to the jury in this connection.

[1] In support of the plea of once in jeopardy, appellant contends that there was an identity of time, facts, evidence, and of criminal act or omission in the two Maiman Cases. He does not, nor could he, successfully contend that the second information charged the same offense as that alleged in the first one. It has repeatedly been held that one test applicable to determine the identity of the offense is to ascertain if the evidence which is necessary to support the second information was admissible under the former, and was sufficient if believed by the jury, to have warranted a conviction of that crime. 16 Corp. Jur. p. 265, § 445; *People v. Cummings*, 123 Cal. 269, 55 P. 898; *People v. Bentley*, 77 Cal. 7, 18 P. 799, 11 Am. St. Rep. 225. It is obvious that the evidence offered in the case in which this defendant was convicted would not have stood this test as applied to the prosecution of the case in which the jury found the defendant not guilty. Indeed, it was objected by appellant's own counsel upon the first trial that all of the testimony offered by the prosecution was irrelevant, incompetent, and immaterial, and that it did not tend in any manner to prove any issue in that case. Whether or not this objection was well taken, it is certain that the evidence which the people presented did not sustain the charge of an embezzlement of money, for it showed that if the defendant was guilty of any offense, it was of having embezzled jewelry.

[2] It was held in *People v. Oreileus*, 79 Cal. 178, 21 P. 724, that an allegation of assault with a deadly weapon upon a person who had never been known by the name alleged was not the same offense as that charged in a subsequent information containing the correct name and the same facts; and in *People v. Meseros*, 16 Cal. App. 277, 116 P. 679, it was said that "proof of the embezzlement or larceny of a check will not support a charge of embezzlement * * * of money." It has been established in other jurisdictions that an indictment charging embezzlement of money will not sustain a conviction upon proof of the embezzlement of horses, potatoes, or stocks, and that each is a separate and distinct offense. *State v. Dodson*, 72 Mo. 283; *State v. Crosswhite*, 130 Mo. 359, 32 S. W. 991, 51 Am. St. Rep. 571; *State v. Peck*, 299 Mo. 454, 253 S. W. 1019. It follows, therefore, that appellant was not tried in the first instance for the same offense with which he was charged in this case, and, since the offenses were not the same, his plea of having formerly been in jeopardy is without merit.

[3] The contention that this judgment should be reversed because the verdict in the first trial did not read "Not guilty by reason of variance between indictment and proof,"

as required by section 1151 of the Penal Code, is clearly untenable. It may be granted that the verdict which was rendered is an acquittal, not merely upon the ground of variance between the information and the facts proved, but upon the merits of the charge. The charge itself was embezzlement of \$1,500, and the evidence did not sustain it. As pointed out in the discussion of the contention that the plea of former jeopardy should have been sustained, the charge contained in the second information, and of which the defendant was convicted, is entirely different from that of which he was acquitted. Section 1151 reads, in part: "A general verdict upon a plea of not guilty is either 'Guilty,' or 'Not Guilty,' which imports a conviction or acquittal of the offense charged in the indictment." From this language it follows that the verdict of "Not Guilty" which was rendered merely imports an acquittal of the identical offense charged in the first information, which was a different and distinct offense from that charged in the information upon which the defendant was convicted.

[4] It is also argued that since the trial court did not instruct the jury to acquit on the ground of variance in the first case, or direct that the defendant be held upon the other charge, pending the filing of a new information, it committed error, and that he was then entitled to his discharge. Appellant cites section 1165 of the Penal Code as authority for this point. Conceding for the purposes of argument that the defendant should have been discharged upon the rendition of the verdict of acquittal, the fact remains that he was detained in custody. It might be that he would have been entitled to his discharge upon a writ of habeas corpus at any time prior to the 18th day of December, when the justice's court bound him over a second time to the superior court. However, if this second prosecution was legal, the fact that for a brief period of time between the termination of the first trial, and the filing of the complaint which instituted the second prosecution, he might have been at liberty, can have no bearing upon the legality of the filing of the second information, and the conviction of the defendant thereunder.

[5] The jury were instructed in this case that if they believed beyond a reasonable doubt that the defendant was acquitted in the former case upon the ground of variance between the information and the proof, and that such variance was material, and that the court ordered a new information to be filed because thereof, they must find the defendant not once in jeopardy. Appellant insists that this instruction was erroneous, in that it stated that the former verdict was founded upon a variance, and that they must find whether or not the variance was ma-

terial; that the determination of the nature of the verdict was a question of law for the court, and that the jury should find only whether appellant had or had not been once in jeopardy and acquitted of the same offense. In *People v. Ammerman*, 118 Cal. 23, 50 P. 15, it was said:

"It is true, also, as a general proposition, that questions of fact are exclusively with the jury, and that jeopardy is a question of fact; but where, as here, the information failed to charge any offense, it was not error to charge the jury 'that the plea of once in jeopardy is not sustained by the evidence, and your verdict on that issue will be "for the people,"' and so as to the issue of former acquittal. *People v. Varnum*, 53 Cal. 630; *People v. Helbing*, 61 Cal. 620; *People v. Clark*, 67 Cal. 99."

It is apparent that the trial court would have been authorized in directing a verdict against appellant upon the question of former jeopardy; but having submitted the question to the jury, exception is taken to its action in permitting them to determine whether or not such variance was material. We do not perceive how appellant could have been prejudiced by the instruction given. The entire record in the former trial was introduced in evidence, and became a part of the proof in this case, from which the only conclusion possible was that the embezzlement consisted, if at all, of jewelry, and that the information alleged an embezzlement of coin. This being true, if the trial court committed any error, it was favorable to appellant in so instructing the jury as to permit it to find that such variance was immaterial, and that jeopardy had attached. Appellant is not in position to raise this objection. *People v. Wilkison*, 30 Cal. App. 473, 158 P. 1067.

[6] It is further contended that the evidence is insufficient to sustain the judgment; that appellant had formerly borne a good reputation, and that his testimony was direct and credible; whereas that of the witnesses for the people was circumstantial, conjectural, and unworthy of preference to his positive statements. It was admitted that he received the jewelry, and that he did not return it, or any proceeds of a sale; it appears that he became confused, or attempted to confuse the officers, in locating the corner of the street where he claimed to have been robbed; he told Maiman that he had not had time to go to Long Beach, or to see the other customer in Los Angeles, but he told the officers that he had been to Long Beach; at one time he stated that the men who held him up were white, and at another time he stated that they were negroes; he did not know the name, address, or telephone number of the Long Beach customer, and finally stated that he was to meet him at Second and Spring streets in Los Angeles, at a barber shop, at 1 o'clock in the morning. A

police officer testified that appellant offered him \$50 to let him go. There are other discrepancies in his testimony, and from all the evidence adduced the jury may well have concluded that it was unworthy of belief, and that he had utterly failed to plausibly account for the missing diamonds. If his own testimony be rejected, which the jury were authorized to do, there is ample evidence to support the verdict and judgment.

No other points are attempted to be raised which require attention.

The judgment is affirmed.

We concur: FINLAYSON, P. J.;
WORKS, J.

70 Cal. App. 438

H. D. HALEY & CO. OF CALIFORNIA v. McVAY, County Auditor. (Civ. 2818.)

(District Court of Appeal, Third District, California. Dec. 30, 1924.)

1. Corporations ⚡672(7)—**Compliance by foreign corporation with statute need not be alleged and proved.**

Compliance by a foreign corporation with Corporation License Act 1917, § 1, as amended by St. 1921, p. 638, need not be alleged and proved in proceeding to enforce contract made with it, in view of disputable presumption raised by Code Civ. Proc. § 1963, subd. 33, that the law has been obeyed.

2. Counties ⚡47—**Authority of boards of supervisors rests on statute.**

Since boards of supervisors are creatures of statute, their authority for doing any act must be sought in the statute.

3. Counties ⚡47—**Statutory power of board of supervisors includes implied powers necessary to exercise powers expressly granted and not prohibited.**

The statutory powers of board of supervisors include implied powers necessary to exercise the powers expressly granted and not expressly or impliedly prohibited.

4. Taxation ⚡319(2)—**Presumed assessor will be guided by adjustments made by board of equalization, rather than by data upon which adjustments are based.**

It will be presumed that the assessor in assessing property will be guided by the adjustments made by the board of supervisors sitting as a board of equalization, rather than by the data upon which such adjustments are based.

5. Counties ⚡113(6)—**Officers** ⚡100(1)—**Contract of board of supervisors for timber cruise and survey to be used in equalizing property held not in excess of board's powers, and not to violate Constitution as to increasing assessor's compensation.**

Contract of board of supervisors for a cruise and estimate of timber on certain patented lands and for topographical survey and

report of such patented lands to enable board intelligently to perform duties as a board of equalization, *held* not to exceed board's powers conferred by Pol. Code, §§ 3672, 3673, 4041, subd. 15; and not to violate Const. art. 11, §§ 5, 9, by increasing assessor's compensation.

6. Counties ⚡126—**Court may not question wisdom of authorized contract of board of supervisors.**

When a board of supervisors enters into an authorized contract for services, the court may not question the wisdom of the contract with respect to compensation, in the absence of fraud or mistake.

Appeal from Superior Court, Del Norte County; Warren V. Tryon, Judge.

Application for mandamus by H. D. Haley & Co. of California, a corporation, against N. G. McVay, as Auditor of the County of Del Norte. From a judgment denying a peremptory writ, petitioner appeals. Reversed, with directions.

R. L. Shinn, of Sacramento, and George W. Howe, of Crescent City, for appellant.

James Davis, of Crescent City, for respondent.

FINCH, P. J. The board of supervisors of Del Norte county, by unanimous vote of the members thereof, adopted the following resolution:

"It being deemed by this board of supervisors that a classification of the patented timber and other lands subject to assessment and taxation in Del Norte county is necessary in order to enable this board of supervisors to promptly perform its duties when sitting as a board of equalization, it is therefore ordered that the county of Del Norte this day enter into written agreements with H. D. Haley & Co. of Portland, Oregon, for the classification of such lands on the terms and conditions as set forth in said written agreements on file with this board which written agreements are hereby referred to, and considered a part of this order and motion; the chairman is authorized to sign for the board of supervisors of Del Norte county, Cal."

On the same day two contracts were duly executed, one providing for a "cruise and estimate of all timber on such patented lands * * * as shall be hereafter designated" by the board, and the other for the "classification, topographical survey, and report of such patented lands * * * as shall be hereafter designated" by the board.

The company performed services in accordance with the terms of both contracts, and its reports thereof "were used by such board as data for the equalization of taxes in said county, during the session of said board as a board of equalization in the month of July, 1923." The company filed claims for such services, which claims were duly allowed by the board. The contracting cor-

puration thereafter assigned such claims to the petitioner herein, a corporation organized under the laws of this state. The county auditor refused to issue his warrants for the claims so allowed, and this proceeding was then instituted to compel such issuance. The court granted an alternative writ of mandate, which was duly served upon the auditor. The auditor did not file an answer, but the district attorney appeared for him at the hearing and resisted the application. Evidence was introduced in support of the application, and, after argument by counsel for the respective parties, the court rendered judgment denying a peremptory writ. This appeal is from the judgment.

[1] The petition alleges that H. D. Haley & Co., the contracting corporation, is "a corporation duly organized and existing under and by virtue of the laws of the state of Oregon." It is not alleged, nor was any proof offered to show, that such corporation had taken the required steps to authorize it to do business in this state. Section 1 of the Corporation License Act of 1917 (Stats. 1917, p. 371), as amended in 1921 (Stats. 1921, pp. 638, 640), after prescribing a fine to be imposed upon a foreign corporation for doing business in the state without complying with the statute, provides:

"In addition to the penalty herein provided every contract made by or on behalf of any such foreign corporation affecting the personal liability thereof or relating to property within the state shall be held void on its behalf and on behalf of its assigns, but shall be enforceable against it or them."

Respondent contends that the judgment must be affirmed because of the failure to allege and prove that the contracting corporation had complied with the statute. "An allegation of compliance with the statutory conditions for doing business is not necessary in a complaint by a foreign corporation. If it does not appear on the face of the complaint that plaintiff has not complied with the statute, such want of capacity to sue cannot be raised by demurrer." 7 Cal. Jur. 212; Redding, etc., Min. Co. v. Nat. Surety Co., 18 Cal. App. 488, 123 P. 544; Bernheim Distilling Co. v. Elmore, 12 Cal. App. 85, 106 P. 720; Lincoln County Bank v. Fetterman, 170 Cal. 357, 359, 149 P. 811; South Yuba Water, etc., Co. v. Rosa, 80 Cal. 333, 336, 22 P. 222. The statutory provisions under consideration in the foregoing cases did not declare a contract, executed by a foreign corporation without compliance with the statute, to be void as does the statute under discussion, but the underlying principle is the same. It is a disputable presumption "that the law has been obeyed." Code Civ. Proc. § 1963, subd. 33. "Under some statutes prohibiting foreign corporations from doing business until they have complied with the re-

quirements imposed by such statute, any contracts made without having complied with the statutory provisions are held to be absolutely void, and the statute is enforced no matter how harsh its provisions may be." Thompson on Corporations (2d Ed.) § 6707. "In actions by a foreign corporation that has complied with the statutory provisions for doing business it is not ordinarily necessary for it to allege in its complaint such compliance nor is it necessary to prove the same as a condition precedent to its right to sue. In an action by a foreign corporation to enforce a contract made with a domestic citizen, the presumption is, in the absence of evidence to the contrary, that it complied with the local laws giving it authority to enter into the contract." Id. § 6728. The foregoing rule is in accordance with the weight of authority. 14a C. J. 1358. Where a contrary rule is followed it has been held that unless the fact of the compliance of a foreign corporation with our state law is put in issue by a demurrer to the complaint, or by answer, it is waived. Valley Lumber, etc., Co. v. Driessel, 13 Idaho, 662, 93 P. 765, 15 L. R. A. (N. S.) 299, 13 Ann. Cas. 63, 68; Gem State Lumber Co. v. Sheldon, 38 Idaho, 651, 224 P. 79.

[2, 3] It is contended that the contracts are unauthorized by law and therefore void. One of the duties of boards of supervisors is "to equalize assessments." Pol. Code, § 4041, subd. 15.

"The board of supervisors of each county must meet on the first Monday of July in each year, to examine the assessment book and equalize the assessment of property in the county. It must continue in session for that purpose, from time to time, until the business of equalization is disposed of, but not later than the third Monday in July." Pol. Code, § 3672.

"The board has power, after giving notice in such manner as it may by rule prescribe, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said roll, and make the assessment conform to the true value of such property in money." Pol. Code, § 3673.

"Boards of supervisors are creatures of the statute, and the authority for any act on their part must be sought in the statute. But while their jurisdiction is confined within the statutory limits, still it includes not only the powers expressly enumerated, but also those implied powers which are necessary to the exercise of the powers expressly granted, except in the instances where such implied power is expressly or impliedly prohibited. In the exercise of their powers, supervisors are necessarily endowed with a large discretion." 7 Cal. Jur. 449.

"The board must be held to be invested with considerable discretionary power in determining what information is essential to its intelligent action, and in such matters the courts may not properly interfere unless it is apparent that the service contracted for has no possible relation whatever to a proper discharge of its func-

tions." *Skidmore v. West*, 186 Cal. 212, 219, 199 P. 497, 500.

"The board of supervisors has a right to employ persons to assist in the performance of the duties that devolve upon the supervisors; for instance, to employ a superintendent of the county hospital and of the poor farm, and other persons, to enable them to discharge their many duties as supervisors, which it is not intended they should perform personally." *Forward v. County of San Diego*, 189 Cal. 704, 709, 209 P. 993, 995.

In *Skidmore v. West*, supra, it was held that the supervisors had power to employ persons to make "an examination of certain records in certain county offices, the state surveyor general's office, and the United States land office, with relation to the parcels of real estate sold to the state for taxes delinquent prior to the year 1912, which covered a period of many years, and a report thereon to the supervisors with their recommendations as to further disposition, accompanied by lists for authorization from the state controller for sale by the tax collector, * * * for the information of the board of supervisors, with a view to further proceedings by them."

In *Maurer v. Weatherby*, 1 Cal. App. 243, 81 P. 1083, the contract under consideration was the employment of the plaintiff by the city council of Eureka to furnish "an abstract of the assessment roll of the city of Eureka, with various comparisons with the county assessment roll of Humboldt county, Cal., and with maps, and other data and information, showing a gradual rise in such properties as may be deemed undervalued in their present assessed valuations. * * * These maps, data, and information are to be of such character as will aid the council, as such, and as sitting as a board of equalization, in equalizing the assessment roll and the taxation of the properties in the city of Eureka." The court, in holding the contract valid, said:

"Boards of equalization cannot increase an assessment unless they have evidence before them justifying such increase. *Oakland v. Southern Pac. Co.*, 131 Cal. 230, 63 P. 371. When an assessment is too high the taxpayer may be depended upon to furnish the evidence upon which they may act in reducing it. But if there is an undervaluation, the assessor having recorded his best judgment on the face of the assessment roll, we have no doubt that the board may call to its aid such maps, abstracts, data, and information as will enable the members to act fairly, intelligently, and legally in equalizing assessments. They are not limited to in-

formation and data the assessor may be able or willing to furnish."

[4] Respondent relies upon the case of *Forward v. County of San Diego*, supra, which held invalid the provision of section 4041b of the Political Code, providing for the appointment by boards of supervisors of advisory boards to co-operate with county assessors in making annual appraisements of real property for taxation purposes. It was held that the effect of such appointment would be to increase the compensation of the county assessor after his election and during his term of office, contrary to section 9 of article 11 of the Constitution. It was also held that the statutory provision is violative of section 5 of the same article, in that it delegates to the supervisors the power to increase the compensation of the assessor at their discretion. The decision is inapplicable to the facts of the instant case. The data contracted to be furnished was for the purpose of enabling the supervisors intelligently to perform their duties as a board of equalization. It is true that the assessor may make use of such data in assessing property during succeeding years, but he may likewise make a similar use of any adjustment made by the board in the equalization of assessments, whatever the data may be upon which such adjustment may be made. It may be presumed that the assessor will be guided by the adjustments made by the board rather than by the data upon which such adjustments are based.

[5, 6] It must be held that the supervisors did not exceed their powers in entering into the contracts in question. As said in *Skidmore v. West*, supra, page 220 (199 P. 501):

"With the question of the wisdom of this contract in so far as the county was concerned, and especially with regard to the method and amount of compensation provided, the courts have nothing to do, in the absence of a claim of fraud or mistake. There is no pretense of any such claim in this matter. The question in this proceeding is simply one as to the power of the board."

All of the facts alleged in the petition were expressly admitted to be true by the respondent at the hearing, and his counsel stated: "The only question I am interested in is the question of law."

The judgment is reversed, with direction to the trial court to enter judgment in favor of petitioner as prayed for in the petition.

We concur: PLUMMER, J.; HART, J.

70 Cal. App. 448

CAFFARO et ux. v. ROMANI. (Civ. 4962.)

(District Court of Appeal, First District, Division 2, California. Dec. 31, 1924. Hearing Denied by Supreme Court Feb. 26, 1925.)

1. Limitation of actions ☞50(1)—Action on note held not barred by statute in view of automatic renewal clause.

Where note provided that "if not paid at maturity, it is hereby renewed from year to year at option of holders until paid," action thereon brought within eight years of original maturity *held* not barred by four-year statute (Code Civ. Proc. § 337).

2. Mortgages ☞315(2)—Marginal release on record of one county held not to release property in another.

Where note was secured by mortgage on property situated in two counties and recorded in both, release upon margin of record in one county reciting that mortgage was fully paid, *held* in view of Civ. Code, § 2938, not to effect release of property in other county.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Suit to foreclose mortgage by Louis Caffaro and wife against Albert Romani and another. From a deficiency judgment against him, named defendant appeals. Affirmed.

H. W. Zagoren, of Sacramento, for appellant.

M. Martino and John L. McVey, both of Oakland, for respondents.

LANGDON, P. J. This is an appeal by the defendant Albert Romani from a deficiency judgment against him in a suit to foreclose a mortgage upon certain real property in Alameda county. Romani borrowed money from the plaintiffs and as security executed his promissory note, dated April 16, 1913, and due in two years from date for \$1,650, payable to plaintiffs. This note contained the following clause:

"If this note is not paid at maturity it is hereby renewed from year to year at the option of the holders until paid, and during such year the maker shall not have the right to pay the same."

This note was secured by a mortgage upon real property, some of which was situated in the county of Sacramento and some of which was situated in the county of Alameda, Cal. The mortgage was duly recorded in both these counties. On May 17, 1913, the plaintiffs signed the following release upon the margin of the records of Sacramento county:

"This mortgage is fully paid, satisfied, and discharged.
Louis Caffaro.

"Francesca Caffaro.

"Signed and acknowledged before me this 17th day of May, 1913.

"C. A. Root, County Recorder."

No release was recorded in the county of Alameda, and the property situated therein was transferred to W. D. McKoy in March, 1917. McKoy was made a defendant herein, but has not appealed from the judgment of foreclosure, and so there is no question before us as to the right of plaintiffs to subject the property in Alameda county to the payment of the debt. The appeal concerns itself merely with the deficiency judgment against Romani, who claims that as to him the debt is discharged and satisfied by the written release.

[1] The appeal presents two questions. The first contention of appellant is that the action is barred by section 337, Code of Civil Procedure. This is true, unquestionably, unless the clause above quoted, automatically renewing the note from year to year, prevents the statute from running. The only case which the parties have been able to present to the court which involves a similar provision in a note is the case of Kleinsorge v. Kleinsorge, 133 Cal. 412, 65 P. 876. In that case the validity and effect of the provision in question was not directly in issue, for the opinion states that it was conceded by appellant that it was competent for the parties to provide for a renewal of the note by its own terms. The court proceeds upon the assumption that a provision such as we have in the instant case automatically renewed the note from year to year, and, apparently, saw no objection to such provision or such effect, for the opinion states:

"The note was dated August 1, 1896, and was drawn payable one year after date. It was by its terms renewed for 1897, 1898, and from August 1, 1899."

By analogy, the note in the instant case became due April 16, 1915, and was, by its terms, renewed for 1916, 1917, 1918, and 1919 and suit was brought upon it within four years from April 16, 1919.

Appellant contends that even though the note be construed as self-renewing, there should be some limit to the number of automatic renewals, and he cites the case of Wells Fargo v. Enright, 127 Cal. 669, 60 P. 439, 49 L. R. A. 647. We do not think this case supports the contention. It holds that no question of public policy is involved in the statute of limitations and the protection of said statute may be waived; that when such waiver occurs, it becomes an estoppel to plead the statute. The opinion mentions that some of the cases from other jurisdictions place a limit upon the time in which the waiver is effective, accepting the statutory period as a reasonable limitation. But in Wells Fargo v. Enright, *supra*, decision of that question is expressly withheld and the conclusion reached is based upon the fact that the action involved there was brought in time. So, in the instant case, it is unnecessary for us to announce any defi-

nite limitation upon the period for which the statute may be waived, for even though such period be measured by the period mentioned in the statute itself, this action is brought in time.

[2] The other question before us is as to the effect of the release upon the margin of the record in Sacramento county. Section 2938, Civil Code, provides:

"A recorded mortgage may be discharged by an entry in the margin of the record thereof, signed by the mortgagee, or his personal representative or assignee. * * *

The mortgage sought to be foreclosed in this case was a mortgage upon property in Alameda county and the only effective record thereof was the record in Alameda county, and no release appears upon that record in conformity with the code section above quoted, and we think such mortgage was not released by the marginal entry in Sacramento county. This conclusion also reaches the equity of the situation, for, by the testimony of the appellant himself, it appears that, by the marginal release in Sacramento county, the parties only intended to release the Sacramento property from the mortgage, because only \$750 had been paid by the mortgagor, and the parties all understood that the balance was to remain a lien upon the property in Alameda county.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

70 Cal. App. 489

PEOPLE v. COLOMBO. (Cr. 823.)

(District Court of Appeal, Third District, California. Dec. 31, 1924.)

1. Criminal law $\S$ 1144(4)—Presumed that accused would have admitted correct charge of prior conviction.

It will be presumed that accused would have admitted a prior conviction at his arraignment if it had been correctly charged, thereby excluding reference thereto under Pen. Code, §§ 1025, 1093, subd. 1.

2. Criminal law $\S$ 1202(1)—Accused arraigned on charge containing allegation of prior conviction not required to admit prior conviction of different offense.

Accused, when arraigned on a charge containing erroneous allegation of a prior conviction, is not required to state he has suffered a prior conviction of an offense other than the one charged.

3. Indictment and information $\S$ 161(3)—Amendment of count charging prior conviction held prejudicial error.

In prosecution for unlawful possession of intoxicating liquors, amendment during trial of denied count in information charging prior conviction under the Wright Act to charge prior conviction of different offense, held prejudicial

error within Pen. Code, § 1008, in view of section 1025 and section 1093, subd. 1.

4. Indictment and information $\S$ 114—Previous conviction need not be alleged with same particularity required in original charge of such offense.

Previous conviction need not be alleged with same particularity required when party is originally charged with commission of such offense, in view of Pen. Code, § 969.

5. Witnesses $\S$ 52(7)—Wife's warning to accused of sheriff's approach held properly admitted.

In prosecution for unlawful possession of intoxicating liquor, evidence of wife's warning to accused of sheriff's approach, upon which accused acted in endeavoring to dispose of liquor, was not inadmissible under Code Civ. Proc. § 1881, subd. 1; Pen. Code, § 1322, prohibiting husband or wife from being examined for or against other without other's consent, her warning not being an "admission."

6. Intoxicating liquors $\S$ 236(6½)—Evidence held to support conviction for unlawful possession of intoxicating liquor.

Evidence held to support conviction for unlawful possession of intoxicating liquor.

7. Criminal law $\S$ 1159(1)—Jury's verdict on question of fact is conclusive.

Jury's verdict on question of fact is conclusive.

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Carlo Colombo was convicted of unlawfully possessing intoxicating liquors, and he appeals from the judgment and from an order denying a new trial. Reversed, with directions.

J. B. Curtin, of Sonora, and A. S. Ormsby, of Martinez, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The information filed in this case charged the defendant with the unlawful possession of intoxicating liquor on the 13th day of January, 1924. In a separate count it charged:

"That prior to the 13th day of January, 1924, to wit the 5th day of November, 1923, defendant above named was convicted in the justice's court of Fourth township, Tuolumne county, Cal., on a charge of unlawfully having and possessing intoxicating liquors, containing in excess of one-half of 1 per cent. of alcohol, which was fit for use for beverage purposes, contrary to the provisions of the act commonly referred to as the Wright Act."

The information then concluded in the stereotyped language, "contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California."

The defendant entered a plea of not guilty and denied the prior conviction. The jury returned a verdict of guilty as charged, and found that the defendant had suffered a prior conviction of violation of the Wright Act. Stats. 1921, p. 79. This appeal is from the judgment entered on the verdict and from the order denying defendant's motion for a new trial.

The sheriff of the county testified that on the 13th day of January, 1924, he went to defendant's hotel, armed with a search warrant, for the purpose of searching the premises for intoxicating liquors; that when he drove up in his automobile the defendant's wife "hollered Charley three times very loud, or Carlo; it sounded like Charley to me"; that the witness immediately ran to the kitchen and that about the time he arrived there the defendant "dumped some liquor into the sink from a coffee pot; that the witness saw the discoloration in the sink made by the liquor and stooped over the sink and smelled the liquor; that the defendant was very pale and washed the coffee pot with a dish rag; that when the witness turned away from the sink the defendant "turned to the stove and got a pitcher of hot water and flushed it into the sink, and he flushed this stuff out"; that the witness "had considerable experience in the smelling of alcoholic liquors" and "can determine from the smell of alcoholic liquors whether it is whisky, wine, or brandy"; that the liquor turned into the sink was "corn whisky"; that there was "just a small odor of liquor" in the coffee pot after it had been washed; that he made a thorough search of the premises, but found no other intoxicating liquor except a bottle in a guest's room. It is not claimed that this bottle of liquor was in defendant's possession. The defendant denied that he heard his wife call to him, or that he had any liquor in his possession or turned any into the sink. He also denied other parts of the sheriff's testimony which it is not material here to discuss.

The last witness produced by the people was the justice of the peace of Fourth township, who identified the record of the alleged prior conviction. The complaint in that action charged that the defendant, on the 1st day of November, 1923, "did then and there willfully and unlawfully have, possess, and have in his possession equipment, ingredients, and property designed and used in the manufacture of intoxicating liquors for use for beverage purposes, said equipment consisting of a still with grain, mash, and container for the same." To this charge the defendant entered a plea of guilty on the 5th day of November, 1923. On the same day he was sentenced to pay a fine of \$500, which he immediately paid.

[1-3] The defendant objected to the introduction of the record in evidence, on the

ground that it showed a conviction of a different offense than that charged in the information. On motion of the district attorney, and over defendant's objection, the court then ordered the information amended by striking out the words thereof which are herein italicized. The record of the prior conviction was then admitted in evidence over defendant's objection.

Penal Code, section 1008 provides:

"An indictment or information may be amended by the district attorney, without leave of court, at any time before the defendant pleads. Such amendment may be made at any time thereafter, in the discretion of the court, where it can be done without prejudice to the substantial rights of the defendant."

It is clear that the amendment here allowed prejudiced the substantial rights of the defendant. He had properly denied the prior conviction alleged in the information, because the allegation thereof in the original information was not true. When a defendant is arraigned on a charge containing an allegation of a prior conviction, he certainly is not called upon to state that he has suffered a prior conviction of an offense other than the one charged. At the beginning of the trial, the information was read to the jury, including the part relating to the prior conviction, and the record of the prior conviction actually suffered had been identified by the justice of the peace as an action "charging the defendant with a violation of the provisions of what we call the Wright Act" and offered in evidence prior to the amendment to the information. It must be presumed that the defendant would have admitted the prior conviction at his arraignment if it had been correctly charged. Section 1025 of the Penal Code provides that when a prior conviction is charged "in case the defendant pleads not guilty, and answers that he has suffered the previous conviction, the charge of the previous conviction must not be read to the jury, nor alluded to on the trial." Section 1093, subdivision 1, provides that in cases where the indictment or information "charges a previous conviction, and the defendant has confessed the same, the clerk in reading it shall omit therefrom all that relates to such previous conviction." In *People v. Thomas*, 110 Cal. 41, 44, 42 P. 456, it is said that the violation of the provisions of the foregoing sections of the Penal Code "was not only erroneous, but highly prejudicial to the defendant." The prejudice to the defendant's rights in this case is in no sense less than in the case cited.

[4] Had the amendment been made before trial, with the opportunity for defendant to admit the previous conviction, his rights would not have been prejudiced thereby, and it will be sufficient to give him such opportunity before the retrial of the case. While

the charge of the prior conviction is not well expressed, as the information now reads, there is no doubt as to what is intended. "It is not necessary to allege previous convictions with the same particularity as if the party was charged originally with the commission of such offense." 31 C. J. 735. In *State v. Gilfilen*, 124 Wash. 434, 214 P. 831, the defendant was charged with the unlawful possession of intoxicating liquor, and with "having heretofore been twice convicted of a violation of the liquor laws of the state of Washington," giving the dates of such convictions and the court in which they were had. This was held a sufficient charge of the prior convictions. Section 969 of the Penal Code provides that a previous conviction of a felony may be charged by stating:

"That the defendant, before the commission of the offense charged in this indictment or information, was in [giving the title of the court in which the conviction was had] convicted of a felony."

In *Alzheimer v. State*, 165 Wis. 646, 163 N. W. 255, it is said that the prior conviction "must be alleged in the information, and if not so alleged when it is filed it may be amended on leave of court."

[5] Appellant contends that the admission of testimony to the effect that the defendant's wife warned him of the approach of the sheriff was violative of the statutory provision prohibiting a husband or wife from being examined for or against the other without the other's consent. Code Civ. Proc., § 1881, subd. 1; Pen. Code, § 1322. It is clear that the sections cited have no application. Her warning, if given, was not in the nature of an admission of anything that her husband had done, and the testimony relative thereto was not introduced as an admission by her. Such evidence was admissible only because the defendant acted upon the warning in endeavoring to dispose of the liquor alleged to have been in his possession.

[6, 7] Appellant urges that there is no evidence of the character of the alleged liquor except the smell thereof and that hence it is insufficient. The Attorney General well says:

"Smell is one of the senses by which a human being receives and records facts, the same as sight, touch, hearing and taste. It is as accurate as any of the senses. * * * It is within the common knowledge of all that the sense of taste depends to a great extent upon the sense of smell. This fact is established by the well known fact that if the nose is held, there are many materials which the sense of taste cannot distinguish."

It is not necessary, however, to decide whether the sense of smell is sufficient to determine the character of liquors. In addition to such evidence, the jury had the right to consider the defendant's actions with

relation to the warning given him, including his pale face and his act of flushing out the sink. The sheriff also testified that he observed the color of the liquor. All of this evidence, considered together, was sufficient to justify the verdict. The question for the jury to determine was one of fact upon which their verdict is conclusive on appeal. While no case has been discovered which holds that the smell of a liquor is or is not sufficient evidence of its character to justify a conviction, it has been held that a witness may testify as to the character of a liquor from its color, taste or smell. *United States v. Borkowski* (D. C.) 268 F. 408; *Finch v. State*, 120 Ga. 174, 47 S. E. 504; *Rush v. State*, 47 S. W. 585, 20 Ky. Law Rep. 673; *Nixon v. State*, 92 Neb. 115, 138 N. W. 136; *Munn v. State*, 5 Okl. Cr. 245, 114 P. 272; *Whitten v. State*, 95 Tex. Cr. R. 42, 252 S. W. 526; *Berry v. State*, 83 Tex. Cr. R. 210, 203 S. W. 901; *Glasscock v. State*, (Tex. Cr. App.) 43 S. W. 989.

The judgment is reversed, with direction to the trial court to permit the defendant to answer whether or not he suffered the alleged previous conviction.

We concur: HART, J.; PLUMMER, J.

70 Cal. App. 458

MORTON v. KOHLER & CHASE.
(Civ. 5001.)

(District Court of Appeal, First District, Division 2, California. Dec. 31, 1924. Hearing Denied by Supreme Court Feb. 26, 1925.)

1. Sales — § 359(1) — Evidence held to sustain recovery for purchase price of piano.

In action by plaintiff to recover purchase price of piano, alleged to have been purchased by defendant to whom it had been sent for repairs, evidence held to sustain finding for plaintiff.

2. Frauds, statute of — § 90(2) — Purchase of piano by defendant to whom it was sent for repairs constituted delivery, taking sale out of operation of statute.

Where defendant to whom plaintiff's piano was sent for repairs, after completing repair work, purchased such piano from plaintiff, defendant's possession changed to that of owner, and such change constituted a delivery of the piano, taking sale out of operation of statute.

3. Principal and agent — § 103(2) — Salesman held to have ostensible authority to purchase piano.

A piano salesman, placed in defendant's store for purpose of dealing with customers in regard to pianos, had ostensible authority to purchase from plaintiff piano sent there for repairs, on which authority plaintiff was entitled to rely.

4. Principal and agent ⇨171(5)—One retaining benefits of transaction by agent bound, regardless of authority.

Where defendant's salesman purchased from plaintiff a piano sent there for repairs, and defendant retained piano and refused to return it or proceeds thereof, it is bound by such purchase, regardless of authority of salesman making sale.

5. Appeal and error ⇨931(1), 1024(4)—Where affidavits conflicting, trial court's determination conclusive, and presumed that conflict resolved in favor of prevailing party.

Where affidavits on motion to vacate judgment were conflicting, and they contained the only evidence upon the subject in record, appellate court is bound by determination of trial court, and must assume that conflict was resolved in favor of prevailing party.

6. Trial ⇨6(1)—Where plaintiff not given notice of substitution of defendant's attorneys, service of notice of trial on attorneys previously acting for defendant was sufficient.

Where substitution of attorneys for defendant was made without giving written notice thereof to plaintiff or her attorneys, as required by Code Civ. Proc. § 285, plaintiff's attorneys, in giving notice of time of trial to attorneys who were acting for defendant until substitution, fulfilled their legal obligation in view of their lack of notice of substitution.

7. Costs ⇨260(4)—Penalty attached where appeal frivolous and for purpose of delay.

Where defendant had no defense whatever, and appeal is extremely frivolous and was taken for delay, a penalty will be taxed against defendant.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Cora Wallace Morton against Kohler & Chase. Judgment for plaintiff, and defendant appeals. Affirmed.

G. C. Ringole, of San Francisco (Samuel Hamburg, of San Francisco, of counsel), for appellant.

Drown, Leicester & Drown, of San Francisco, for respondent.

LANGDON, P. J. This appeal is by the defendant from a judgment against it for \$900, the alleged purchase price of a piano.

It is contended that the evidence is insufficient to sustain the judgment, and the findings are contrary to the evidence. This point is clearly without merit. The trial court found that on April 13, 1921, the defendant purchased from the plaintiff a Steinway Grand piano for \$900, which was on said day delivered to defendant, and defendant agreed to pay the purchase price thereof, but refused to do so notwithstanding plaintiff's demand for said sum. The record contains the testimony of the plaintiff that prior to April 13, 1921, the piano in question had been delivered to the defendant for the purpose of having it polished and repaired;

that on April 13, 1921, plaintiff called at the place of business of defendant. There she talked with Mr. Zeidler, Mr. Ostler, and Mr. Fleischman, persons employed by defendant. Mr. Zeidler was an agent for defendant in the piano department. Plaintiff was also introduced to Mr. Chase by Mr. Fleischman, and this is what occurred:

"They wanted to know if I would like to sell it (the piano). I had always felt as though I would like a smaller Grand, but they said, 'If you will give it to us, we will sell it, and we think we can get a good price for it.' After thinking it over, and it being in good order, I said I would take \$900 for it, and then after they had that, young Mr. Zeidler came and asked me to sign a paper."

A copy of the writing which plaintiff signed at that time was introduced in evidence, and read as follows:

"Kohler & Chase. Established 1850. April 13, 1921. For value received, I hereby sell, set over and assign all my right, title and interest in one Steinway grand piano No. —, to Kohler & Chase. I hereby certify that the above instrument is my property and free of all encumbrances. Title guaranteed. [Signed] Cora Wallace Morton. Witness: J. Crimen Zeidler."

Plaintiff testified that she never received any money for the piano, and that defendant never offered to return the instrument.

[1, 2] The foregoing, standing in the record uncontradicted, is sufficient evidence upon which to base the findings and judgment of the court. There is no occasion to discuss at length appellant's position that a memorandum of the essential terms of the contract should have been in writing, and that the sale was not taken out of the operation of the statute of frauds by delivery of the property, because the property was delivered to defendant for the purpose of repair, and not in fulfillment of a contract of sale. The piano was originally delivered to defendant for the purpose of repair, but the repair work had been completed when the contract was made on April 13, 1921, and the bill of sale was signed. At that time defendant's possession changed to the possession of an owner. The situation does not differ in principle from a case where the person engaged to do the repairing was a third person, and after the repairs were completed, the piano had been delivered by the repair man to the vendee of the plaintiff.

[3, 4] The argument that plaintiff was required to prove the actual authority of the piano salesman to make the contract for the defendant is also without merit. The persons with whom plaintiff dealt were placed in the store of defendant for the purpose of dealing with customers in regard to pianos. They certainly had ostensible authority, upon which the plaintiff was entitled to rely. Defendant is contending for a rule which

would seriously embarrass it in the conduct of its business, for if each person who deals with the Kohler & Chase Company must pause and ascertain the exact scope of the authority of the salesman negotiating the transaction, we apprehend that the trouble and uncertainty involved will cause a material decrease in the number of such transactions. But quite apart from the question of the authority of its agents, the defendant has received and retained the piano and refused to return the same or the proceeds thereof to the plaintiff, and it is bound, therefore, by the contract regardless of the authority of the agent making the same.

[5] The last argument made upon appeal is that no notice of the time of trial was served upon the attorney for the defendant five days before the time of trial, and that, therefore, the court was without jurisdiction to proceed with the trial. This point was raised by defendant upon a motion for an order vacating the judgment. Upon that motion, there was some conflict in the affidavits filed, and they contain the only evidence upon this subject in the record. We are bound by the determination of the trial court upon this question, which was against the defendant, so we must assume that all conflicts in the affidavits were resolved in favor of the plaintiff. In the light of this assumption we state the facts with reference to the matter to be: That on May 10, 1922, the defendant answered the complaint herein by and through its attorneys, Messrs. Roche and Ibos. That on September 1, 1922, the plaintiff, after giving due notice to said attorneys for defendant, moved to set the cause for trial. The cause was placed upon the reserve calendar of department 14 of the superior court, and, thereafter, on September 30, 1922, the court of its own motion fixed February 20, 1923, as the day for the trial of the action. That thereafter, on October 3, 1922, the plaintiff, through her attorneys, duly served upon the said attorneys for defendant written notice that the trial of said action was set for February 20, 1923, and the said attorneys for defendant made a written admission of service of said notice, which was duly filed on October 5, 1923. That on February 20, 1923, when said cause came on for trial, said defendant requested a continuance, and, in response to said request, and over the objection of plaintiff, the court placed the cause upon the reserve calendar, to be reset later. That on said 20th day of February, 1923, G. C. Ringole appeared in the superior court when the action was called for trial, and stated to the court that he had been called into the case, and that he desired more time to prepare for the trial, and that a continuance was had upon this statement. That the said Roche and Ibos continued to be and were the attorneys of record for the said defendant in said action, and that the attorneys for the plaintiff had

no notice or knowledge of any substitution of attorneys, but were led to believe from the statements of said G. C. Ringole that he would either be associated with the said Roche and Ibos or would be substituted thereafter as an attorney for the defendant. That no notice of substitution of attorneys was ever at any time served upon the plaintiff or her attorneys in said action, and that neither the plaintiff nor her attorneys had any notice of the filing of any such substitution, or of the fact that said G. C. Ringole had been substituted as attorney for defendant until September 5, 1923. That on March 17, 1923, the court of its own motion set the case for trial on June 11, 1923, but on that day it was again placed upon the reserve calendar, because there were many cases ahead of it on the calendar. That thereafter the clerk of the superior court notified the attorneys for the respective parties, by mail, to appear in the court on June 21, 1923, and on said 21st day of June the court set the case for trial on September 5, 1923. That on August 28, 1923, the attorneys for the plaintiff duly served upon Messrs. Roche and Ibos, as attorneys for defendant, written notice that the trial of said action was set for September 5, 1923, and said Roche and Ibos admitted service of said notice in writing, as attorneys for defendant, and said attorneys did not then nor at any time inform plaintiff or her attorneys that any one had been substituted in their place and stead as attorneys for defendant. That said last-mentioned notice was filed in the office of the clerk of said court on the 29th day of August, 1923, and on said last-named day the clerk in the office of the attorneys for plaintiff met G. C. Ringole in the city hall in San Francisco, Cal., and stated to him that said action would come on for trial on September 5, and that notice of said trial had been served on Roche and Ibos, and that said G. C. Ringole actually knew, at least as early as August 29, 1923, that the trial of said action had been set for September 5, 1923. That at the time of trial plaintiff appeared in court by her attorneys, and defendant appeared by Frederick Dubovsky, an attorney at law, who stated that he was associated with Mr. G. C. Ringole, and further stated that the defendant was not ready to proceed with the trial, and asked the court to continue the trial. That no showing was at that time made as to why the defendant was not ready to proceed with the trial, and the court informed the said Frederick Dubovsky that it would allow him time to communicate with Mr. G. C. Ringole and with the defendant, in order to bring them into court if they desired to come, and instructed the said Frederick Dubovsky to retire and so communicate with them, and to report to the court. That thereupon said Dubovsky retired from the courtroom, and shortly afterwards returned and stated that he had communicated

with Mr. G. C. Ringole, but that Mr. Ringole was not ready to proceed with the trial. That thereupon the court stated that the trial of said action would have to go on, and that thereupon said action was duly and fully tried in open court.

It seems almost idle to recite all the foregoing details with reference to the setting of the cause for trial, for the reason that the attorneys for the plaintiff were bound by law to recognize Messrs. Roche and Ibos until they received written notice of a substitution of attorneys. Section 285, Code of Civil Procedure, provides:

"When an attorney is changed, as provided in the last section, written notice of the change and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party. Until then he must recognize the former attorney."

[6] It is admitted by appellant that no written notice of substitution of attorneys was ever served upon the plaintiff or her attorneys. It appears, therefore, that the attorneys for the plaintiff, in giving the notice of time of trial to Messrs. Roche and Ibos, fulfilled their legal obligation, and the error is Mr. Ringole's in omitting to serve a notice of substitution upon the adverse party.

Our statement of facts has been unduly extended to demonstrate, not only the fallacy of Mr. Ringole's position as a matter of law, but that, as a matter of fact, he was not even prejudiced by his own omission to serve the notice of substitution, for he had actual notice of the time of trial and appeared by his associate. This additional fact has some bearing upon the question of the good faith of this appeal.

[7] This matter has been in the courts now for almost three years, during which time the plaintiff has been kept out of the purchase price of her property by a defendant who, apparently, had no defense whatever to offer to her action. The appeal is extremely frivolous, and can only have been taken for delay.

The judgment is affirmed with the addition of \$100 penalty to be taxed as costs against the appellant.

We concur: NOURSE, J.; STURTEVANT, J.

had an opportunity to proceed against him for unlawful possession.

4. Criminal law §37—One willingly complying with request of others to purchase liquor and carrying out criminal purpose of his own cannot set up defense of entrapment.

Where whole course of accused's conduct showed that he willingly complied with request of two "investigators" to procure liquor for them, for which they gave him money, and that he was voluntarily carrying out criminal purpose of his own, law of entrapment does not apply.

Application for writ of habeas corpus by Frank Moore. Denied.

Fred Forgy, of Berkeley, for petitioner.

FINLAYSON, P. J. This is an application for a writ of habeas corpus to secure the release of petitioner from detention, after a preliminary examination in the justice's court upon a complaint charging him with the crime of selling intoxicating liquor, in violation of what is generally known as the Wright Act (St. 1921, p. 79). Petitioner was bound over to the superior court for Orange county, and he now seeks his discharge upon the ground that the order holding him to answer was made without reasonable or probable cause.

The testimony, as set out in the transcript, shows substantially the following: On November 13, 1924, the date of the alleged offense, the prosecuting witnesses, two men employed as "investigators" by an organization styling itself the Anti-Saloon League, met petitioner at a pool hall in Huntington Beach. Two days previously these self-constituted "investigators," endeavoring to ascertain what places there were in Orange county where intoxicating liquors were being sold, sought an introduction to petitioner through an employee of the pool hall. Upon that occasion the prosecuting witnesses asked petitioner if he could get them some liquor. Though he replied that he could get it for them, no attempt seems to have been made by petitioner at that time to procure any intoxicants for his newly made acquaintances. Two days later, November 13, 1924, the date laid in the complaint filed against petitioner, he and the two "investigators" again met at the poolroom. Upon that occasion the Anti-Saloon League representatives asked petitioner if he could get them two bottles of whisky. In reply petitioner said that he did not know whether he could or not, but that he would try and see if he could get it. He told the "investigators" that the cost was \$3 a pint. Thereupon one of the men gave petitioner the sum of \$6. Petitioner then left the pool room, ostensibly for the purpose of getting the whisky. Returning in about 10 minutes without any liquor, he asked one of

70 Cal. App. 483

Ex parte MOORE. (Cr. 1193.)

(District Court of Appeal, Second District, Division 2, California. Dec. 31, 1924.)

1. Habeas corpus §85(1)—Evidence held sufficient to show probable cause for believing petitioner guilty of unlawful possession of intoxicating liquor.

Evidence, if insufficient to show probable cause for believing petitioner guilty of selling liquor, for which offense he was bound over to superior court, held sufficient to show probable cause for believing him guilty of possessing it unlawfully.

2. Habeas corpus §111(1)—Where evidence shows probable cause to believe accused guilty of any offense he will not be discharged.

Where evidence before committing magistrate shows probable cause to believe accused guilty of any offense, though it be an offense other than one for which he was held to answer, he will not be discharged upon habeas corpus until opportunity is afforded to cause correct charge to be preferred against him.

3. Habeas corpus §111(1)—Where evidence sufficient to show guilt of possessing liquor accused will not be released on habeas corpus.

Where evidence fails to establish probable cause for believing accused guilty of selling liquor unlawfully, for which crime he was held to answer, but was sufficient to show probable cause for believing him guilty of possessing liquor, he will not be discharged on habeas corpus, but held in custody until authorities have

the prosecuting witnesses if the latter had a "car." Upon receiving an answer in the affirmative, petitioner said that they would drive to a certain place. Guided by petitioner, he and one of the "investigators" drove to a hotel in Huntington Beach. There petitioner left the automobile, climbed a stairway leading to the hotel and was gone about 5 minutes, when he returned to the vehicle and said, "They haven't any either. This is the first time I ever went in there that I never got any liquor." Under petitioner's direction he and his companion then drove to a place in Huntington Beach known as "Brownings," but found no one there. They then parked the car at a place near by. Petitioner left the vehicle and was gone about 15 minutes, when he returned and said, "No, they have got none." The two men then drove to an appointed place where they picked up the other "investigator." Still guided by petitioner, the three men then drove to a Mr. Bickmore's place in Westminster. Petitioner told his two companions that he was quite sure that he could get some liquor at Bickmore's—that "he had never failed there." When they arrived at Bickmore's place petitioner left the car, went into Bickmore's home and in about 15 minutes returned with two bottles of whisky, which he delivered to one of the prosecuting witnesses—the one from whom he had received the \$6 at the beginning of their quest.

Petitioner's contentions are: (1) That there is no evidence that he "sold" any whisky; that the testimony shows merely that he acted as the agent for the two "investigators" in the purchase of the liquor, and that under the Volstead Act (Comp. St. Ann. Supp. U. S. 1923, § 10138¼ et seq.) the "penal provisions" of which are adopted by the Wright Act, the purchase of liquor is not a crime—citing *Singer v. United States* (C. C. A.) 278 F. 415, where the court says: "It is a crime to sell, but not a crime to purchase." (2) That if he committed any offense he was inveigled into it by the "investigators," who paid him the money with which to make the purchase.

If petitioner were entitled to a discharge merely upon a showing that the evidence is insufficient to make out a case of probable cause for believing him guilty of the specific crime for which he was held to answer—the crime of "selling" intoxicating liquor—we should entertain grave doubt as to the legality of his imprisonment. Many cases are to be found in the books, to the effect that if a defendant is in no way interested on behalf of the seller, but simply acts as agent of the prosecutor, he is not guilty of making a sale. The Texas Court of Criminal Appeals, having under consideration a state of facts somewhat similar to that presented here, held that the evidence disclosed a case of agency in the purchase of the liquor and not a "sale"

by the accused. *Givens v. State*, 49 Tex. Cr. R. 267, 91 S. W. 1090. On the other hand, the Supreme Court of Georgia and the Court of Appeals of that state have held that if it be shown that the accused received money from another person, accompanied with a request to procure intoxicating liquor for the latter, and that shortly thereafter the accused delivered the liquor to the person by whom he was given the money, a prima facie case of a sale by the accused is made out, the onus is put upon him to explain where, how, and from whom he received the liquor, and to escape criminal responsibility for making a sale he must satisfy the jury that he did not induce the transaction, that he had no profits in it, that he was not an agent of the seller, and that he acted solely as agent for the purchaser. *Mack v. State*, 116 Ga. 546, 42 S. E. 776; *Highsmith v. City of Waycross*, 7 Ga. App. 611, 67 S. E. 677; *Plummer v. State*, 8 Ga. App. 379, 69 S. E. 28.

[1-3] However, we do not find it necessary in this case to determine whether the evidence is sufficient to show probable cause for believing petitioner guilty of selling the liquor, for it unquestionably suffices to show probable cause for believing him guilty of possessing it unlawfully. "Possession," says the court in *Beyer v. United States* (C. C. A.) 282 F. 226, "is a crime separate and distinct from the crime of the sale of liquor." In title 2, § 3 (section 10138½aa) of the National Prohibition Law, it is expressly declared that "no person shall * * * possess any intoxicating liquor except as authorized in this act." Possession, therefore, except as authorized by the Volstead Act, is one of the acts which the Wright Act, by its adoption of the "penal provisions" of the federal statute, denounces as a criminal offense. It is the established rule in this state that where the evidence before the committing magistrate shows probable cause to believe the accused guilty of any criminal offense, though it be an offense other than the one for which he was held to answer, it is not proper to discharge him upon habeas corpus until the proper authorities have had an opportunity to cause the correct charge to be preferred against him. *Ex parte Keil*, 85 Cal. 309; *Ex parte Nicholas*, 91 Cal. 640; *In re Severin*, 188 Cal. 348. Therefore, if it be assumed that the evidence fails to establish probable cause for believing petitioner guilty of the crime of selling liquor unlawfully, he nevertheless should be held in custody until such time as the authorities may have an opportunity to proceed against him for unlawfully having the whisky in his possession.

[4] We do not find any merit in petitioner's second point. It may be conceded that it would be violative of sound public policy and repugnant to good morals to uphold the conviction of a person who, being entirely in-

nocent of any intention to commit a crime, was inveigled into its commission by an officer of the law or by a private detective hired for that purpose by some self-constituted guardian of the public morals. *People v. Barkdoll*, 36 Cal. App. 25. The rule that private detectives, as well as officers of the law, are not permitted to generate in the mind of a person, who is wholly innocent of any criminal purpose, the original intent to commit criminal acts which that person would not have committed or even have contemplated, but for such inducement, and that convictions based upon such conduct will not be permitted to stand, is a wholesome and salutary rule and should be enforced. But it has no application to the facts of this case. Here the facts and circumstances surrounding the transactions testified to by the witnesses before the committing magistrate are abundantly sufficient to warrant the inference that petitioner not only was willing to comply with the request that he procure the whisky, but that he had a strong personal predilection to obtain the liquor for his new-found friends. His whole course of conduct, and particularly his statements to the "investigators," such, for example, as his statement that never before had he failed to secure liquor at one of the places visited by them, fully justifies the inference that his criminal purpose to procure the whisky from some one known to him to be a vendor of intoxicating liquors took ready root in his mind, not as one passively yielding to the inducements of another, but as a willing, active, and enthusiastic co-operator in the proposed plan to secure liquor, thinking, possibly, that thereby he might attain to "an airy scene of transitory joys." It may well be inferred, therefore, that petitioner, when complying with the request that he procure the drink, was but voluntarily and intentionally carrying out a criminal purpose of his own. The law of "entrapment" is stated in a recent Idaho case as follows:

"Entrapment into the commission of a crime is not a defense in the sense of a justification or excuse for an act which otherwise would be criminal, but it resolves itself into a question of whether the accused committed any crime. If the criminal design originated with him, or if he intentionally committed or carried out his own criminal purpose, whether it originated with him or not, at the suggestion of another person, the fact that some one other than the accused facilitated the execution of the scheme, or that an officer appeared to co-operate with him, will not be a defense." *State v. Mantis*, 32 Idaho, 724, 187 P. 268.

It was held in *State v. Lucas*, 94 Mo. App. 117, 67 S. W. 971, that the fact that the prosecuting witnesses were furnished the money by citizens for the purpose of buying whisky at a particular drug store with a view to

prosecuting the seller, and that each bought the whisky with the money so furnished, is no defense. See, also, *State v. O'Brien*, 35 Mont. 482, 90 P. 514, 10 Ann. Cas. 1006.

The writ is denied.

We concur: WORKS, J.; CRAIG, J.

70 Cal. App. 424

NIGHTINGALE v. WILLIAMS, Auditor for City of Oakland. (Civ. 4853.)

(District Court of Appeal, First District, Division 2, California. Dec. 30, 1924. Hearing Denied by Supreme Court Feb. 26, 1925.)

1. Mandamus ☞101—Rule as to courts' review of allowance of claim by municipal board, stated.

When claim against public corporation is approved by duly constituted approving board, courts may examine into legality of claim to see whether it is one which such body had authority to approve; but, when action of approving body depends upon its determination of question of fact, such determination is conclusive.

2. Mandamus ☞172—In action to compel city auditor to pay claim allowed by council, legality of claim may be determined by court.

In mandamus proceeding to compel city auditor to pay claim allowed by city council, court may determine issue whether claim was legal obligation of city as matter of law.

3. Municipal corporations ☞185(11)—Suspension of policeman valid though notice thereof stated no grounds.

Where suspension of subordinate officer or employee for certain causes is authorized, but notice to him is not required, it is sufficient if legal cause exists in fact, and such cause need not be specified in order of suspension; hence suspension of police officer under Charter of City of Oakland, § 81, was not invalid, though notice of suspension stated no grounds therefor.

4. Evidence ☞83(2) —Suspension of police officer presumed legal.

Where suspended police officer of city of Oakland did not avail himself of right, under sections 81, 82, of Charter, to full hearing, it must be presumed that chief of police and commissioner performed their duties and that suspension was regularly made.

5. Municipal corporations ☞186(4)—Police-man not entitled to compensation while lawfully suspended.

Police officer lawfully suspended is not entitled on reinstatement to compensation during period of suspension.

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Action for mandamus by Charles F. Nightingale against Harry G. Williams, as Auditor of the City of Oakland. Judgment for defendant, and plaintiff appeals. Affirmed.

Crosby, Naus & Crosby, of Oakland, for appellant.

Leon E. Gray, City Atty., and Bestor Robinson, Deputy City Atty., both of Oakland, for respondent.

NOURSE, J. Plaintiff commenced this action in mandamus in the superior court of Alameda county to compel the defendant, as auditor of the city of Oakland, to draw and sign his warrant upon the treasury of that city for the amount of his salary as a member of the municipal police department during the period of his suspension from that office. The facts of the case briefly are that on July 11, 1921, the plaintiff, while a member of such police department, shot and killed one Joseph Suppro. He was immediately accused of murder and was arrested upon that charge. The chief of the police department, in pursuance to the authority given him by the municipal charter, suspended the plaintiff pending further investigation. The chief gave plaintiff due notice of this suspension and within due time reported the facts in writing to the commissioner of public health and safety, as required by the charter, and said commissioner in due time certified the fact of petitioner's suspension to the civil service board. The action of the chief of police was followed by a suspension of the plaintiff by the commissioner. From the date of his suspension until January 4, 1922, the plaintiff did not report for duty nor perform any services of the office of patrolman; did not protest to any of his superiors that his suspension was illegal and did not demand his salary for the period for which he was suspended. On January 3, 1922, the appellant was acquitted by a jury of the charge of murder and was immediately thereafter reinstated to his position in the police department. He thereafter demanded his salary for the period of his suspension, and this demand was refused by the auditor. The demand was thereafter presented to the city council, which, without a hearing of any kind, approved the claim by a four-fifths vote and ordered the auditor to draw his warrant therefor. The auditor again refused the claim, and this action results from such refusal. After a trial upon the merits, the trial court rendered judgment in favor of the defendant. From this judgment and from the order denying plaintiff's motion for judgment on the findings, the plaintiff appeals on the judgment roll and on a bill of exceptions.

It is unnecessary to consider the various motions which the appellant made during the course of the proceedings or to give particular consideration to the second appeal, because the allegations of the answer relating to the suspension of the appellant and his acquiescence therein raised an issue of both law and fact which the trial court was re-

quired to determine, and this was sufficient to support the order of the trial court denying appellant's motion for judgment on the pleadings, as well as the order on demurrer to the answer and the motion made after judgment.

The point upon which appellant bases main reliance is that the approval of the claim by the city council forecloses all inquiry by the auditor, as well as by the courts, concerning the validity of the claim. In this connection appellant insists that the rule of *Contra Costa Water Co. v. Breed*, 139 Cal. 432, 73 P. 189, compels us to hold with him on this point. The rule to which counsel refers is not the real rule of the case cited. The language which he quotes is from the minority opinion which rests on the doctrine of estoppel found in *Argenti v. San Francisco*, 16 Cal. 255, 265. This doctrine—that a public corporation may not refuse payment of a claim for service received on the ground that the claim was not incurred in a legal manner—was expressly rejected by the Supreme Court in *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96, and, in the *Contra Costa Case*, four of the members of the court refused to follow the doctrine and refused to concur in the opinion from which counsel quotes. The majority of the court in the latter case issued the mandamus on the ground that the claim was legally incurred and that the resistance of the auditor had no legal support. The only rule which can be taken from the opinions of the majority of the court in the *Contra Costa Case* applicable to this appeal is that the court will in mandamus determine the legality of the claim when resisted by the auditor and that the approval of the council after rejection by the auditor does not preclude the latter from raising the question of its invalidity.

All our authorities following the *Contra Costa Case* are in harmony with this view. See *Biggart v. Lewis*, 183 Cal. 660, 672, 192 P. 437; *Hammel v. Neylan*, 31 Cal. App. 21, 25, 159 P. 618; *Dufton v. Daniels*, 190 Cal. 577, 581, 213 P. 949; *Clinton Construction Co. of California v. Clay*, 34 Cal. App. 625, 628, 168 P. 588.

[1] The rule which we draw from the authorities is that when a claim against a public corporation is approved by the duly constituted approving body, the courts may examine into the legality of the claim to see whether it is one which such body had authority to approve; but when the action of the approving body depends upon its determination of a question of fact, such determination is conclusive. To illustrate the rule: If a claim based upon a contract for the performance of some service for a municipality is resisted on the grounds that the contract was invalid and that the work was not properly performed, the council has the authority (sometimes called jurisdiction) to

pass upon both grounds when the claim is presented for final approval. The determination of the council on the question of the performance of the work is a determination of an issue of fact, which, if the legal mode of procedure has been followed, will be taken as conclusive by the courts. But its determination of the question of the validity of the contract is but a conclusion of law which is open to review in any proper proceeding.

We have not found anything to the contrary in *Contra Costa Water Co. v. Breed*, but if that case is authority for the proposition to which it is cited by appellant, that the approval by the council is conclusive on questions of both law and fact, then the case must be held to have been overruled to that extent by the later rulings of our Supreme Court. The last expression of that court is found in *Dufton v. Daniels*, 190 Cal. 577, 580, 213 P. 949, 950, where it is said:

"The fact that the board of control in auditing claims against the state acts in a sense judicially does not preclude the issuance of a writ of mandate to control its action, where, as here, the facts are all admitted and are susceptible to but one construction. (Citing cases.) * * * It may be conceded for the purposes hereof that if there had been a disputed question of fact determined by the board upon conflicting evidence its finding thereon would be conclusive, but such is clearly not the case here." (Emphasis ours.)

[2] In view of these authorities, it necessarily follows that the trial court had jurisdiction to hear and determine the issue whether as a matter of law the claim was a legal obligation against the city. In this determination two questions of law are involved—whether the appellant was legally suspended from his office, and whether a suspended officer is entitled to the salary attached to the office during the period of suspension.

[3] On the first point the fact of suspension is conceded. The only attack on the legality of the suspension is that the appellant was not given legal notice thereof and that legal grounds therefor were not stated in the report of the chief to his superior. The appellant argues that as the notice of suspension stated that he was suspended pending further investigation, this must be deemed to be the sole ground or cause of the suspension. But this language refers to the period rather than the ground of the suspension and merely indicates that the action was temporary or for an indefinite time. Section 81 of the Oakland Charter authorizes any chief official to suspend a subordinate for incompetency, neglect of duty, or disobedience of orders, and requires such official to "report the facts" in writing to the commissioner of his department and furnish a copy "of the report" to the suspended official upon his request therefor. If the one suspended demands it, the commissioner

must hold a hearing and affirm or revoke the suspension.

The appellant was suspended by the chief of police, the officer authorized by this section. The facts were reported to the commissioner as required, but the appellant did not request a copy of the report and did not demand a hearing before the commissioner. The trial court found that the appellant was legally suspended and that, in addition thereto, he acquiesced in said suspension from the day it was made until January 4, 1922, and during that time never reported for duty, performed any service pertaining to his office, protested to his superiors, or demanded payment of his salary. The evidence fully supports these findings, but the appellant insists that the finding of legal suspension is wrong because the notice of suspension did not state the grounds therefor. The answer is that the charter does not require it to do so. As the mode prescribed in the charter is the measure of the power of the city authorities respecting the suspension of a subordinate, so is it the measure of the right of the subordinate to demand action on the part of his superior. The general and universal rule is that a subordinate officer or employee who has no fixed term of office may be suspended or removed at the pleasure of his superior or appointing officer. This power has been generally limited in respect to municipal and state officers or employees under various civil service laws. Where such laws place restrictions upon the power of suspension or removal, the authority of the superior is to that extent curtailed; but it is not necessary that he should do more than the law limiting his authority requires. Thus, where a suspension may be made for certain causes but notice thereof is not required to be given to the subordinate, it is sufficient if the legal causes exist in fact and it is not necessary to specify such causes in the order of suspension.

Two cases are discussed in the briefs as bearing upon this question, *Matter of Carter*, 141 Cal. 316, 74 P. 997, and *Bannerman v. Boyle*, 160 Cal. 197, 116 P. 732. The first involved an interpretation of the charter of the city of San Diego which authorized the mayor to remove certain officers and required him "in case of such removal" to give "written notice thereof stating the cause to the person removed." The Supreme Court held that as the charter required the notice to be given to the "person removed," the act of removal was not judicial and the court could not inquire into the sufficiency of the cause assigned. The *Bannerman* Case involved an interpretation of the San Francisco charter which provided that certain officers might be "removed by the mayor for cause." The Supreme Court held that the words "for cause," without qualification, meant legal cause, and that the power to remove was thus limited to

a showing of good cause proved upon a hearing after reasonable notice.

The provisions of the Oakland charter providing for the suspension of a subordinate and a subsequent hearing by the commissioner are similar to those of the San Diego charter considered in the Carter Case, in that the suspended official is not entitled to a notice and hearing before suspension, and therefore the court in this proceeding is not concerned with the sufficiency of the cause of the suspension.

[4] In passing, it should be pointed out that the suspended official is not deprived of his remedy by this interpretation of the charter. Section 81 of the charter authorizes the person suspended to demand and receive a full hearing before the commissioner if he is dissatisfied with the order of suspension, and section 82 provides for an appeal and hearing before the civil service board after decision by the commissioner. In both instances the person suspended would be entitled to question the sufficiency of the grounds for his suspension and could demand a full hearing. In the absence of any proceedings of this nature, we must presume that the chief of police, as well as the commissioner, duly performed their respective duties and that the suspension was regularly made.

In addition to this, the trial court found that the appellant had acquiesced in his suspension. The evidence in support of this finding is that he made no protest to any officer that his suspension was illegal; he did not follow any of the remedies provided in the charter for relief; he did not report for duty or offer to perform any official service; he did not demand any salary for the period of his suspension until he was restored to duty, but accepted without protest the voucher of his July salary up to the day of his suspension.

[5] The next question which presents itself is whether a suspended official, who does not directly attack, but who acquiesces in, the order of suspension, is entitled to the compensation attached to his office during the period of suspension. The weight of authority supports the conclusion of the trial court that the appellant was not entitled to his salary during such period. 19 R. C. L., 941; Hagan v. City of Brooklyn, 126 N. Y. 643, 27 N. E. 265; Byrnes v. City of St. Paul, 78 Minn. 205, 80 N. W. 959, 79 Am. St. Rep. 384; Cote v. Biddeford, 96 Me. 484, 52 A. 1019, 1020, 90 Am. St. Rep. 417. The appellant has not questioned this rule of law and has not raised any point on the ruling of the trial court that he was not entitled to his salary if lawfully suspended. His point is that he was unlawfully suspended and that for that reason he was entitled to his compensation. If the suspension had been

unlawful, his right to the salary would not be open to question. O'Neill v. Williams, 53 Cal. App. 1, 3, 199 P. 870. As the suspension was lawful and the appellant for that reason was not entitled to his salary, it follows that his claim for such salary was not a lawful claim against the city and the council was without authority to order it paid.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

70 Cal. App. 526

FARLEY v. STIRLING et al. (Civ. 4665.)

(District Court of Appeal, First District, Division 1, California. Jan. 8, 1925.)

1. Counties $\S$ 190(1)—County taxes may not be imposed for purpose of establishing or operating a private competitive commercial business.

County taxes may not be imposed for purpose of establishing or operating a private competitive commercial business.

2. Counties $\S$ 21½—May not exercise powers beyond those expressly granted or fairly implied, or which are not essential to declared objects and purposes.

Counties may not exercise powers beyond those expressly granted by law or fairly implied therefrom, or which are not essential to declared objects and purposes.

3. Counties $\S$ 21½ — County's manufacture and sale of poisoned barley for extermination of ground squirrels held not in excess of its authority.

County's manufacture and sale without profit to its residents of poisoned barley for use in exterminating ground squirrels held, under Const. art. 11, § 11, and Pol. Code, § 4041, subds. 26, 31, a reasonable exercise of police power, and not the unlawful engaging in private competitive commercial business.

4. Injunction $\S$ 121—Permitting defendant to amend answer to conform to proof held not error.

In action for injunction, permitting county to amend its answer to conform to proofs held not error.

5. Appeal and error $\S$ 236(2)—Litigant held not in position to complain of adverse party's amendment of pleadings to conform to proof.

Litigant, who after adverse party has amended his pleadings to conform to proof makes no request that submission of cause be set aside or that he be permitted to offer further pleadings or proof, is in no position to complain on appeal.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by Peter A. Farley against R. A. Stirling, J. B. Hickman, Horticultural Commissioner of Monterey County, and others.

Judgment for defendants, and plaintiff appeals. Affirmed.

James A. Hall, of Hemet, for appellant.
Albert Warth and Chas. B. Rosendale, both of Salinas, for respondents.

KNIGHT, J. An appeal by plaintiff from a judgment in favor of defendants, in an action brought by plaintiff, as a taxpayer of Monterey county, to enjoin said county, its supervisors, and horticultural commissioner, from manufacturing and selling therein poisoned barley to be used in the extermination of ground squirrels. Before trial the action was dismissed as to the members of the board of supervisors.

Appellant contends upon this appeal that the evidence is insufficient to support the findings and that the findings do not sustain the judgment; also, that the enterprise engaged in by the county was illegal and that taxation of property for that purpose constituted a taking of the property without due process of law in violation of section 13 of article 1 of the state Constitution and of the Fourteenth Amendment to the federal Constitution.

The trial court found that the practice here complained of was undertaken and carried on by respondents with the sole design of speedily and effectively destroying ground squirrels, and "as a sanitary and salutary measure conducive to and in promotion of the general health and economic well-being of the people of said Monterey county"; that it was impracticable for the landowners of that county to obtain enough suitable, effective, and reliable squirrel poison in the open market for the purposes stated and that the prices at which those poisons were obtainable "were so great that the farmers, ranchers and landholders of said Monterey county could not be induced to undertake the extermination of ground squirrels," thereby making it necessary for the county to provide such poisons; that the county purchased the necessary ingredients, including the poison and the grain, separately, and that the same were afterwards mixed and distributed by the county horticultural commissioner and his deputies directly to the farmers, ranchers, and landholders of said county at the actual cost of said ingredients to the county, no charge being made for mixing and distribution; that occasional sales were made through local merchants upon which a 10 per cent. commission was allowed, but that the quantity sold through said merchants was insignificant, amounting to practically nothing; that no profit was made or loss sustained by the county in the manufacture and distribution of said poisoned barley. The court further found that said undertaking by the county was not carried on as a business, nor was said poisoned barley sold at wholesale or retail quantities to the "gener-

al public" nor in the "open market." It further found that the practice complained of did not violate any of appellant's constitutional rights. From these findings the trial court concluded, as a matter of law, that appellant was not entitled to the relief prayed for and judgment was accordingly entered in favor of respondents.

The evidence, we think, is amply sufficient to support the findings. Aside from the ultimate facts set forth in the findings the evidence shows that ground squirrels, as carriers of human disease and destroyers of crops, were considered a menace to health and property by the health and agricultural departments of both federal and state governments, and that their extermination was not only requested and encouraged by those departments of government, but under state legislation their destruction was made compulsory; that at the time the county engaged in and carried on this enterprise there was a scarcity of poisons offered for sale in the open market, many of them were ineffective, and the high prices for which they were being sold made it impossible for the local authorities and the landholders in that county to cope with the squirrel evil; that consequently Monterey county, together with many of the other counties in the state, found it necessary to manufacture and supply directly to the farmers and landowners of their respective counties sufficient quantities of suitably poisoned barley, at reasonable prices, in order that the law requiring squirrel extermination be complied with and to protect the health and property of the community. The evidence further shows that there was no compulsion about the purchase of the county product, and that sales were made only to land occupants in Monterey county, there being but one sale made to an outside resident so far as the evidence shows, and in that case the purchaser was the owner of a ranch situate in Monterey county and at least a portion of the poisoned barley purchased was used on said ranch; whether or not the rest of the purchase was used elsewhere does not appear. The volume of gross sales made by the county, according to the testimony given by the horticultural commissioner, averaged about \$3,700 a year for the five years preceding the commencement of this action, which amount, considering the vast area of farming and ranching lands embraced within the boundaries of Monterey county, serves to corroborate the statement made by said commissioner that the use of the county product was confined to that county.

[1-3] Regarding the legal contentions urged by appellant, it may be conceded that taxes may not be imposed by a county for the purpose of establishing or operating a private competitive commercial business; for illustration, a cement plant wherein a county seeks to manufacture and sell its product

in the open market in competition with others, preference being given only to public corporations; and wherein also in doing so it may possibly suffer tremendous loss. *City of Los Angeles v. Lewis*, 175 Cal. 777, 167 P. 390. Nor may a county exercise any powers beyond those expressly granted by the law or fairly implied therefrom, or which are not essential to its declared objects and purposes. *City of Madera v. Black*, 181 Cal. 312, 184 P. 397. We think it obvious, however, that the instant case does not fall within either of those inhibited classes. The practice here engaged in cannot be regarded as a private commercial business in view of the fact that financial profit to the county was not, in fact, its object or result. It was a measure adopted for the purpose of protecting the health of the people of the county and to prevent injury and destruction to their property from an existing evil, and as such the enterprise engaged in finds abundant express legal sanction. Section 11 of article 11 of the state Constitution and subdivision 31 of section 4041 of the Political Code provide that any county may make, within the limits of said county, all such police, sanitary, and other regulations as are not in conflict with general laws. Regarding such constitutional power it has been held that when a county, asserting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures, having reasonable relation to that end, as it may deem necessary in order to make that action effective. *People v. Velarde*, 45 Cal. App. 520, 188 P. 59. And subdivision 26 of said section 4041 of the Political Code grants full authority to boards of supervisors "to provide for the destruction of gophers, squirrels, other wild animals, noxious weeds," etc. In *Ex parte Hodges*, 87 Cal. 162, 25 P. 277, in discussing the authority granted the county under that provision to proceed in the matter of squirrel extermination, it was said that—

"This is a power that should be upheld on all occasions, where the means employed are reasonable, and not otherwise objectionable."

It cannot be said to be an unreasonable exercise of police power for the county to aid its landholders in combating a common nuisance; and, as already pointed out, the plan here adopted is not obnoxious to the law. The exercise of county police powers has its limitations, of course, which depend largely upon the circumstances of each case, and beyond which a county may not go; but we are of the opinion that in the instant case, in view of the conditions set forth by the findings and shown by the evidence under which the enterprise was instituted and carried on, those powers were not transcended, and that the practice complained of, when carried on

under those conditions, does not reach the proportions of a private business venture in which a county is forbidden to engage.

[4, 5] There was no error committed by the trial court in allowing respondent Monterey county to amend its answer to conform to the proofs. Moreover, after a party amends to conform to the proofs and the opposite party makes no request that the submission of the cause be set aside or that he be permitted to offer further pleadings or proof, he is in no position to complain. *Gartlan v. C. A. Hooper & Co.*, 177 Cal. 422, 170 P. 1115; *Wardrobe v. Muller*, 53 Cal. App. 370, 200 P. 77. So far as the record discloses there was no such request made in the instant case.

The judgment is affirmed.

We concur: TYLER, P. J.; St. SURE, J.

70 Cal. App. 465

PEOPLE v. WILLIS. (Cr. 1142.)

(District Court of Appeal, Second District, Division 2, California. Dec. 31, 1924. Hearing Denied by Supreme Court Feb. 26, 1925.)

1. Criminal law ⇨1159(5)—Jury's determination of facts questions on conflicting testimony conclusive.

Jury's determination of fact questions on conflicting testimony as to admissions by defendant is conclusive.

2. Criminal law ⇨1036(1)—Exceptions to testimony as to admissions, not shown to have been involuntary nor objected to when offered, not considered.

Exceptions to testimony as to defendant's admissions, not shown to have been involuntary, nor objected to when offered, need not be considered.

3. Criminal law ⇨519(9)—Admissions made without express solicitation, promises, or coercion, admissible.

Admissions made without solicitation, except for questions asked of defendant as result of her voluntary surrender, or, even if asked to relate facts, without promises or coercion, are admissible.

4. Criminal law ⇨342—Evidence as to motive for committing crime admissible.

Evidence relevant to show motive for commission of crime charged is always admissible.

5. Homicide ⇨166(1)—Evidence of defendant's financial straits held admissible to show motive.

In murder prosecution, testimony as to loaning money to defendant, her indebtedness on certain furniture, and her pledge of automobile she agreed to purchase from deceased as security for such debt, held admissible, with her extrajudicial statements, on issue whether she committed homicide in self-defense, or to avoid paying for automobile.

6. Criminal law $\S$ 1159(2)—Conviction warranted by evidence not disturbed, unless testimony of people's witnesses is inherently improbable or unworthy of belief.

Verdict of guilty, warranted by sufficient evidence, cannot be disturbed on appeal, unless there is such disparity in testimony of people's witnesses as to render it inherently improbable or necessarily unworthy of belief.

7. Criminal law $\S$ 407(1), 418(1)—Evidence of statement in defendant's presence concerning decedent's telephone conversation with defendant held admissible; silence held admission of truth.

In murder prosecution, evidence of statement by decedent's widow, in presence of defendant and police officer, at city jail, as to telephone conversation between decedent and defendant concerning payment for automobile purchased by latter, held admissible and defendant's failure to deny statement evidence of tacit admission of its truth; weight thereof being fact question for jury.

8. Criminal law $\S$ 475—Expert testimony as to operation of defendant's gun and difficulty of firing it from certain position held admissible.

In murder prosecution, expert's testimony as to operation of gun used by defendant, and difficulty of pulling trigger while holding it in position from which defendant was alleged to have fired, held admissible.

9. Criminal law $\S$ 449(1), 472—Subjects of expert and nonexpert testimony stated.

Nonexpert may not express opinion whether person could have done act within range of common knowledge and experience, nor may expert express opinion as to conclusions from matters of common observation and experience, but one skilled in some art, trade, or science, having knowledge and experience in matters not known to men of ordinary intelligence, education, and experience, may express opinion on state of facts within its specialty.

10. Criminal law $\S$ 388—Results of experiments with firearms competent.

Results of experiments with firearms are not conclusive, but are competent on issue of guilt in homicide cases; their weight being for jury.

11. Criminal law $\S$ 561(1)—Jury not bound to give accused benefit of "any" doubt.

It is not jury's duty to give defendant benefit of "any" doubt in their minds.

12. Criminal law $\S$ 829(1)—Instructions covered by charges given properly refused.

Instructions fully and correctly covered by general charge and other instructions given are properly refused.

13. Criminal law $\S$ 858(1)—Delivery of exhibits or instructions to jury before retirement not required.

Exhibits or instructions, requested by and ordered delivered to jury in defendant's presence need not be physically delivered in courtroom before retirement.

14. Criminal law $\S$ 956(1)—Affidavits of defendant's counsel as to coercion of juror and request for testimony after retirement held incompetent on motion for new trial.

Affidavits of defendant's counsel as to coercion, abuse, etc., causing juror to change vote and agree on conviction, and jury's request, after retirement for testimony of two witnesses, which is within inhibition of Penal Code, $\S$ 1137, held incompetent on motion for new trial.

15. Criminal law $\S$ 1130(2)—Mere statements that court erred in making rulings not considered.

Mere statements in record that court erred in making enumerated rulings, without stating reasons for assigning errors, will not be considered.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Margaret B. Willis was convicted of first degree murder, and she appeals. Affirmed.

S. S. Hahn, of Los Angeles, for appellant.
U. S. Webb, Gen. Atty., and John W. Maltman and H. H. Linney, Deputy Attys. Gen., for the People.

CRAIG, J. The appellant was charged by indictment with having murdered one Dr. Beecher B. Baldwin on or about the 11th day of April, 1924. She admitted having killed him, but her defense was that he attacked her in her apartment while he was intoxicated, and that she shot him in defense of her person and her honor. A verdict was returned by the jury finding her guilty of murder in the first degree, with a recommendation of imprisonment for life, and she appeals from the judgment and order denying her motion for new trial.

Many grounds for reversal are assigned in appellant's briefs, which consist of the assertion of errors in rulings upon the admissibility of evidence, in instructing the jury, and alleged misconduct of the jury.

[1] A considerable portion of appellant's argument is devoted to alleged errors in the admission of contradictory statements testified by various witnesses to have been made by the defendant, and to the plausibility or weight of conflicting testimony, all of which were clearly admissible, and merely presented questions of fact for the final consideration of the jury. Its determination of these questions is conclusive. The defendant did not testify, and the testimony as to her admissions was not denied; it was submitted, under full instructions, with all the other evidence in the case, and, if the different versions of various witnesses did not completely harmonize, it was solely within the province of the jury to believe or disbelieve the portions which they might upon consideration of the whole case decide to accept or to reject. *People v. Truitt*, 49 Cal. App. 727, 194 P. 295;

People v. Jurado, 56 Cal. App. 481, 205 P. 696.

[2, 3] Exceptions to the testimony of witnesses as to admissions of the defendant are urged upon the theory that confessions obtained from a person while under arrest are liable to have been exacted by unfair methods. But there is no showing that any of her statements were other than voluntary admissions, and when they were offered no objection was interposed. Appellant's counsel subsequently objected to the reading of a portion of one such statement, but the objection was withdrawn with the remark, "Let everything go before the jury. It is all right. Go ahead." It is not contended that any such statements were not freely made and voluntary, and it appears from the record that appellant made them without solicitation except for questions that were asked of her as a result of her voluntary surrender. Even had she been asked to relate the facts, without promises or coercion, her statements would have been admissible. People v. O'Brien, 53 Cal. App. 754, 755, 200 P. 766.

[4-6] It is further argued that the trial court erred in admitting over appellant's objection the testimony of one Webster as to money which he had loaned her at various times, evidence oral and documentary of her indebtedness upon certain furniture, and as to an automobile transaction which she admittedly had with the decedent. Evidence relevant to show motive for the commission of the crime charged is always admissible, and often valuable. People v. Rongo, 169 Cal. 71, 75, 145 P. 1017; People v. Durrant, 116 Cal. 179, 48 P. 75; People v. Owens, 132 Cal. 469, 64 P. 770. It was the theory of the prosecution that appellant was in financial straits, and that she killed Dr. Baldwin in order to avoid paying him for an automobile which she had agreed to purchase from him, and that she pledged the automobile as security for \$150 which she owed one Edward Othman for said furniture. Motions to strike out this evidence were also made upon the grounds that it was irrelevant, incompetent, and immaterial, and not part of the res gestæ. From appellant's own statements on different occasions, it appeared that she had said that she would obtain the money with which to pay Dr. Baldwin from commissions due her in real estate transactions, that she would get it from her sister, and again that it consisted of small amounts which she had saved, and she later declared that she had paid Baldwin \$750, but the money was never found among his effects. Since she did not testify, it was incumbent upon the jury to weigh and compare her extrajudicial statements with the other evidence in the case, and conclude whether she committed the homicide in self-defense or in furtherance of selfish designs. Having done so, if there be enough evidence for the prosecution to warrant a verdict of guilty, it cannot

be disturbed upon appeal, unless there is such a disparity in the testimony of witnesses for the people as to render their evidence inherently improbable or necessarily unworthy of belief. People v. Brittan, 118 Cal. 409, 50 P. 664; People v. Billings, 34 Cal. App. 549, 168 P. 396. Such is not the status of the evidence before us.

[7] Another exception is taken to the admission in evidence of testimony which purported to quote a conversation between Mrs. Baldwin, the decedent's widow, and others, had in the presence of the defendant, at the city jail. In this conversation the deceased was said by Mrs. Baldwin to have stated to Mrs. Willis over the telephone, among other things:

"Well, if you are sure you will have the money to-morrow morning, I will make it a point to drop around there, but, unless you could have the money, I would not have time to come over until the first of the week, * * * and we will fix up the transfer to-morrow morning."

There was considerable more conversation of a similar import, indicating that Dr. Baldwin was making arrangements to sell an automobile to Mrs. Willis and to receive the money therefor. This witness testified to having related this to defendant in the presence of the latter's counsel, a stenographer, and a police officer. Mrs. Baldwin was permitted to testify to this conversation which she said took place over the telephone, against the objection that it was irrelevant, incompetent, and immaterial, and hearsay. Appellant's contention is that the conversation took place between Mrs. Baldwin and a police officer; that the admission of such testimony was error, because it was introduced for the purpose of entrapping the defendant into making a denial; but that there was no cause for response. It is argued that mere silence when such a statement is made in the presence of one accused of crime is not evidence of guilt. The witness testified further:

"This is the conversation that I related in front of Mrs. Willis at the detective bureau; and I related it as the conversation that took place the night before." "When I got through with this statement, everyone got up and left the room and left me there with Mrs. Willis; and I didn't say anything; and Mrs. Willis said—she sort of drew a long breath, and said, 'Well, Mrs. Baldwin, there isn't a thing I can say.'"

If Mrs. Baldwin stated to the defendant or in her immediate presence that this telephonic conversation had occurred, it was clearly admissible (People v. Piggott, 126 Cal. 509, 513, 59 P. 31), and, if the statement in that regard was untrue, the failure of the defendant to reply by way of a denial was evidence tending to show a tacit admission by her of the truth of the statement, whose relevancy is apparent, and the weight of which was a question of fact for the jury.

People v. Schoon, 177 Cal. 678, 682, 171 P. 680; People v. Amaya, 134 Cal. 536, 66 P. 794.

[8] It is contended that, in permitting a certain witness to testify concerning experiments which were made with the gun with which the deceased was killed, the court committed seriously prejudicial error. The testimony to which exception is especially taken is that of the witness Sellers. Several questions were asked of this witness which would have called for answers of an objectionable character, but which the court excluded. The substance of his testimony is that he assumed a position alleged to have been occupied by the defendant at the time of the shooting, facing another person in the position in which it is claimed the deceased was at that time. The head of the latter person was approximately 18 inches above the floor. An explanation was made of the operation of the gun which was used by the defendant and of difficulties which he encountered in attempting to fire it from the position which other witnesses had testified the defendant claimed to have occupied. In testifying concerning these difficulties, it appears from the transcript that the witness was demonstrating the use of the gun before the jury. Questions and answers involved in this objection are as follows:

"Q. Will you just explain to me, or demonstrate it, why it is difficult to discharge the gun with the wrist twisted? A. Of course, if the gun is held in this manner, it can be easily fired by pulling the trigger, and pressing this back safety. As the arm begins to turn in this manner (illustrating) there is, naturally, a lengthening of certain muscles in the arm here (indicating), and there is a limit to the degree that you can turn the gun, and the further you turn it—

"Q. Just a minute. Can you discharge that gun now? A. I can, with a great deal of effort. The further back I pull it this way toward me this way, the more difficult it would be."

Counsel for appellant contends that in allowing the witness to testify in this manner the trial court violated the principle laid down in the case of People v. Salaz (Cal. App.) 225 P. 777, in which it is said:

"Dr. Wagner, over defendant's strenuous objections, was permitted to testify that in his opinion, based entirely upon the result of his examination of the body and the course taken by the bullets, the man who did the shooting was in front and towards the left of the decedent. Asked by the district attorney if, from his examination of the body and the course of the bullets, he could tell in what position the decedent was when he was shot, the witness replied: 'In a general way I could. I can positively state that the man [who did the shooting] was in front and towards the left. He was not immediately in front, but what we might call diagonal towards the left and in front of the deceased.' * * *

"That grievous error was committed when Dr. Wagner was permitted to testify that

he could 'positively state' that the man who did the shooting was in front 'and towards the left,' that 'he was *not immediately* in front, but what we might call *diagonal towards the left* and in front of deceased,' is clearly demonstrable. The question whether the direction of a gunshot wound in the body of a deceased indicates the relative positions of the person firing the shot and the person receiving it is not a matter of expert or opinion evidence, and it has been held by our Supreme Court that it is error to allow a physician to testify to his opinion upon that question." (Italics quoted.)

In the instant case the witness did not express any opinion concerning the positions of the deceased and defendant. He drew no conclusions at all, except in connection with the gun and its operation. As to this it is not questioned that he qualified as an expert, nor can there be any doubt that this was a proper subject for expert testimony. The witness' statement that, holding the gun in a certain position, it was difficult to pull the trigger is merely a statement of fact, and, at the same time, an explanation of the mechanical operation of the firearm.

It does not appear that the witness gave any conclusions concerning his experiments when he and the other man assumed the positions on the floor to which he testified. His only answers bearing upon experiments with a gun, aside from explaining its mechanical operation, are those which we have quoted.

[9, 10] A nonexpert witness may not express an opinion as to whether a person could have done any act within the range of common knowledge and experience, as the jury are as competent as the witness to draw the inference from the facts. People v. Helm, 152 Cal. 532, 93 P. 99; People v. Lowrie, 4 Cal. App. 137, 87 P. 253. And for the same reason an expert witness will not be permitted to express his opinion as to conclusions from matters of common observation and experience. People v. Heacock, 10 Cal. App. 450, 102 P. 543. But one skilled in some art, trade, or science, having knowledge and experience in relation to matters which are not within the knowledge of men of average intelligence, education, and experience, may express an opinion on a state of facts within his specialty and which is involved in the inquiry. 16 Corp. Jur. p. 748, § 1532, citing People v. Heacock, supra. Experiments with firearms have frequently been made in homicide cases, and the results proven at the trials as tending to show the guilt or innocence of the accused. Such results are not conclusive, but are competent and admissible, and their weight is for the jury to determine. People v. Levine, 85 Cal. 39, 43, 22 P. 969, 24 P. 631.

[11, 12] The court was asked to instruct the jury that, "when determining her guilt or innocence, if there is *any* doubt in the minds of the jury as to the actions and state-

ments of the defendant, it is the duty of the jury to give her the benefit of the doubt," but such is not the law, and, the point having been fully correctly covered by the general charge and by other instructions requested by the appellant, further discussion of the subject is here unnecessary. Other instructions requested by appellant which the trial court declined to give were covered by those which were given, and which correctly stated the law of the case. They were therefore properly refused. *People v. Cox*, 29 Cal. App. 419, 155 P. 1010; *People v. Wilson*, 29 Cal. App. 563, 156 P. 377.

[13] It is contended that the jury received evidence outside of court, and after the case had been finally submitted to them, after the defendant and her counsel had departed. This matter was subsequently called to the attention of the trial court, and from the statement made by the judge it appears that as the jury left the courtroom it requested the exhibits and instructions. The court assembled them on the desk and ordered them delivered to the jury. The request by the jury, and the order of the court, were made in the presence of the defendant, and there is no showing that the jury received other evidence from the bailiff or otherwise. No authority is called to our attention, nor are we aware of any, which requires that the physical delivery of exhibits or instructions to the jury must be made in the courtroom before they retire.

[14] Counsel for appellant moved for a new trial, based in part upon an affidavit wherein he alleged that one of the jurors at first voted for a verdict of not guilty, and insisted upon reading the testimony of Webster and the widow of deceased; that a request for said testimony was conveyed to the court, but was denied; and that two other jurors then "by coercion, abuse, undue influence, misinformation, and insults" caused her to change her vote and agree upon a verdict for conviction. Counsel's affidavit is the only evidence that was offered as to these alleged facts; it furnishes no light as to the source of his information, but it could not have been otherwise obtained than from hearsay. It was expressly held in *People v. Clark*, 183 Cal. 677, 192 P. 521, that such an affidavit is entitled to no weight, and is not competent or proper evidence upon a motion for new trial. The same authority disposes of another contention, also based upon an affidavit of defendant's counsel, wherein it is made to appear that, after the jury had been instructed and had retired, it sent word to the court by the bailiff that it desired to receive the testimony of two of the witnesses. At all events, a request of that character falls within the inhibition of section 1137 of the Penal Code.

[15] As to many other criticisms of appel-

lant they amount to nothing more than mere references to pages throughout a voluminous record where general objections appear, without argument or citation of authority. They are mere naked statements that the court erred in making certain enumerated rulings, without stating reasons why errors are assigned, and we are not called upon to institute an independent inquiry in order to furnish reasons for or against the correctness of the rulings. *People v. Clark*, supra.

The judgment and order denying the motion for new trial are affirmed.

We concur: FINLAYSON, P.J.; WORKS, J.

70 Cal. App. 498

PEOPLE v. LANZIT. (Cr. 1130.)

(District Court of Appeal, Second District, Division 2, California. Jan. 2, 1924. Hearing Denied by Supreme Court March 2, 1925.)

1. Homicide ⚡256—Evidence of overt act held to sustain conviction for attempt to murder.

Evidence of overt act held to sustain conviction for attempt to murder, under Pen. Code, § 664.

2. Criminal law ⚡44—Intent and overt act essential to offense of attempt to commit crime.

Intent to commit crime and direct effectual act towards its commission are essential elements of offense of attempt to commit crime.

3. Criminal law ⚡44—Mere preparation is insufficient to establish attempt to commit offense.

Mere acts of preparation not proximately leading to consummation of intended crime are insufficient to establish attempt to commit offense.

4. Criminal law ⚡44—"Attempt to commit crime" as distinguished from preparation, consists of direct movement toward consummation.

"Attempt to commit crime," as distinguished from mere preparation, consists of a direct movement toward consummation of intended crime after preparations have been made.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Attempt to Commit Crime.]

5. Criminal law ⚡44—Overt act is sufficient to complete offense of attempt to commit crime if it constitutes commencement of consummation of offense.

Overt act is sufficient to complete offense of attempt to commit crime, if it goes far enough toward accomplishment of offense to amount to commencement of its consummation.

6. Criminal law ☞44—That one acting with defendant would not have consummated offense is not defense to prosecution for attempt.

That one working with defendant would not have actually consummated crime, and was co-operating with officers, is no defense to charge of offense of attempt to commit crime.

7. Criminal law ☞37—That defendant acted with and was encouraged by one who was co-operating with officers held not defense.

That defendant, charged with attempt to commit murder, acted with and was encouraged by one who was co-operating with officers, does not constitute defense where he originally conceived criminal intent and does overt acts necessary to completion of offense.

8. Criminal law ☞37—Acts of feigned accomplice may not be imputed to defendant.

Acts of feigned accomplice who is co-operating with officers may not be imputed to defendant.

9. Criminal law ☞37—Conviction for attempt to commit crime cannot be sustained where intent originated with feigned accomplice.

Where intent to commit crime did not originate with defendant, but with feigned accomplice acting in co-operation with officers, conviction cannot be sustained.

10. Criminal law ☞1172(7)—Giving of conflicting instructions is not reversible error if condition results to defendant's advantage.

Giving of conflicting instructions is not reversible error, if condition results to defendant's advantage.

11. Criminal law ☞772(6)—Instruction as to defense of entrapment in prosecution for attempt to commit murder held correct.

In prosecution for attempt to commit murder, instruction that if jury believed beyond reasonable doubt that defendant originated and formed intent to kill and that he communicated his intent to another, fact that officers planned to and did furnish defendant an opportunity to carry out his offense is no defense held correct.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Joseph J. Lanzit was convicted of attempt to commit murder, and he appeals. Affirmed.

Cooper, Collings & Shreve, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. Defendant was charged with an attempt to murder his wife. From a judgment of conviction and from an order denying him a new trial he appeals to this court. As his main ground for the appeal he claims that the evidence is insufficient to justify the verdict.

[1] There is evidence to show the following: On March 13, 1924, defendant's wife

owned and conducted a restaurant known as the Royal Barbecue, on Washington boulevard not far from the city of Venice, in the county of Los Angeles. Her brother and likewise her mother lived in Venice. There was a bedroom in the Royal Barbecue in which defendant's wife customarily slept. Immediately in the rear of this bedroom is a toilet. It was in this toilet that defendant and a man of the name of Woodhead, sometimes referred to by defendant as Tate, on the night of March 13, 1924, were about to place a bomb, when they were seized and arrested by officers of the law. Defendant and his wife had been married but a short time prior to this occurrence. In the month of February and in the early part of March, 1924, defendant, who had quarreled with his wife shortly after their marriage and had left Los Angeles county, was operating a restaurant or lunch stand in Ventura county. It was there that he met Woodhead, who was experienced in the handling of explosives, and who was the principal witness for the prosecution. At no time did Woodhead intend carrying out defendant's scheme to murder his wife; instead it was his purpose to turn defendant over to the authorities before any killing was actually accomplished. The pith of Woodhead's testimony, reduced to narrative form, is substantially as follows:

"I first met defendant on February 3, 1924, at the restaurant which he was then running in Ventura county. I met him at the same place a week later. He told me then that he had had family troubles and that he would like to put his wife out of the way. I mentioned dynamite and told him that things like that had happened before. In one of our conversations he told me that a few weeks previously he had unsuccessfully tried to poison his wife. When I mentioned dynamite he said, 'I think you are the man that can put her out of the way. She has a brother and I want him out of the way by all means.' I knew that if he could not get me to blow up his wife and her family it was his intention to get some one else to do it. I was trying all the time to find out whether he was going to dynamite his wife or poison her or what he was going to do. I saw defendant again on February 11th at the same place. On that day he said to me, 'I am nearly sure this thing can be pulled off; you using dynamite. I think you can pull the job off for me.' I said, 'All right, if that is the case we will see how we can fix plans.' He said, 'There is a lot of money in this. My wife's brother is very wealthy. I would like to have my wife's mother out of the way. I would like to kill her first; there are five in the family, and my wife will get a fifth share. Then we will plan to put my wife out of the way. Then the whole bulk will come to me.' He figured that there would be somewhere near \$100,000. On February 13th I again saw defendant at his restaurant. I told him I had been using dynamite on some work that I was doing nearby and showed him three sticks of the stuff. He said, 'This is

just the thing. I will fix you pretty well for this if you can pull the job off. I am going to sell out my restaurant on the first of March and then we will go down to Los Angeles and make final arrangements.' The next day he wanted to know whether I could go to his wife's restaurant near Venice in Los Angeles county, look it over, and get the lay of the land. He told me he would like to have me put the dynamite in the oven of the Royal Barbecue. He said, 'It is easy.' I said, 'Such things like this are not so easy. They have to be planned carefully, to take life like that.' He showed me a photograph of his wife's restaurant. He drew a diagram of the place showing where the oven was. He said, 'I want you to put it there, because my wife sits at the cash register nearly all the time, and the best time to get her will be 9 o'clock in the morning, because then the cook is not on duty.' Upon another occasion, before going to Los Angeles, defendant and I experimented with dynamite. I showed him how a detonator works. We timed it. He said it went off too soon—that it would not allow sufficient time to get away. He said, 'I think my wife has a gasoline tank just back of the oven in the Royal Barbecue. You can go down there with a bomb, and if that does not get them you can set the gasoline going and empty the gasoline out of the can and string it all the way around the house.' Then he showed me with a rag saturated with gasoline how to make a ring of fire around the house. Defendant sold his restaurant on March 3d, and on the 5th or 6th of that month we came to Los Angeles. On the 8th of March defendant took me to Venice and pointed out to me his mother-in-law's house. He took me under the house and showed me the spot which he thought would be the best place to plant a bomb. On the 11th of March I went to see defendant's mother-in-law at her house in Venice. I told her of the plot. She sent for her daughter. I told them what defendant intended to do. They brought me to the district attorney's office. There I told a deputy district attorney about the case. Through him I met two deputy sheriffs who instructed me to go ahead and prepare a dynamite bomb. Before coming to Los Angeles nothing had been said by the defendant and myself about blowing up the house otherwise than by putting dynamite in the oven of the Royal Barbecue. On the 13th of March defendant met me at my hotel room in the city of Los Angeles. I told him I had got a real proper bomb, clock and dry battery, sticks of dynamite, wire and everything attached. He said, 'That is fine. Are you sure it will work?' I told him it would. He said, 'I want you to kill my wife; kill all of them. I want you to go to my wife's place at 7 o'clock this evening and meet me in front of her place, and bring the bomb with you.' He said he would give me \$2,000 or \$3,000 for the job. I met him shortly after 7 o'clock that evening as we had agreed. He conducted me to the rear of the Royal Barbecue near his wife's bedroom. We came to an outbuilding where the cook lives. I was carrying the bomb. Defendant said, 'I want this job done, and I want you to get it done sharp. Can you fix the bomb to go off at 3 o'clock in the morning?' I said I could, but that I would have to pull the detonator

out. I told him that monkeying with bombs is not a good thing, but that I would wind the clock up and put the alarm on, so it would go off at the time he wanted it to. He then brought me back to the toilet immediately in the rear of his wife's bedroom. He told me that his wife had gone to a show, but that she probably would be back about 9 or 10 o'clock in the evening. He said, 'According to what I heard my wife say, they are all [defendant's wife, mother-in-law, and brother-in-law] going to sleep here in my wife's place, the Royal Barbecue, to-night. So I want you to get this bomb properly timed. Fix it for 3 o'clock in the morning.' I set it for 3 o'clock in the morning as he told me to. He said, 'This is my wife's bedroom here.' I had opened up the box containing the bomb and had taken out the detonator. I told defendant to light a match for me so I could see to fix the detonator. He struck a match, but it went out before the detonator could be fixed. Then he struck a second match for me, but I didn't get the detonator fixed. Then he struck a third match, and I had the detonator out, and I said to defendant, 'Run back and fetch me another match,' and he fetched me another match. By that time I was just putting the detonator in, when the officers rushed in on us and arrested us. The bomb would have gone off, if permitted to. If it had gone off, it would have blown the building and also the people a quarter of a mile away."

The officers had been informed by Woodhead of defendant's intentions, and pursuant to a prearranged plan, to which Woodhead was a party, they had concealed themselves at several stations where, without being seen by the defendant, they could observe what was going on in the toilet.

[2] The jury was warranted in finding defendant guilty of an attempt to commit murder—a crime denounced by section 664 of the Penal Code. An attempt to commit a crime is compounded of two elements: (1) An intent to commit the crime, and (2) a direct, ineffectual act done toward its commission. In this case there is abundant proof to support the first element. Without doubt appellant intended to murder his wife. His intention to accomplish that crime, an intention conceived and born in his own malignant mind, is shown beyond peradventure and quite independently of the acts done by him in his attempted consummation of the crime. A more serious question presents itself as to the existence of the second element. That is to say, Is there substantial evidence that appellant personally did any act which immediately and directly tended to the execution of his fixed purpose to put his wife out of the way by murdering her?

[3-5] It unquestionably is true that mere acts of preparation—acts not proximately leading up to the consummation of the intended crime—will not suffice to establish an attempt to commit the offense, especially when made at a distance, from the place where the contemplated crime is to be com-

mitted. 8 R. C. L. p. 278. It is useless to undertake to reconcile the authorities on the subject of what constitutes an attempt and what is mere preparation. To a very great extent each case must stand upon its own facts. The text-books and the decisions upon this subject are noted for their lack of harmony. Generally speaking, the attempt, as distinguished from mere preparation, consists of some direct movement toward the consummation of the intended crime after the preparations have been made. *People v. Murray*, 14 Cal. 159. The difficulty generally is in determining the proximity of the overt act or acts to the complete accomplishment of the substantive crime. The acts proximately leading up to the consummation of the intended crime need not include the last proximate act for its completion. It is sufficient if the overt acts reach far enough toward the accomplishment of the intended offense to amount to the commencement of its consummation. That is to say, if the actual transaction has commenced which would have ended in the crime if not interrupted, there is an attempt to commit the crime. *People v. Mayen*, 188 Cal. 256, 205 P. 435, 24 A. L. R. 1383. In *State v. Roby*, 194 Iowa, 1032, 188 N. W. 709, the Iowa Supreme Court correctly states the rule as follows:

"It [the overt act] need not be the last proximate act to the consummation of the offense attempted to be perpetrated, [but] it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made. Whenever the design of a person to commit crime is clearly shown, slight acts done in furtherance of that design will constitute an attempt; and the courts should not destroy the practical and common sense administration of the law with subtleties as to what constitutes preparation and what an act done towards the commission of a crime. It would be useless to attempt to lay down any rule by which an act might be characterized as overt or otherwise in a particular case, and the general principles * * * must be applied in each case as nearly as can be, with a view to working out substantial justice."

Upon this subject the New York Court of Appeals, in the case of *People v. Sullivan*, 173 N. Y. 122, 65 N. E. 989, 63 L. R. A. 353, 93 Am. St. Rep. 582, speaking through Cullen, J., says:

"The question of what overt act is sufficient to constitute an attempt to commit a crime has been the subject of much discussion by both text-writers and courts, and of some conflict in the decisions. In the early English cases the view seems to have been adopted that to constitute an attempt the overt act must be the final one towards the completion of the offense and of such a character that, unless it had been interrupted, the offense itself would have been committed. * * * This extreme doctrine has not been accepted in this country, certainly not in this state. * * * But as-

suming that mere preparation is not in all cases an attempt to commit the crime, it is well settled in this country that it is not necessary to constitute an attempt that the act done should be the last proximate one for the completion of the offense. 'However attempt is viewed in England, the act need not, according to the American idea, be the next preceding the one which would render such substantive crime complete.' *Bish. Cr. Law*, § 762."

In *People v. Mills*, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131, it was said by Vann, J.:

"An overt act is one done to carry out the intention, and it must be such as would naturally effect that result, unless prevented by some extraneous cause. * * * If the defendant did anything with intent to steal the papers, which in the ordinary course of events, unless interfered with, would have resulted in the theft thereof, it was an overt act."

The proximity of the overt acts to or their remoteness from the place where the substantive offense is to be committed enters largely into the question of whether the actual transaction has been commenced or not. *People v. Stites*, 75 Cal. 576, 577, 17 P. 693.

As we have stated, we know the criminal intent of appellant as an independent fact. "Murder most foul" he had committed "already in his heart." The circumstances of the case satisfy all requirements of proximity to the place where the intended crime was to be consummated. Appellant, in conjunction with Woodhead, was actually engaged in the commission of overt acts upon the very spot where the substantive offense was to be perpetrated. The instrument with which he intended to blow his wife and the members of her family into eternity was fully prepared for the horrid deed, with the one exception that it remained to replace the detonator—that part of the murderous mechanism having been temporarily removed by Woodhead for precautionary reasons while he was setting the alarm clock to "go off" at the hour designated by appellant. This one act of replacing the detonator—a proximate act in a direct movement toward the consummation of the intended crime—was being done on the identical spot where appellant intended that the substantive offense should be accomplished. Appellant assisted in the replacement of the detonator by striking several matches and holding them so that Woodhead could see to do his part of the work. These acts of assistance on the part of appellant constitute a series of overt acts personally performed by him and tending toward the present execution of his murderous design. They constitute a course of conduct tending directly to the commission of the crime of murder. Moreover, Woodhead, who carried the bomb, was guided by appellant to the exact spot where the deadly contrivance was to be deposited

in close proximity to the sleeping apartment occupied by appellant's intended victim. In *Stokes v. State*, 92 Miss. 415, 46 So. 627, 21 L. R. A. (N. S.) 898, it was held that an overt act sufficient to convict the defendant of attempt to murder has been committed when he hires another to commit the act, procures a loaded gun and goes with the person hired to the point where they are to lie in wait for the victim, although the accused is arrested just as he is in the act of handing the gun to the one whom he had hired to do the killing. See, also, *People v. Stites*, supra. In the *Stokes Case* the Mississippi Supreme Court says:

"The mere buying of a gun and loading it might not constitute an attempt. But when the facts show, in furtherance of the design, that a gun has been procured and loaded, and the party so procuring and loading the gun has armed himself and started out on his mission to kill, but is prevented from carrying out his design by such extraneous circumstances as that the party he intends to kill does not come to the point where he expected to carry out his design, or if the party designing to kill is arrested and prevented from carrying out the design, he is clearly guilty of the attempt. When Stokes attempted to procure Robertson to perpetrate this crime, and in furtherance of this purpose took the gun, loaded it, and started with him to the point where the killing was to occur, the act was an act done tending to effect the commission of the crime, within the meaning of" section 1049 of the Code, "and was an attempt. In this stage it had proceeded beyond mere preparation or intent, and was an actual step taken towards the commission of the crime. * * * Whenever the design of a person to commit crime is clearly shown, slight acts done in furtherance of this design will constitute an attempt. * * *"

[6] But for the interruption which put an end to appellant's criminal endeavor—the timely arrival of the officers—he would have effected the crime he was then attempting to consummate, provided, of course, that Woodhead had been willing to go on with the enterprise to the end. But the fact that Woodhead would not have gone all the way to the actual consummation of the crime contemplated by appellant is no defense. It is the condition of appellant's mind and his conduct in the attempted consummation of his design which determines whether there was an actual attempt to commit crime. Here appellant did his utmost to effect the consummation of the crime intended by him. He failed only by reason of a cause or causes not previously apparent to him. "It is a well-settled principle of criminal law in this country," says our Supreme Court in *People v. Lee Kong*, 95 Cal. 668, 30 P. 801, 17 L. R. A. 626, 29 Am. St. Rep. 165, "that where the criminal result of an attempt is not accomplished simply because of an obstruction in the way of the thing to be operated upon, and these facts are unknown to the aggres-

sor at the time, the criminal attempt is committed. Thus, an attempt to pick one's pocket or to steal from his person, when he has nothing in his pocket or on his person, completes the offense to the same degree as if he had money or other personal property which could be the subject of larceny." In *People v. Moran*, 123 N. Y. 254, 25 N. E. 412, 10 L. R. A. 109, 20 Am. St. Rep. 732, it is declared:

"Whenever the *animo furandi* exists, followed by acts apparently affording a prospect of success and tending to render the commission of the crime effectual, the accused brings himself within the letter and intent of the statute. * * * The question whether an attempt to commit a crime has been made, is determinable solely by the condition of the actor's mind and his conduct in the attempted consummation of his design. * * * So far as the thief is concerned, the felonious design and action are then just as complete as though the crime could have been, or, in fact, had been committed, and the punishment of such offender is just as essential to the protection of the public, as of one whose designs have been successful."

The court, after calling attention to some English decisions to the contrary, continues:

"In this country, however, the courts have uniformly refused to follow the cases of *Regina v. McPherson* and *Regina v. Collins*, * * * and have adopted the more logical and rational rule, that an attempt to commit a crime may be effectual, although, for some reason undiscoverable by the intending perpetrator, the crime, under existing circumstances, may be incapable of accomplishment."

See, also, *In re Magidson*, 32 Cal. App. 566, 163 P. 689.

[7-9] Appellant next contends that even if his overt acts, coupled with his murderous intent, did fulfill all the essential requirements necessary to constitute an attempt to commit murder, still, under the circumstances of this case, no crime can be imputed to him, for the reason that he was led on by Woodhead, and his arrest, prosecution, and conviction were the result of an "entrapment," as that term is understood in the criminal law. There is no merit in this point. When officers of the law are informed that a person intends to commit a crime against the property or person of another, the law permits them to afford opportunities for its commission and to lay traps which may result in the detection of the offender. To this end a person may be engaged to act with the one who is suspected and to be present with him at the time the crime is to be committed; and if the accused, having himself originally conceived the criminal intent, commits such of the overt acts as are necessary to complete the offense, he will not be protected from punishment by reason of the fact that when the acts were done by him the person who was present with the

knowledge and approval of the authorities aided in and encouraged their perpetration. It is, of course, necessary that the defendant should have directly participated in so much of the entire transaction that the acts which he himself personally committed shall alone be sufficient to make out a complete offense against the law; for no act done by his feigned accomplice may be imputed to him, and if, in order to constitute the offense, it is necessary that something done by the supposed confederate shall be imputed to the accused, then the prosecution will fail. Or if it appear that the intent to commit the crime did not originate with the accused but was suggested by the person present with him, and that he was not intentionally carrying out his own criminal purpose, the prosecution will likewise fail. *Dalton v. State*, 113 Ga. 1037, 39 S. E. 468; *State v. Jansen*, 22 Kan. 498; *State v. Currie*, 13 N. D. 655, 102 N. W. 875, 69 L. R. A. 405, 112 Am. St. Rep. 687; *Crowder v. State*, 50 Tex. Cr. R. 92, 96 S. W. 934; *People v. Conrad*, 102 App. Div. 566, 92 N. Y. S. 606, affirmed in 182 N. Y. 529, 74 N. E. 1122; *State v. Mantis*, 32 Idaho, 724, 187 P. 268; *People v. Macy*, 43 Cal. App. 482, 184 P. 1008; 8 R. C. L., p. 128.

In *State v. Jansen*, supra, Mr. Justice Brewer says:

"The act of a detective may, perhaps, not be imputable to the defendant, as there is a want of a community of motive. The one has a criminal intent, while the other is seeking the discovery and punishment of crime. But where each of the overt acts going to make up the crime charged, is personally done by the defendant, and with criminal intent, his guilt is complete, no matter what motives may prompt or what acts be done by the party who is with and apparently assisting him."

In *McAdams v. State*, 8 Lea (Tenn.) 456, it is said:

"A man may direct his servant, or a third person to appear to encourage the design of a thief, and lead him on until the offense is complete, so long as he does not induce the original intent, but only provides for its discovery after it has been formed."

In *Crowder v. State*, supra, the Texas court of criminal appeals states the rule thus:

"If an owner of property in order to detect a thief directs another person to apparently encourage the thief's design, and lead him on, and the act is consummated [by the accused], it would be theft, provided the owner or his agent did not induce the original intent on the part of the thief."

People v. Conrad, supra, was a prosecution for an attempt to commit an abortion. It seems that a woman, acting under the direction of the officers of a county medical society, went to the defendant, a physician, and asked him to commit an abortion on her. The defendant agreed to do so and ar-

rangements were made for the commission of the offense. Just as the defendant had prepared his instruments and placed the woman in a position convenient for their use, the detectives, on a prearranged signal given by the woman, entered and made the arrest. The court, holding that the entrapment was no defense, used this language:

"The conviction of the defendant was brought about by means of a trap arranged by the officers of the county medical society. It is claimed that, as the defendant was lured into the commission of the claimed overt acts, he cannot be punished therefor. This contention has recently been the subject of examination by this court and by the court of appeals, and decided adversely to the contention of the defendant. He was not a passive instrument in the hands of the entrapping parties. He did the act with which he was charged voluntarily, with full knowledge of the subject, and of the consequences which would flow therefrom. Under such circumstances, setting a trap by which he was caught is not a defense."

These principles, applied to the facts of this case, warranted the jury's verdict, notwithstanding Woodhead's apparent willingness to aid and abet appellant in his murderous design. Woodhead, it is true, fell in with and apparently agreed to appellant's purpose to murder his wife, and did certain acts which, had his motive been a criminal one, would have made him also a guilty party in the attempt to commit murder. But the original intent to murder Mrs. Lanzit was conceived in appellant's brain. It was not planted there by Woodhead. It was because it already had germinated in appellant's mind, as a result of his own independent volition, that Woodhead seems to have thought that the ends of justice would best be subserved if he adopted the strategy pursued by him. The suggestion that murder be committed, and a very considerable part of the active planning of it—even to suggesting the time and place when and where the explosion should occur—is shown to have come from appellant. As we have pointed out, appellant himself did certain overt acts which proximately led up to the commencement of the consummation of the intended murder and which of themselves were sufficient to constitute an attempt on his part to commit the crime of murder. Every essential ingredient of the crime with which appellant is charged was committed by him in person. To complete his guilt it was not necessary that any act done by his supposed confederate should be imputed to him.

Nor do we perceive wherein any principle of public policy has been violated through Woodhead's pretended co-operation. It is true Woodhead, who assisted with his acts but with a hidden motive, deceived appellant as to the purpose of his apparent complicity in the crime. We refrain from either commending this practice or commenting upon

it as dangerous and generally of doubtful propriety. We content ourselves with saying that it is enough that appellant originated the idea of doing away with his wife and that he committed overt acts which of themselves were sufficient to constitute the attempt to murder. This being the situation, the feigned complicity of Woodhead cannot and should not be a shield for the protection of guilt. The authorities almost unanimously hold that one who undertakes to aid in the commission of any offense, in conjunction with the real criminal, in order to detect the latter in his crime and to bring him to justice, may render such aid, and that the guilty party will not be exonerated, if he independently conceived the original intent and personally did every act necessary to constitute the crime with which he is charged. Appellant was not a passive instrument in the hands of Woodhead, but voluntarily did the acts performed by him, and did them with full knowledge of the subject and of the consequences which would flow from them.

Counsel have cited and commented upon several cases of "entrapment" in which the defendants were adjudged guiltless of the crimes charged. But this feature distinguishes them: Some act essential to the crime charged was in fact done by the feigned accomplice and not by the defendant, and such act not being imputable to the defendant, the latter's guilt was not made out. Such a case is *People v. Collins*, 53 Cal. 185. Intent alone does not make crime. The intent and the act must combine, and all the elements of the act must exist and be imputable to the defendant. But here appellant himself, quite independently of what his supposed accomplice did, performed acts which, in conjunction with his guilty intent, constituted every essential ingredient of the crime of attempt to commit murder.

[10] Finally, it is contended that in its charge to the jury upon the subject of "entrapment" the court gave contradictory and misleading instructions. To support this position appellant picks out one of the instructions as an unimpeachable model of accuracy, saying of it that it correctly states the law, and then sets forth a number of other instructions which he says are inconsistent with the one which he sets up for a flawless standard. He makes no attempt to point out wherein the instructions are contradictory, but simply makes the point and cites authorities which he claims sustain his contention. Obviously, if the instructions of which appellant complains are correct statements of the law and are applicable to the facts of the case, he has not been prejudiced even if they are in seeming conflict with the one picked out by him as a standard for comparison. While generally the giving of conflicting or misleading in-

structions will warrant a reversal, this rule is subject to the exception that when this condition results to appellant's advantage, as it may if one of the instructions be too favorable to him, he has no ground of complaint.

We have examined with painstaking care the instructions complained of, and are convinced that each of them is an accurate statement of the law applicable to the case. They are too numerous to warrant a separate consideration of each. One of those to which objection is made will suffice for the purpose of illustrating our view that the charge as a whole does not misstate the law. The one which we select for that purpose is as follows:

"If you find from all the evidence, to a moral certainty and beyond a reasonable doubt, that the defendant originated the idea and formed the intent of killing his wife, and that he communicated his intent to kill her to one Tate or Woodhead, the fact, if it be a fact, that the officers of the law planned to and did furnish the defendant an opportunity to carry out his intent to kill his wife is no defense to the charge of attempt to murder his wife."

[11] We find no error or inaccuracy in this instruction. Where the alleged offense is against property rights, as in larceny, for example, any instigation on the part of the owner or his authorized agent which amounts to a consent to the injury or attempted injury to the owner's right of property is a defense. In such cases the consent of the individual affected by the alleged crime eliminates one of the essential elements of the offense. But here the crime of which appellant was found guilty involved an attempted injury to the person of another, and not to that other's property right. Moreover, Mrs. Lanzit did not consent to appellant's attempt upon her life; and even if she had consented thereto and murder had actually followed, her consent would not have excused the crime. When appellant, with the intent to murder his wife, personally did overt acts which proximately led up to the commencement of the consummation of the contemplated murder, an offense against the people of the state of California was perpetrated, and he cannot insist as a defense that he would not have committed the crime if Woodhead had not furnished him with the opportunity. In *People v. Liphardt*, 105 Mich. 80, 62 N. W. 1022, the court says:

"We know of no case that holds that one who has committed a criminal act should be acquitted because induced to do so by another. It is merely when the criminality of the act is shown to be absent by the fact of the inducement that such proof justifies acquittal. In cases of alleged larceny, where the master has directed a servant to deliver his property to a thief, or burglary, where he has directed the admission of a burglar, the principal element of

the offense is lacking; in the former there is no felonious taking, in the latter no felonious breaking and entering."

See, also, *Hummelshime v. State*, 125 Md. 563, 93 A. 990, Ann. Cas. 1917E, p. 1072, and *People v. Conrad*, supra. In a note, to *Butts v. United States*, 18 A. L. R. 146, the author says:

"Where the doing of a particular act is a crime regardless of the consent of any one, the courts are agreed that if the criminal intent originates in the mind of the accused, and the criminal offense is completed, the fact that an opportunity is furnished, or that the accused is aided in the commission of the crime in order to secure the evidence necessary to prosecute him therefor, constitutes no defense."

In *People v. Mills*, supra, the New York Court of Appeals voices the doctrine thus:

"We are asked to protect the defendant, not because he is innocent, but because a zealous public officer exceeded his powers and held out a bait. The courts do not look to see who held out the bait, but to see who took it. When it was found that the defendant took into his possession the property of the state with intent to steal it, an offense against public justice was established and he could not insist as a defense that he would not have committed the crime if he had not been tempted by a public officer whom he thought he had corrupted. He supposed he had bought the assistant district attorney when he handed over the money, but he knew he had not bought the state of New York and, hence that the assistant had no right to give him its property for the purpose of enabling him to steal it."

The judgment and the order appealed from are affirmed.

We concur: WORKS, J.; CRAIG, J.

71 Cal. App. 159

GREENWOOD v. BUILDING TRADES COUNCIL OF SACRAMENTO et al.
(Civ. 2857.)

(District Court of Appeal, Third District, California, Feb. 5, 1925. Hearing Denied by Supreme Court March 5, 1925.)

1. Associations ⇨14—Court will not interfere in controversy between members of voluntary association until all remedies of association exhausted.

Courts will not interfere in controversy between members of voluntary association until aggrieved member has exhausted all remedies afforded him by Constitution or by-laws of association.

2. Trade unions ⇨4—Fact that hardship may be suffered while remedies provided for by association are exhausted does not warrant interference of court.

That a local labor union seeking reinstatement as member of Building Trades Council

will suffer hardships during a period necessary to exhaust remedies afforded it by their by-laws and constitution does not furnish ground for interposition of court.

3. Trade unions ⇨4—Court will not interfere to prevent collection of money from members of trade union.

Court will not interfere to prevent collection by Building Trades Council of a per capita tax from members of local union; it being pure matter of law between respective parties.

4. Injunction ⇨101(1) — Right to quit work cannot be enjoined, and motive immaterial.

The right to quit work, either individually or collectively, cannot ordinarily be restrained, and motive actuating a strike or withdrawal of men from employment is immaterial.

5. Trade unions ⇨4—Court will not interfere with questions of membership and enforcement of rules of labor unions until remedies afforded by their by-laws exhausted.

Court will not interfere with questions as to membership and enforcement of rules of labor unions until aggrieved members have exhausted all remedies afforded by by-laws and constitution of their organizations.

6. Associations ⇨7—When fact of membership in voluntary association established, court will restrain violation of rules, if property rights involved.

When fact of membership in a voluntary association has once been established, and property rights are involved, court will restrain violation of rules governing association at behest of any one suffering injury by such violations.

7. Trade unions ⇨7—Relation of trustee and cestui que trust held not to exist between labor union and Building Trades Council where union not member of council.

In suit by local labor union to compel Building Trades Council to reinstate union to membership, plaintiff not being a member of council and having no representation therein, relation of trustee and cestui que trust does not exist between them.

8. Associations ⇨10—When membership in voluntary association acquired, court will prevent illegal expulsion.

When a membership in a voluntary association has once been acquired, court will afford protection against illegal expulsion.

9. Associations ⇨8—Injury by nonadmission of membership in voluntary association not ground for relief.

That one may suffer injury by reason of nonadmission to membership in a voluntary association affords no ground for relief.

10. Trade unions ⇨8—Court will not compel admission of local union into membership of Building Trades Council regardless of motive of council in excluding union.

Where a local union seceded from membership in local Building Trades Council, but later sought reinstatement, a court of equity will not

interfere with action of council in excluding such union from membership, which it had legal right to do, or compel admission into membership, regardless of its motive, especially where action of local council has been approved by parent association.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Suit for injunction by Robert Greenwood, for and on behalf of himself and all members of the Amalgamated Sheet Metal Workers' International Alliance and the Amalgamated Sheet Metal Workers' International Alliance, Local 162, against the Building Trades Council of Sacramento and others. From a judgment granting a temporary injunction, defendants appeal. Reversed.

P. H. Johnson and A. L. O'Grady, both of San Francisco, for appellants.

Downey, Downey & Seymour, of Sacramento, for respondent.

PLUMMER, J. In passing upon the petition for rehearing herein, we have concluded to restate the issues involved and our views thereon. It is therefore ordered that the opinion heretofore filed in this cause on January 6, 1925, be and the same is hereby entirely set aside and the following substituted as the opinion of the court in lieu thereof:

This is an appeal by the defendants from an order of the trial court granting a temporary restraining order or injunction whereby the defendants were restrained and enjoined from collecting, or attempting to collect, a certain per capita tax of \$4.50 from members of Local Union No. 162 of the sheet metal workers, and also restraining said defendants from threatening to or actually striking or calling out members of other crafts engaged in the building industry in the city of Sacramento, in either shops or buildings, in which members of said Local Union No. 162 were employed. A hearing was had upon an order to show cause why a temporary restraining order or injunction should not be issued during the pendency of the trial of the action.

The record shows that the Sheet Metal Workers' Union, Local No. 162, was, at the time of the commencement of this action, a local union duly chartered by the Amalgamated Sheet Metal Workers' International Alliance; that the Sheet Metal Workers' International Alliance is affiliated with and chartered by the American Federation of Labor (Building Trades Department); that the Building Trades Council of the State of California is chartered by and affiliates with the American Federation of Labor (Building Trades Department); that the Building Trades Council of the City of Sacramento is a duly chartered organization of and affiliates with the Building Trades Council of the State of California; that all of the organiza-

tions, and, through their affiliations, are connected with the American Federation of Labor (Building Trades Department); it further appears from the transcript that on or about the 1st day of January, 1922, the Sheet Metal Workers' Union, Local No. 162, of the City of Sacramento, was suspended by the International Sheet Metal Workers' Alliance, and thereupon the affiliation of said Local No. 162 with the said Building Trades Council of the City of Sacramento ceased to exist; that thereafter, and on or about the 1st day of September, 1922, said Sheet Metal Workers' Union, Local No. 162, was reinstated by the International Alliance, and on or about the 1st day of October, 1922, delegates representing said Local No. 162 applied for admission to the said Building Trades Council of the City of Sacramento; that admission was refused on the ground that there were already delegates representing an organization known as Sheet Metal Workers' Union, No. 2, of the City of Sacramento, admitted as delegates and members of said Building Trades Council. It appears that shortly after the suspension of Local No. 162, and the ceasing of its affiliation with the Building Trades Council, a number of sheet metal workers of the city of Sacramento organized Sheet Metal Workers' Union No. 2, elected delegates to the Building Trades Council of the City of Sacramento; that said delegates applied for admission and were admitted to membership in the defendant Building Trades Council of the City of Sacramento, and ever since such admission said affiliations have continued and still continue. It further appears that the Building Trades Council of the City of Sacramento is composed of delegates representing the various local unions existing in the city of Sacramento. It further appears that, after the refusal of the defendant Building Trades Council of the City of Sacramento to admit the delegates of Sheet Metal Workers' Union, Local No. 162, the matter of the status of the delegates of Local No. 2 was brought before the annual convention of the Building Trades Council of the State of California, in March, 1923; that said Building Trades Council of the State of California approved, ratified, and confirmed the action of the defendant Building Trades Council of the City of Sacramento, in seating delegates representing Local No. 2, and refusing to seat delegates representing Local No. 162; that thereafter the question in dispute was taken to the executive council (Building Trades Department) in behalf of said Local No. 162; that said executive council is composed of the officers of said Building Trades Department, the allegation of the complaint being that the executive council conducts all business of said Building Trades Department between conventions of said department; that said executive council, under the rules and regulations of said department, and according to the practice of said depart-

ment, is a duly and regularly constituted tribunal for the purpose of hearing, between conventions of said department, disputes and grievances which may arise in connection with or among members of organizations affiliating with said department; that thereupon the said executive department rendered its decision and recommendation as follows:

"Los Angeles, Cal. March 30, 1923.

"At a meeting of the International Officers of the Building Trades Department, held at the Stowell Hotel at 10 a. m. on March 30, 1923, the following decision was arrived at:

"It is decided that all building trades organizations in Los Angeles shall affiliate with the existing chartered council.

"It is further decided that the basis of representation of all local unions shall be in accordance with the laws of the Building Trades Department.

"It is also decided that all independent or dual local unions associated with the State Building Trades Council of California, or local building trades councils, shall be immediately dropped from membership, and that the State Building Trades Council and local councils use their good offices to have said independent or dual locals affiliate with their respective International Unions.

"Unanimously adopted as read.

"William J. Spencer, Secretary-Treasurer."

It is further alleged that this decision was forwarded to the Building Trades Council of the State of California, and also to the defendant Building Trades Council of the City of Sacramento, but that said Building Trades Council of the State of California and the defendant Building Trades Council of the City of Sacramento have disregarded the same, and that the next tribunal before which that matter can be heard is the annual convention of said Building Trades Council Department of the American Federation of Labor, and that such convention will not be held until October, 1923, or thereabouts, and will be held in the city of Portland, state of Oregon.

The by-laws of the Building Trades Department of the American Federation of Labor, in relation to membership in local councils, provide as follows:

"Sec. 3: Membership in this council shall be confined to local unions in good standing with international unions affiliated with the Building Trades Department, which local unions must be accepted on application.

"Sec. 4. Affiliation of local unions by their national or international unions with this local council shall be required, and affiliation with central labor unions chartered by the American Federation of Labor where such central bodies exist shall be a qualification for membership in this council."

The constitution and by-laws of the defendant Building Trades Council of the City of Sacramento, in so far as pertinent to this action, are as follows:

"Section 1: The revenue of this council shall be derived from a per capita tax levied monthly, or as the council may require, on all affiliated unions for the legitimate work and general support of the council and its constituency."

As to membership, the following appears:

"Section 1. Any union applying for membership in this council shall be referred to the organizing committee, which shall investigate the application and report upon the same to the council at its next regular meeting whereupon a motion to admit shall be decided by a majority vote.

"Section 2. A motion to admit being carried, the organizing committee shall investigate the credentials of the delegates, and, if it be found that the delegates are members of the organization applying and were properly elected, they shall be seated. The council, however, reserves the right to object to the seating of any, or all delegates, who, in its judgment, are considered undesirable or detrimental to the best interests of the council."

The section of the by-laws relating to quarterly cards reads as follows:

"Section 1. Quarterly working cards shall be issued to unions quarterly two weeks prior to the issue, bearing the seal of the council and recording and corresponding secretary. It shall be the duty of the financial secretary of each affiliated union to attach his signature to each card issued to members thereof.

"Section 2. It shall be imperative for all members affiliated with this council to carry with them their working cards while at work.

"Section 3. It shall be the duty of all members of the union affiliated with this council to show such working card when requested to do so or when challenged by any duly accredited business agent of this council or the steward appointed by the business agent.

"Section 4. A steward shall be appointed on each and every job or building when members of the union in any department of the building industry is going to work thereon; said steward shall carry a stewardship card showing that he has been appointed by a duly authorized business agent of this council, and it shall be the duty of such steward to ascertain before 8 a. m. between M. and 1 p. m. or after 5 p. m. from all men going to work if they carry the current quarterly working card of the council. Should the steward find any man without said card or proper credentials he shall immediately report the fact to the business agent or the secretary of the council at such places as the council may direct."

It is also alleged in the complaint, and appears in the transcript, that the Building Trades Council of the City of Sacramento, pending the time of the settlement of the controversy relating to Local Sheet Metal Workers' Union No. 162 and Local Sheet Metal Workers' Union No. 2, sought to collect from members of said Local No. 162 the sum of \$4.50 per quarter, and, in consideration of such payment, agreed to issue to the members of said Local No. 162 quarterly working cards. This sum was to be held in escrow until such time as the controversy

should be settled; that some dues were paid under this agreement by Sheet Metal Workers' Union No. 162, when further payment by the members of said No. 162 was refused. The explanation given for the imposition of this tax was to place members of Local No. 162 on an equal footing with Local No. 2, the claim being made that members of Local No. 2 were subject to dues in that amount, in support of their local union and of the Building Trades Council, and that the members of Local No. 162 were not subject to such dues. It further appears that under the rules and regulations of the Building Trades Council, members of unions not affiliated with the Building Trades Council of the City of Sacramento, were furnished cards authorizing them to work with regularly affiliated union workers, where the circumstances were such that affiliation could not be had. After members of Sheet Metal Workers' Local No. 162 refused to pay any further dues to the Building Trades Council of the City of Sacramento, the matter of members of other building crafts affiliated with the Building Trades Council working on jobs, or rather their inability to work on jobs with persons not holding quarterly working cards, was called to the attention of certain employers, and also to the attention of members of Local No. 162 who were refusing to take out cards, the statement being made that, under the rules of the organization, members of crafts affiliated with the said Building Trades Council of the City of Sacramento could not work on jobs where persons were employed not holding quarterly cards, the business agent in one instance stating that he would have to call out the members of regularly affiliated crafts holding cards unless the dues were paid, and also, in one instance, one of the employers paid the dues, which dues were thereafter returned to him. It does not appear that any actual threats were used, but attention was called to the constitution, by-laws, and rules of the Building Trades Council which forbade members of affiliated unions working where there are other employees not holding quarterly cards issued under the authority of the Building Trades Council, and it appears that all parties understood the meaning, force, and effect of the constitution, by-laws, and rules of the Building Trades Council. So far as the record shows, there were no actual acts of violence, intimidation, or force. The influence used was the inference that any one might properly draw from the constitution, by-laws, and rules hereinbefore referred to. None of the employers of any of the parties referred to in this cause are made parties to this controversy. The litigation involves only a dispute between members of the voluntary associations named herein, and the injunction or restraining order was issued at the instigation of one group, enjoining and restrain-

ing the members of another group from refusing to work with the first group, and also restraining the collection of money.

Sheet Metal Workers' Union, Local No. 2, referred to herein, is an independent voluntary association affiliated with the Building Trades Council of the City of Sacramento, but having no charter connection with any branch of the American Federation of Labor. This local is not made a party to this action and therefore is not further mentioned herein.

[1, 2] Were this a controversy between members of a voluntary association, as argued in part by the plaintiff, the authorities all agree that courts will not interfere until the aggrieved member has exhausted all his remedies afforded him by the constitution or by-laws of the association. This rule is clearly set forth in 3 California Jurisprudence, p. 354. See, also, Martin on the Modern Law of Labor Unions, § 317, p. 390. The record in this case shows that the question of admitting Local No. 162 to membership in the Building Trades Council of the City of Sacramento was taken to the state convention of the Building Trades Council of the State of California, and that said Building Trades Council decided adversely to the contentions of Local No. 162; that, thereafter, an appeal was taken to the executive council of the Building Trades Department, and a decision rendered and recommendation made as we have hereinbefore stated; that compliance with the decision and recommendation last herein referred to has been denied and refused, not only by the Building Trades Council of the City of Sacramento, but also by the Building Trades Council of the State of California, of which the defendant Building Trades Council is a dependent member, and that the next tribunal before whom said matter can be heard is the annual convention of the Building Trades Department of the American Federation of Labor meeting at Portland, Or., in October, 1923. Whether further proceedings have been taken to carry the dispute to such convention does not appear from the record. The recommendation of the executive council, however, does not purport to affect or to decide the matter of the admission or nonadmission to membership of Local No. 162, by the Building Trades Council of the City of Sacramento. The fact that hardship may be suffered during the pendency of the period when such proceedings are being taken and had does not obviate the necessity of their being taken, or furnish any ground for the interposition of a court of equity. Martin on the Modern Law of Labor Unions, supra. The only exceptions to this rule are where the manner of taking the appeal or the proceedings attendant thereupon are made so burdensome as to practically preclude the seeking of redress in this manner. Nothing of that kind appears in this case.

[3, 4] There is no controversy between the parties that, as a general proposition, a court of equity will not interfere to prevent the collection of money; that being a pure matter of law between the respective parties. The law is also well established in this state that the right to quit work, either individually or collectively, cannot ordinarily be restrained. *Parkinson Co. v. Bldg. Trades Council*, 154 Cal. 581, 98 P. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165, and *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 P. 324. The *Parkinson* Case also lays down the rule that the motive actuating a strike, or the withdrawal of men from employment, is immaterial. Other states have announced a different rule, but the cases which we have cited are controlling here. To meet these objections the plaintiffs argue that there is between the parties a contractual relation, and also a relation of trustee and cestui que trust. Under the fifth subdivision of section 526 of the Code of Civil Procedure and the same numbered subdivision of section 3423 of the Civil Code an injunction to restrain the violation of a contract will not lie except in certain specified cases, of which this case is not one. Is there any such relation between the parties to this action as exists between a trustee and a cestui que trust?

Sheet Metal Workers' Union, Local No. 162, of the City of Sacramento is a voluntary organization chartered by the International Sheet Metal Workers' Alliance, which, in turn, is chartered by and affiliated with the American Federation of Labor (Building Trades Department). The Building Trades Council of the City of Sacramento is likewise a purely voluntary association, chartered by and affiliated with the Building Trades Council of the State of California, which, in turn, is chartered by and affiliated with the American Federation of Labor (Building Trades Department).

[5] The law relating to labor unions in relation to interference by the court as to membership and the enforcement of rules is the same as that applied to other voluntary associations. As heretofore shown, the Building Trades Council of the City of Sacramento, in relation to membership, has adopted a by-law, a portion of which reads as follows:

"The council, however, reserves the right to object to the seating of any, or all, delegates, who, in its judgment, are considered undesirable or detrimental to the best interests of the council."

It is argued that the defendant Building Trades Council of the City of Sacramento is not governed by this provision of its own by-laws, but is subject to and must act in accordance with the by-law adopted by the Building Trades Department of the American Federation of Labor, which, in relation

to Building Trades Councils reads as follows:

"Membership in this council shall be confined to local unions in good standing with international unions affiliated with the Building Trades Department, which local unions must be accepted on application."

As to the precedence to be given to these by-laws, the plaintiff relies upon the following cases: *Gilmore v. Palmer*, 109 Misc. Rep. 552, 179 N. Y. S. 1, *Loftus v. Division No. 7, Ancient Order of Hibernians* (N. J. Sup.) 60 A. 1119, and *Taylor v. Pettee et al.*, 70 N. H. 38, 47 A. 733. These cases, however, are not pertinent to the issues here involved. The *Loftus* Case deals with a by-law limiting the pecuniary benefits to be received by a member, after such member has acquired a pecuniary right and property interest under the by-laws of the parent association. The case of *Gilmore v. Palmer*, supra, involves the question of the unlawful suspension of a member, and the case of *Taylor v. Pettee* is based upon the amount of pecuniary benefits to be paid to a deceased member. Thus all of these cases have to do with the property rights of members after those property rights have been acquired, and are no different from the holding of many other cases that courts of equity will interfere to prevent the unlawful expulsion of a member, or the unlawful deprivation of his property rights by voluntary associations.

Lack of membership is the fundamental defect apparent in the instant case. Were the court to decree admission to membership, the Building Trades Council of the City of Sacramento, being a purely voluntary association, could immediately defeat that decree by voluntary dissolution, but, when property rights are involved, the decree of the court cannot be so defeated. This statement shows that courts of equity will interfere in the one case, and not in the other. Jurisdiction in the one instance is founded upon property rights, and the protection of the rights of a member; jurisdiction is lacking in the other case for want of such conditions.

[6, 7] It must be remembered that all of these associations are purely voluntary organizations, not governed by any statutes, and therefore permitted, so far as the law is concerned, to adopt any regulations they may see fit in relation to their local membership. If such local regulations are in conflict with the rules and regulations of what is called the "parent organization," or the rules and regulations governing the Building Trades Council of the State of California, then, and in that case, it is the province of the Building Trades Council of the State of California to take such measures as it may deem wise or expedient to establish harmony in the rules governing both the state and the local associations. When the fact of

membership has once been established, the court will, where property rights are involved, restrain the violation of the rules governing voluntary associations at the behest of any one who has suffered injury by such violations. But this relationship must first be established, and until it is established the parties are independent of each other. In the instant case the plaintiffs are not members of the Building Trades Council of the City of Sacramento, and they have no representation in such council. We do not well see how the relation of trustee and cestui que trust can be held established or shown in this case so long as membership by Local No. 162 in the Building Trades Council of the City of Sacramento is wanting. In 3 California Jurisprudence, 350, § 5, the rule as to membership is stated as follows:

"Membership in a voluntary association is not a right which can be gained independently and then enforced. It is rather a privilege which may be withheld, or accorded on such terms and conditions as the association sees fit to impose. Once acquired, it is a personal right, which, resting as it does in contract, can only be divested in the manner provided in the contract. The holder of such personal right of membership will be protected against any unauthorized act or proceeding on the part of his fellow members, either as individuals, or in their official or collective capacity, by which his enjoyment of such right will be impaired or destroyed."

[8] When this membership has once been acquired, protection against illegal expulsion will be afforded by the courts. *Dingwall v. Amalgamated Ass'n, etc.*, 4 Cal. App. 565, 88 P. 597. Whether any power exists on the part of the Building Trades Council of the State of California or on the part of the American Federation of Labor (Building Trades Department) to impose any penalties, fines, or impositions upon the defendant Building Trades Council of the City of Sacramento, for and on account of its refusal to admit delegates from Local No. 162 to its membership, is immaterial, because, until that membership is established, the right to protection under the rules and regulations adopted governing voluntary associations has no application. We have not been cited to any authority holding that the courts have any power to enforce the admission of members; the only rule which we have discovered is that which we have quoted from 3 California Jurisprudence.

[9] The fact that one may suffer injury by reason of nonadmission to membership in a voluntary association, affords no ground for relief. "Membership in a voluntary association is a privilege which the society may accord or withhold at its pleasure, and a court of equity will not interfere to compel the admission of a person not regularly elected, even though the arbitrary rejection of the candidate may prejudice his material in-

terests, where no rights of property or of person are affected, and no rights of citizenship are infringed upon." 5 C. J. § 64, p. 1353. A long list of authorities is there cited in support of the rule just stated. In the case of *Mayer v. Journeymen Stonecutters' Ass'n*, 47 N. J. Eq. 519, 20 A. 492, the court followed the rule that no jurisdiction exists to compel the admission to membership in voluntary associations of persons not elected according to the rules and by-laws of the association. They will interfere only after one has become a member to prevent the violation of some by-law or to protect or enforce a right acquired by becoming a member. This case is almost identical with the one at bar. A number of individuals were denied admission to the Journeymen Stonecutters' Association, and it is alleged that an attempt was being made to prevent such nonmembers from working at their trade and coercing and intimidating them by refusal of members to work in the same shops with the said nonmembers. After alleging these matters, the complaint in the case further sets forth that, in consequence of their exclusion from membership, they had been deprived of the power of exercising their trade in which they could have made a living and supported their families, and have been compelled to abandon their trade and work at inferior labor at lower wages; that two master stonecutters were at the time of the application to membership in the association in need of larger numbers of skilled journeymen stonecutters than they could obtain from among the members of the association, and would have given them employment but from the danger to their business which they knew would ensue, and that for these reasons they were obliged to refuse, and did refuse, to employ the two men. All of these matters are particularly set forth at great length and particularly detailed. The court said:

"It appears that the complainants Hahn and Zimmerman did make some effort to obtain admission into the defendant association, but it is quite clear that they did not make application for membership regularly, as required by the by-laws, and that the question was never considered or passed upon by that body. But, if it were otherwise, has this court power to require the admission of a person to membership in a voluntary association, when it has been denied by the society? These organizations are formed for purposes mutually agreed upon; their right to make by-laws and rules for the admission of members and the transaction of business is unquestionable; they may require such qualifications for membership and such formalities of election as they choose; they may restrict membership to the original promoters, or limit the number to be thereafter admitted. The very idea of such organizations is association mutually acceptable, or in accordance with regulations agreed upon; a power to require the admission of a person in any way objectionable to the society is repug-

nant to the scheme of its organization. While courts have interfered to inquire into and restrain the action of such societies in the attempted exclusion of persons who have been regularly admitted to membership, no case can, I think, be found where the power of any court has been exercised, as sought in this case, to require the admission of any person to original membership in any such voluntary association. Courts exist to protect rights, and where the right has once attached they will interfere to prevent its violation, but no person has any abstract right to be admitted to such membership; that depends solely upon the action of the society, exercised in accordance with its regulations, and, until so admitted no right exists which the courts can be called upon to protect or enforce." (Supra.)

In *Harris v. Thomas* (Tex. Civ. App.) 217 S. W. 1068, quoting from page 1076, the law in relation to membership in voluntary associations is thus stated:

"A voluntary association has the power to enact laws governing the admission of members and to prescribe the necessary qualification for membership. *Mayer v. Stonecutters' Association*, 47 N. J. Eq. 519, 20 A. 492. Membership therein is a privilege which the society may accord or withhold at its pleasure, with which a court of equity will not interfere, even though the arbitrary rejection of the candidate may prejudice his material interest. *McKane v. Adams*, 123 N. Y. 609, 25 N. E. 1057, 20 Am. St. Rep. 785; *Branagan v. Buckman*, 67 Misc. Rep. 242, 122 N. Y. Supp. 610. Courts sometimes interfere where members have been wrongfully excluded or expelled, but as a rule they do not interfere with the right of an association to make laws or rules, unless they are against good morals or violate the laws of the state. The courts of this state recognize the general principles above announced."

[10] In the language of the Supreme Court of New Jersey as set forth, supra, we may add no case has been called to our attention where the power of the court has been exercised to enforce admission of membership in a voluntary association. The legal right to exclude Local No. 162 by the Building Trades Council of the City of Sacramento is fully established by the foregoing authorities, irrespective of its motives in so doing. If, by so doing, it runs counter to some regulation of a superior or parent organization, the penalties to be inflicted, whatever they may be, are matters to be enforced by such superior or parent organization. In the present case, the parent organization of the defendant Building Trades Council of the City

of Sacramento has approved its action, and we have been pointed to no authority, decided case, or by-law which would authorize the court in reversing such action and compelling admission to membership.

The mere fact that the parties involved in this action are members of unions does not obviate the fact that, so far as the record shows, they are members of separate and distinct voluntary organizations, and therefore stand in the same legal relation as would be the case if they were not members of any union. When Local No. 162 forfeited its charter, seceded from the International Alliance of Sheet Metal Workers, and ceased to be a member of the Building Trades Council of the City of Sacramento, it broke away from the relationship argued by counsel, and, before being reinstated and reacquiring the rights which it had theretofore held and enjoyed, it appears that another union of Sheet Metal Workers of the City of Sacramento, known as Local No. 2, was organized, comprising a large percentage of the persons who had theretofore composed Local Union No. 162, and was admitted to seats in the Building Trades Council of the City of Sacramento, and this admission and retention of membership by said Local No. 2 has been approved and confirmed by the Building Trades Council of the State of California, the immediate parent organization of the defendant Building Trades Council of the City of Sacramento.

There being nothing in this case which takes it from the rule announced by the Supreme Court in *Parkinson Co. v. Building Trades Council*, supra, and *Pierce v. Stablemen's Union*, supra, in relation to the right of individuals to withdraw from work, and it being likewise clear that a court of equity will not interfere to prevent an effort to collect money unless other circumstances give rise to the equitable interposition of the court that the relation of trustee and cestui que trust is not shown to exist, it follows that there is nothing in the complaint or the record to support the temporary injunction issued herein.

It is therefore ordered that the order heretofore entered herein that the judgment herein appealed from be reversed stand as the order of this court. It is further ordered that the petition for a rehearing herein be and the same is hereby denied.

We concur: FINCH, P. J.; HART, J.

195 Cal. 426

**CITY AND COUNTY OF SAN FRANCISCO
v. BOYLE, City Auditor. (S. F.
No. 11352.)**

(Supreme Court of California. Feb. 21, 1925.)

1. Municipal corporations ⇨224—Municipality held authorized to lease real estate.

Under charter of San Francisco, art. 1, § 1, art. 2, c. 2, § 12, relating to purchase and condemnation of real and personal property, it had power to enter into a lease of privately owned real estate.

2. Municipal corporations ⇨224—Lease included in power to hold property.

Generally, broad power under a charter to purchase and hold real and personal property includes lesser power to lease same classes of property.

3. Municipal corporations ⇨59—Municipality has only express powers and those necessarily incident thereto.

Municipal corporations have only powers expressly conferred, and such as are necessarily incident to those expressly granted or essential to declared objects and purposes of corporation.

4. Municipal corporations ⇨224—Agreement, though denominated "lease," held agreement to purchase.

Agreement by municipality to acquire land and buildings for public uses, though denominated a lease, held to constitute an agreement to purchase, where its ultimate end was purchase of such property by municipality, and alleged "lessor" was to acquire no pecuniary advantage from use thereof by municipality during agreement, except application of revenues to payment of its bonds, and whatever advantage might accrue to it by municipality's exercise, or failure to exercise, alleged option to purchase property.

5. Municipal corporations ⇨224—Agreement held not lease, though purchase of premises was optional.

Agreement by municipality to acquire land and buildings for public uses did not constitute a lease, though purchase of premises was stated to be optional, where failure to consummate purchase price would result in loss to municipality, not only of primary and succeeding annual payments, which it was bound to make under agreement, but also usufruct of property during period of its occupation, and property itself.

6. Municipal corporations ⇨864(1)—Agreement to acquire land held to create "liability," within constitutional restriction.

Agreement to acquire land and buildings for public uses, though denominated a lease, by which municipality bound itself to pay two bond issues of "lessor," and to exercise an option to purchase property, or forfeit certain payments, which it was required to make under agreement, and use of property and property itself, created a "liability," in violation of Const. art. 11, § 18, providing that no city shall incur any indebtedness or liability exceeding in any year income and revenue provided for such year without assent of two-thirds of qualified electors thereof.

7. Mandamus ⇨168(2)—Burden on petitioners to show that indebtedness was not in violation of Constitution.

Petitioners, seeking by mandamus, under Code Civ. Proc. 1138-1140, to compel auditor of municipality to audit a claim, had burden of showing affirmatively that auditor's objection that claim required municipality to incur an indebtedness and liability, in violation of Const. art. 11, § 18, was not founded in fact.

8. Municipal corporations ⇨867(2), 868(1)—Agreement to purchase land held void for want of election, and tax levy to pay indebtedness created.

Agreement by city and county of San Francisco to acquire land and buildings for public uses, if constituting an agreement to purchase, and requiring municipality to create obligations exceeding its revenue for every year during term of agreement, held void in view of Charter, art. 16, § 29, and art. 12, where no election was to be held to authorize obligations assumed or tax levied for payment thereof.

Application for writ of mandate by the City and County of San Francisco, to be directed against Thomas F. Boyle, as Auditor of such city and county, to compel him to audit and approve a certain demand for \$100,000 for development of the Marina. Writ denied.

George Lull, City Atty., and Chas. S. Perry, Asst. City Atty., both of San Francisco, for petitioner.

Edward F. Moran, of San Francisco, for respondent.

Chauncey F. Eldridge, of San Francisco (George O. Bahrs, of San Francisco, of counsel), for San Francisco Exposition Company.

H. W. Hutton, of San Francisco, *amici curiae*.

Wright, Wright & Stetson, of San Francisco, for San Francisco Chamber of Commerce.

Edgar D. Peixotto, of San Francisco, for Central Bureau and Program Committee of San Francisco Organizations, California Industries Exposition, and Down Town Association, *amici curiae*.

RICHARDS, J. This application for a writ of mandate was presented to this court upon an agreed statement of facts. The petitioners purport to make the application under the provisions of sections 1138 to 1140, inclusive, of the Code of Civil Procedure, which relate to the submission of controversies which might be the subject of a civil action to courts which would have jurisdiction of such action, upon an agreed statement of facts. It is not necessary to determine whether these sections of the code have application to the submission of causes to this court, since the facts set forth in the application herein would suffice to support the issuance of a writ of mandate if, as a matter of law, such writ should issue. The stipulation of the respondent, taken with his appearance upon the hearing, amounts to a return admitting the facts, but demurring to the sufficiency of the application as a matter of law. The petitioners herein seek to compel the respondent, as auditor of the city and county of San Francisco, to audit and approve a certain claim and demand in favor of the petitioner San Francisco Exposition Company in the sum of \$100,000, based upon certain proceedings had and taken by and before the board of supervisors of the city and county of San Francisco, pursuant to which a certain agreement was entered into between said municipality and the exposition company by which agreement the payment from the former to the latter of the said sum of \$100,000 was provided for. The questions presented for our consideration upon this application involve the validity of said agreement. From the agreed statement of facts herein, it appears that the board of supervisors of the city and county of San Francisco in its budget for the fiscal year ending June 30, 1924, under the head of "Miscellaneous accounts under the control of the board of supervisors," included the following item: "No. 82. To initiate the development and improvement of the Marina—\$100,000." The "Marina" referred to in the foregoing allocation of said sum of money consists of several blocks of land in the northern portion of said municipality lying along the shore line, near the Golden Gate entrance to San Francisco bay, and being intersected by several public streets, but at present unoccupied by any substantial improvements. On April 28, 1924, the said board of supervisors passed and adopted the following res-

olution, which was, on May 9, 1924, approved by the mayor, viz.:

"Resolution No. 22387. New Series. Resolved that the sum of \$100,000 be and the same is hereby set aside and appropriated out of 'To initiate development and improvement of the Marina,' budget item 82, fiscal year 1923, 1924, authorized in payment to San Francisco Exposition Company, as first payment for certain grounds and buildings to be used for exposition grounds and buildings, pursuant to subdivision A, section 2, of that certain agreement, approved March 27, 1924, by ordinance No. 6180 (new series), between San Francisco Exposition Company, a corporation, and city and county of San Francisco."

The petition herein alleges that pursuant to said resolution and of the agreement referred to therein, and on April 30, 1924, a demand was duly presented to the respondent herein, as auditor of the city and county of San Francisco, for the audit and approval of said claim for said sum of \$100,000 and that the said respondent refused to audit or approve said claim and demand, and still refuses so to do, basing his said refusal upon certain specified objections going in the main to the validity of the said agreement upon which said claim and demand were based. The agreement referred to in the foregoing resolution and demand purports to have been entered into between the San Francisco Exposition Company, a corporation, and the city and county of San Francisco, and bears date of April 16, 1924. It embraces a description of the several blocks of land above referred to. It recites that:

"Whereas, it has been proposed that the company construct on said tracts of land a building suitable for the holding therein of agricultural exhibits and fairs, exhibitions of horses, cattle and other livestock, and of agricultural, viticultural, mechanical, manufacturing and domestic products, pageants, athletic exhibitions and other exhibitions and performances designed to foster and stimulate the business and welfare of the people of the city;

"And whereas, by reason of the public nature of the purposes for which said premises are to be used, it is desirable that the same should immediately come under the control of the city and should ultimately be owned by it;

"And whereas, the company proposes to raise the funds necessary to acquire said lands, and to construct thereon said building, by authorizing and selling an issue of its bonds in the amount of one million two hundred thousand (1,200,000) dollars secured by first mortgage upon said premises, and an issue of its bonds in the amount of six hundred thousand (600,000) dollars secured by second mortgage upon said premises, each of which mortgages shall be executed by the company to Anglo-California Trust Company, as trustee (hereinafter termed the 'trustee'), and shall each bear date the 1st day of January, 1924."

Following these recitals the agreement proceeds to provide that the exposition company shall proceed to acquire the foregoing

tracts of land, and to construct thereon a building substantially in accordance with plans and specifications, which are annexed to said agreement, and which building is after its construction to be approved by the architect of said exposition company, whose approval thereof is to be binding upon both of the parties to said agreement. The agreement then proceeds to state that:

"The company hereby leases said premises to the city for the term commencing with the 31st day of December, 1924, and ending with the 15th day of December, 1941, subject to and in consideration of the following conditions and agreements of the city, to wit:"

Then follow the terms and conditions of said agreement, the first of which is the requirement that the city of San Francisco shall forthwith pay to the exposition company the sum of \$100,000. It is the payment of said sum to the demand for which the respondent refuses to give his official audit and approval. The agreement further provides:

"2. (a) The city agrees to pay to said trustee, for account of the Company, in gold coin of the United States, the following sums strictly at the times following, to wit: * * * On the 15th day of December of each of the years from and including 1924 to and including 1941, the sum of one hundred and eighty-five thousand (185,000) dollars. Any of said sums in this section 2 mentioned, or any part thereof, may, at the option of the city, be paid prior to the date herein specified for the payment thereof.

"(d) Said lease shall take effect on the date in this section above specified as the time of commencement of the term thereof, and all payments in this indenture agreed to be made by the city shall be made at the times hereinabove specified, notwithstanding said building shall not be then completed.

"(h) Said lease shall not terminate, nor shall the city be relieved of its obligation to make the payments, or any thereof herein specified, by reason of loss or damage by fire or otherwise to said building; but the city in such event shall, with reasonable diligence cause said building to be restored, and for this purpose it shall be entitled to use (so far as required) all insurance moneys received and held by said trustee.

"(k) The city further agrees that, during the term of this agreement, it shall include in each of its annual budgets such amounts and sums as shall be requisite in order that the payments herein required to be made by the city shall be made at the time and in the manner herein specified, and that it will also take any and all other steps necessary or advisable in order that each and all of its covenants herein contained may be performed as herein provided. The city further agrees that in the event that it shall fail to perform any of its agreements in this indenture contained, and any suit or suits shall be brought by the company and/or by said trustee against the city or any of its officers in respect thereof, which suit or suits shall result in judgment in favor of the company and/or said trustee, the city will pay on demand the reasonable

costs and attorneys' fees of the company and/or trustee in such suit or suits."

[1,2] The first contention which the respondent makes in support of his refusal to audit and approve said demand is the contention that the city and county of San Francisco has, under the terms of its charter, no power to enter into a lease of privately owned real estate. We are disposed to hold that this general objection is without merit. The charter of said municipality, in article I, section 1, thereof, provides that it "may purchase, receive, hold and enjoy real and personal property." By article II, chapter II, section 12, of said charter, the board of supervisors are given power "to purchase or acquire by condemnation such property as may be needed for public use." Certain other sections of said chapter contain provisions regulatory of the method and exercise of the foregoing powers, but we are directed to no other article or section of said charter which undertakes to place any such limitation upon the amplitude of the foregoing powers as the respondent herein would have us impose. On the other hand, it is a general rule of interpretation applicable to charters that the broad power to "purchase, receive, hold and enjoy real and personal property" embraces and includes the lesser power to lease the same classes of property. 3 Dillon Mun. Corp. (5th Ed.) p. 1593; Hackett v. Emporium Borough School Dist., 150 Pa. 220, 24 A. 627; 28 Cyc., pp. 604, 605, and cases cited. The succeeding contentions of the respondent go to the substance and effect of the agreement itself rather than to its own definition of its name or nature; and in this connection it may be well to refer to the language used by this court in the case of Parke, etc., Co. v. White River L. Co., 101 Cal. 37, 39, 35 P. 442, 443, wherein, in construing the document presented in that case and which purported on its face to be a "lease," this court said:

"This paper was not a lease. Calling it a lease did not establish the fact. This is peculiarly a case where there is nothing in a name, for the contents of the paper determine its true character. It is said in Heryford v. Davis, 102 U. S. 235: 'What then is the true construction of the contract? The answer to this question is not to be found in any name which the parties may have given to the instrument, not alone in any particular provisions it contains disconnected from all others, but in the ruling intention of the parties gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account.'"

[3,4] It may also be said in this connection that while it is true, as was stated by this court in the case of Egan v. City and County of San Francisco, 165 Cal. 576-581, 133 P. 294, 295 (Ann. Cas. 1915A, 754), that "the trend of authority, in more recent years,

has been in the direction of permitting municipalities a wider range in undertaking to promote the public welfare or enjoyment," it is also true, as stated in the same case, that the elementary rule still obtains that "municipal corporations have only the powers expressly conferred, and such as are necessarily incident to those expressly granted, or essential to the declared objects and purposes of the corporation." *Dillon, Mun. Corp.* (5th Ed.) § 357; *Von Schmidt v. Widher*, 105 Cal. 151, 38 P. 682; *Gassner v. McCarthy*, 160 Cal. 82, 116 P. 73. It may also be suggested that the objects and purposes for the consummation of which the agreement under consideration has been entered into by the parties thereto, are such as are embraced within the powers and functions which may be beneficially exercised by or on behalf of said municipality and its people under the conferred powers of its charter; and that the motives of those persons who, on behalf of said municipality and of said corporation, have promoted the entering into and furtherance of the agreement in question are public spirited and unselfish, and are not tinctured with any suggestion of personal advantage. But as this court has already said in the *Egan Case*:

"However worthy the motive, however advantageous to the public the result sought to be attained, it must always be remembered that municipal corporations are public bodies of limited powers, and that the validity of their acts must be judged by an examination of the charter or law defining their powers, rather than by a view of the purposes or results of those acts."

Bearing in mind the foregoing principles which must govern the action of this court, we address ourselves to an interpretation of the written agreement upon the basis of which this writ is sought, for the purpose of resolving upon its real scope and effect regardless, in a certain measure, at least, of the phrases which are made use of within it purporting to define its nature. The agreement is by its express terms denominated a "lease," but, if we are permitted to look to the stipulation of the parties to said agreement accompanying the application for this writ and made a part of its averments, the ultimate purpose of this agreement, and of the activities and conduct of the parties thereunder, is "to the end that said municipality shall be entitled to acquire said lands and buildings at the actual cost thereof to said San Francisco Exposition Company." And even if we are to disregard said stipulation and look only to the content of the agreement itself, we can arrive at no other conclusion than that the agreement in question is not a lease merely, nor a lease with an option to purchase merely, but that when read in the light of the subject to which it relates, and when construed as a whole, with

a view to determining the end of its creation, it is nothing more nor less than an agreement for the conditional sale of the premises described within it to the municipality for public uses, in accordance with the terms and conditions which said agreement contains. The agreement itself declares in the opening recitals thereof that the purpose for which the exposition company has obtained options to purchase said lands, and for which it intends to acquire the same, is that of constructing thereon a building at a cost of approximately \$1,800,000 (including the purchase price of said land), "such building to be suitable for the holding of agricultural exhibits and fairs, exhibitions of horses, cattle, and other livestock, and of agricultural, viticultural, mechanical, manufacturing and domestic products, pageants, athletic exhibitions and other exhibitions and performances designed to foster and stimulate the business and welfare of the people of the city." This recital is immediately followed by another declaring that "by reason of the public nature of the purposes for which said premises are to be used, it is desirable that the same should immediately come under the control of the city, and should ultimately be owned by it." These recitals dominate the entire agreement, and bind the parties thereto to the admission that the ultimate end of its creation is the ownership by the municipality of the lands and premises in question, and for the public uses and purposes set forth therein.

When we pass from the recitals of said agreement to the covenants thereof we find that while the instrument embodying the mutual agreements of the parties is denominated a "lease," certain of the usual elements of a lease are lacking. For example, there is no fixed or determinable rental for the premises, the possession of which is to be transferred to the municipality as of the date of said agreement. True, the municipality is to pay over to the exposition company the sum of \$100,000 as of the date of the execution of the agreement, but it is nowhere stated therein that this payment is being made on account of rental or is to be so applied. On the contrary, the fact that at the date of said agreement, which was to be also the date of said payment, the exposition company was not the owner of said property, but had only an option to purchase the same, coupled with the further fact that the premises were at said date unequipped for the public uses for which it was being taken over, and that, before it could be usable for such purposes, extensive and costly structures were to be constructed thereon, occupying much time in their erection, would lead to the somewhat plain inference that the primary payment of \$100,000 was intended by the parties to be included in the purchase of the property by the exposition company and

was, as to at least some portion thereof, to be accounted for and applied to the ultimate purchase price to be paid by the municipality for the property, in the event that it should acquire the same. The same reasoning is to be applied to the subsequent annual payments of \$185,000 to be made by the municipality on the 15th of December of each and every year during the term of said agreement. These payments were not to be received by the exposition company to be applied as rental of the premises, but were to be paid to the trustee named in said agreement, and to be applied by it upon account of the purchase price of the property, upon the exercise by the municipality of its right to purchase the same, and said aggregate sums of money were only to pass to the exposition company upon the failure of the municipality to exercise said right of purchase, or to otherwise keep the covenants of said agreement to be by it performed. The same thing is true of the annual income to be derived by the municipality from the operation of the premises for the public uses to which these lands with the buildings to be erected thereon were to be applied. As to the first \$30,000 of these revenues earned in each year, the gross amount thereof was to be paid over by the municipality to the trustee to be held by it and applied to the eventual purchase price of the property. The net earnings annually above that sum were to be similarly applied. In a word, the exposition company, the so-called lessor of said property, was to derive no pecuniary income or advantage from the use thereof by the municipality during the term of said agreement, except in so far as the trustee was to apply such revenues to the payment of its bonds, and also except as to whatever advantage might accrue to it by reason of the exercise or the failure to exercise the so-called option to purchase said property.

Turning now to the advantage, if any, accruing to the municipality from the entering into and operating under said agreement. The prime advantage of a lease to a lessee is the usufruct of the premises during the term thereof. But under this agreement the entire usufruct in the way of the annual income from the use of said property was to be paid over to the trustee to be applied upon the eventual purchase price thereof; or, in the event of the failure of the municipality to consummate such purchase, was to be utterly lost to it. Viewed from either standpoint, therefore, it is seen that those elements which are the usual concomitants of a lease are lacking from this agreement, while, on the other hand, these are the usual and consistent elements entering into agreements for the conditional sale and purchase of real property.

[5] It is, however, claimed by the petitioners that this should not be construed to be

such an agreement, because the provision therein for the purchase of the premises by the municipality is expressly stated to be a mere option to purchase, which is not binding upon or enforceable against it. It is to be noted, however, that the agreement to make the several payments to be made by the municipality as a prerequisite to the exercise of the so-called "option" are not in themselves optional. As to the first of such payments the petitioners are united in insisting upon its enforcement by means of this very proceeding; while as to the annual payments of \$185,000, to be made by the municipality during the period of 14 years, the entire life of this agreement, or at least until the municipality shall exercise said option, these payments are not only made binding obligations upon the municipality, but are expressly made enforceable by actions to be brought by either the exposition company or the trustee in the event of any default on the part of the municipality in taking the necessary steps provided by its charter for the payment of these obligations. The same compulsions and the same remedies are made applicable to all of the other payments provided for in said agreement, with the possible exception of the obligation on the part of the municipality to assume and pay the bonded indebtedness of the exposition company. A closer reading of this agreement will show, however, that this is an apparent and not a real exception. By the several subdivisions of section 2 of said agreement, the municipality is bound, as we have seen, to make each and all of the annual and other payments provided for in the agreement to the trustee named therein. By the provisions of subdivision 3 of said agreement, the said trustee is required to apply all amounts so agreed to be paid to such trustee (with certain minor exceptions) to the payment of the first and second mortgage bonds of the exposition company and to that purpose only. With each succeeding year during the life of this agreement the voluntary or compelled payments of the obligations of the municipality thereunder accumulate in the hands of the trustee until, as the life of this agreement draws towards its close, these payments aggregate several million dollars, applicable only to the redemption of said bonds, whether the municipality does or does not exercise its so-called option to purchase the said property. It thus appears that while it is not expressly stated in said agreement that the municipality has obligated itself to the payment of the principal and interest of the two bond issues of the exposition company, it has bound itself to do so, in effect, since it is bound to pay over to said trustee the accumulating funds from which said bonds are to be paid. It also quite clearly appears that the so-called option on the part of the municipality to pur-

chase the said property becomes in effect an increasing compulsion upon it to consummate such purchase, since not to do so would result in the irrevocable loss to the municipality, not only of the primary and succeeding annual payments, which it is bound to make under this agreement, but also of the entire usufruct of the property during the period of its occupation, and also of the property itself.

Sufficient has thus far been said as to the real nature and effect of this agreement, as revealed by the recitals and obligations thereof, to lead to the inevitable conclusion that it must be construed to be an agreement for the purchase by the municipality of the property described therein for public uses. Being thus interpreted we are next to consider the obstacles, if any, which the law interposes against the validity and execution of such an agreement as affecting the city and county of San Francisco. Section 18 of article 11 of the state Constitution provides as follows:

"No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof on or before maturity, which shall not exceed forty years from the time of contracting the same. * * * Any indebtedness or liability incurred contrary to this provision * * * shall be void."

"The natural and reasonable construction to be given this language," said this court in the case of *Higgins v. City of San Diego*, 131 Cal. 294, 298, 63 P. 470, 472, "is that all legitimate indebtedness of the municipality for any year must not exceed all the revenues and income provided for that year, and all indebtedness beyond such provision becomes void and cannot be paid out of the funds of a succeeding year or at all except by the assent of two-thirds of the qualified voters." In the case of *Chester v. Carmichael*, 187 Cal. 287, 201 P. 925, it was held that the liability assumed by the city of Sacramento, under the facts as shown in that case, to make certain expenditures of money, annually, for a series of years, amounted to the creation of an indebtedness to the extent of the aggregate of such payments as of the date when the obligation was entered into, and that the above provision of the Constitution was violated thereby. In that case it appeared that certain persons, the owners of a tract of land in Sacramento suitable for park purposes, had executed to the city a convey-

ance of such land for said purposes upon certain covenants and conditions set forth in the conveyance, and which had been formally accepted by said city. Among these was the condition that the city should annually, and for a period extending over a number of years, expend the sum of at least \$5,000 in the improvement and maintenance of said property, such improvement to exceed in cost the sum of \$50,000, in addition to the annual cost of maintenance, which was estimated as in excess of \$5,000 per annum. The penalty of failure or refusal on the part of the city to make these expenditures was to be the forfeiture of its rights to said property under said conveyance, and the reversion thereof to the grantors. This court held that the obligation thus imposed upon said city by said transaction amounted to the creation of a liability to the extent of the aggregate of such expenditures as of the year and date of the conveyance, and that as such it was an indebtedness and liability created in violation of said constitutional provision. In so declaring this court cited and commented approvingly upon a number of cases from other jurisdictions having a more or less immediate bearing upon the matters involved in the present controversy. Among these was the case of *Browne v. City of Boston*, 179 Mass. 321, 60 N. E. 934, the facts in which case showed that the city of Boston had made an agreement with the owners of certain lands by which it agreed to purchase said lands for the sum of \$226,000, paying \$24,000 down, and entering into an arrangement by which the owners were to place mortgages upon said lands for the sum of \$202,000, payable three years after date, whereupon the city was to take said lands subject to said mortgages, with no personal liability to pay the same, but with the result that in order to retain the lands the city would be put to the compulsion of paying off the mortgages when due. The Supreme Court of Massachusetts held that such an arrangement was in violation of the statutory provision of that state limiting the debt liability of cities. In the case of *Voss v. Waterloo Water Co.*, 163 Ind. 69, 71 N. E. 208, 66 L. R. A. 95, 106 Am. St. Rep. 201, 2 Ann. Cas. 978, also cited, the facts were that the town of Waterloo, not having sufficient money to construct a waterworks and electric light plant for the town, and not being able to borrow the money necessary for such purpose without creating an indebtedness exceeding the constitutional limit, entered into an agreement with a private corporation by the terms of which the latter was to construct such electric light and water plant and issue bonds for the cost thereof, whereupon the town agreed to levy and collect annually taxes, and pay the same to a trustee for the bondholders until such time as a sufficient sinking fund had been created for the pay-

ment of such bonds, the city to become eventually the owner of the plant. It was expressly provided in the agreement that there should be no liability upon the town for the payment of such bonds. The court nevertheless held that the agreement created an indebtedness beyond the limit fixed by the Constitution. In the case of *Eddy Valve Co. v. Town of Crown Point*, 166 Ind. 613, 76 N. E. 537, 3 L. R. A. (N. S.) 684, also cited and approved, the town of Crown Point, desiring to become the owner of a system of waterworks, entered into an agreement with a private corporation, by the terms of which the latter was to construct said plant, mortgaging the same for that purpose, the town to pay annually certain rentals for the use of hydrants and of water for the inhabitants, and was to have the right at its option to purchase the plant, subject to its incumbrance, but that the town was not to otherwise assume the payment of such incumbrance. The court held that in accepting the conveyance of the property subject to the incumbrance, but without any obligation to pay the same other than that imposed by the liability of a foreclosure of the mortgage, thereby depriving the town of the property, an indebtedness was created beyond the constitutional limitation. In *Dillon on Municipal Corporations* (5th Ed.) § 199, the general rule applicable to this class of cases is thus stated:

"If the city purchases waterworks or other valuable property subject to a mortgage, the amount secured by the mortgage is indebtedness of the city even if it do not assume it or become liable for it in any way. In order to keep the property purchased the city will have to pay the mortgage, and if the amount due exceeds the limit of the debt which the city is authorized to incur, the purchase is beyond its power and void."

In the discussion of the case of *Chester v. Carmichael*, supra, the court considered the similarity of the transaction in that case to that of a purchase of lands upon the installment plan, holding, that in either case, even though the only remedy of the seller for the enforcement of payment was the right to forfeiture, yet the debt was created at the time the contract was entered into for all the sums subsequently to be paid. The court, also, in that case distinguished it from the cases of *McBean v. Fresno*, 112 Cal. 160, 44 P. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191; *Smilie v. Fresno*, 112 Cal. 311, 44 P. 556; and *Doland v. Clark*, 143 Cal. 176, 76 P. 958, by pointing out that each of the foregoing cases involved contracts for the furnishing to the city in the future of service, materials, etc., and that no indebtedness or liability within the meaning of the constitutional provision in question was incurred until the furnishing of the consideration for which the payments were to be made. The distinction between

those cases and that case, and also the instant matter is obvious. The recent decision of this court in the matter of the Controversy, etc., with Boyle, 191 Cal. 172, 215 P. 549, shows that matter to be within the class of cases considered in *McBean v. Fresno*, supra, and the other like cases cited, and hence distinguishable from the instant case. In the latter case it was held that question of the applicability of section 18 of article XI of the Constitution was removed from inquiry under the stipulated facts of that case.

[6, 7] We are unable to perceive that there is any difference as to the principles involved between the case of *Chester v. Carmichael*, supra, and the matter here in controversy. The only remaining inquiry is as to the applicability of the constitutional provision to the facts herein agreed upon in the state of the record before us. The petition for a writ of mandate herein is silent as to whether the creation of a liability on the part of the city and county of San Francisco, to the extent of approximately \$3,500,000 during the year 1924, would have the effect of causing said municipality to exceed during that year the income and revenue provided for such year. In the agreed statement of facts embodied in said petition it, however, appears that, at the time of the presentation of the aforesaid claim and demand to the auditor, he specified, among the several grounds of his refusal to audit and approve the same, the fact—

"that by said agreement said city and county of San Francisco incurs an indebtedness and liability exceeding in each of the years of the term thereof the income and revenue provided for such year without the assent of two-thirds of the qualified electors thereof voting at an election held for that purpose, in violation of section 18 of article XI of the constitution of the state of California."

In the presence of this express objection to the audit and approval of said claim and demand, it was, we think, incumbent upon the petitioners herein to show affirmatively, either in their petition or agreed statement of facts, that this objection was not founded in fact. This is particularly true where the municipality itself is seeking to have one of its own officials compelled to act in the approval of an expenditure from its treasury, and when the state of its finances and expenditures for the year in question is peculiarly within its knowledge.

[8] Aside from the constitutional obstacle, which seems to stand in the way of the enforcement of the agreement under review, there are also certain provisions of the charter of the city and county of San Francisco which, it is urged, deny to the city the power to acquire property or construct permanent buildings or improvements above a certain cost without submitting the matter to the vote of the people. Section 29, of article XVI of the charter provides as follows:

"When the supervisors shall determine that the public interest requires the acquisition of any land or lands, or the construction or acquisition of any permanent building or buildings, improvement or improvements, the cost of which, in addition to the other expenses of the city and county will exceed the income and revenue provided for the city and county for any one year, they must, by ordinance, submit a proposition or propositions to incur a bonded indebtedness for such purpose or purposes to the electors of the city and county at a special election to be held for that purpose only. All provisions of this charter, as the same shall read at the time of submitting such propositions to the electors, providing for the acquisition of public utilities, so far as the same are applicable, shall apply to the manner of submitting such proposition or propositions, to the issuance, character, and registration of said bonds and to the time when, and the kind of money in which said bonded indebtedness shall be payable."

Article XII of the said charter, to which the foregoing provision refers for its procedure, embraces an elaborate plan for the acquisition of public utilities, which need not be here recited, but with reference to which it will suffice to say that, in the agreed statement of facts which are embodied in the petition for this writ, it is expressly set forth:

"That no election has been called nor will any be held for the purpose of authorizing the incurring by said city and county of San Francisco of the liabilities assumed by it in and by said agreement, and no provision has been made, and it is intended that no provision shall be made, for the levy or collection by said city and county of an annual or other tax sufficient to pay the interest on said indebtedness created by said agreement, nor any part thereof, nor for the creation of a sinking fund for the payment of the principal of said indebtedness."

This stipulation and averment amounts to a frank avowal that the foregoing provisions of the charter relating to the acquisition of these properties for public uses are not being and are not to be complied with; and if the nature of this agreement is as we have construed it to be, and if, as we have seen, the statement of the auditor in refusing to audit and approve the present demand, to the effect that said agreement has the effect of creating obligations exceeding the income and revenue of the municipality for each and every year during the term thereof, is to be taken to be true because uncontroverted, it follows inevitably that said agreement is wholly void as in violation of the express requirements of these provisions of said charter.

There are a number of other respects in which, as urged by the respondent or by amicus curiæ, this agreement is obnoxious to the provisions of the state Constitution, or of the charter of said municipality, and

which, though fully considered, we do not deem it necessary to discuss in this opinion, having thus far based our conclusions upon what appear to be vital points involved in this controversy. There are also certain technical objections urged by the respondent against his present audit or approval of the claim and demand which form the immediate reason for seeking this writ, but which we have not considered because of the evident desire of the parties hereto that our decision should go to the ultimate question as to the validity of this agreement, rather than that it should be based upon any matter that might be remedied in a later proceeding.

The application for a writ of mandate is denied.

We concur: MYERS, C. J.; SEAWELL, J.; SHENK, J.; LENNON, J.; WASTE, J.; LAWLOR, J.

195 Cal. 386

In re STEEHLER'S ESTATE.

STEEHLER et al. v. RILEY, State Controller.

(L. A. 8040.)

(Supreme Court of California. Feb. 14, 1925.
Rehearing Denied March 16, 1925.)

1. Taxation $\S$ 860—Rule of strict construction against state applicable in determining whether Inheritance Tax Act imposes tax on family allowances.

Rule that statutes imposing taxes must be strictly construed in favor of individual and against state applies in determining whether St. 1917, p. 880, as amended by St. 1921, p. 1500, imposes inheritance tax on family allowances.

2. Taxation $\S$ 866—No inheritance tax on family allowance to widow and minor children of deceased.

St. 1917, p. 880, §§ 1(3), 2(1), as amended by St. 1921, p. 1500, in view of history of legislation, imposes no inheritance tax on family allowance to widow and minor children of deceased; section 2(1), imposing tax on transfers by court orders "setting apart" property referred to in Code Civ. Proc. §§ 963, 1464-1470, 1486, 1719.

3. Taxation $\S$ 860—Exemption provisions of Inheritance Tax Act construed strictly against claimant.

Exemption provisions of Inheritance Tax Law of 1921 should be construed liberally in favor of state and strictly against those claiming exemptions.

4. Statutes $\S$ 225—Rule that latest of two statutory provisions must be given effect inapplicable, unless irreconcilable conflict clearly appears.

Rule that when two provisions in statute are irreconcilable, one last adopted must be given effect, is one of necessity, and should

not be applied, unless irreconcilable conflict clearly appears.

5. Taxation — 886½ — Entire amount of property transferred above \$25,000 taxed at increased rate by deducting exemption from first \$25,000.

St. 1921, p. 1500, § 6, subd. 6, requiring deduction of exemptions, therein allowed from "aggregate" amount of property transferred, and taxation of transfer of remainder at same rates as if exemption were not allowed, does not change rule, under St. 1905, p. 341, §§ 1-4, that entire amount of property transferred be considered in fixing rate, and hence that amount above \$25,000 be taxed at increased rates, under section 3, by deducting exemption from first \$25,000.

6. Statutes — 245 — Interpretation of statutory provisions which lays burden uniformly on all standing in same degree with relation to tax adopted.

Where two interpretations of statutory provisions imposing or exempting from taxes are urged, that should be adopted which lays burden of taxation uniformly on those bearing it, and standing in same degree with relation to tax.

In Bank.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

In the matter of the estate of William A. Steehler, deceased. From an order confirming inheritance tax appraiser's report and fixing amount of tax to be paid by deceased's widow, Rose H. Steehler, and minor daughter, the former, as administratrix, and others appeal, Ray L. Riley, as State Controller, appearing as respondent. Reversed in part, and affirmed in part, with directions.

Hunsaker, Britt & Cosgrove, of Los Angeles (John N. Cramer, of Los Angeles, of counsel), for appellants.

Ralph W. Smith, State Inheritance Tax Atty., and Wesley E. Marten, Asst. State Inheritance Tax Atty., both of Sacramento (Erwin P. Werner, of Los Angeles, Adrian C. Stanton, of Sacramento, and Ida V. Wells, of Los Angeles, of counsel), for respondent.

RICHARDS, J. This appeal is by the administratrix and heirs of William A. Steehler, deceased, from an order of the superior court of Los Angeles county, confirming the report of the inheritance tax appraiser and fixing the amount of inheritance tax to be paid by the widow and minor daughter of said deceased. The facts of the case are conceded to be correctly set forth by the appellants in their opening brief and are as follows: William A. Steehler died intestate in Los Angeles county on August 28, 1921, leaving a widow, Rose H. Steehler, and a minor daughter, Rosemary Hastings Steehler, as his only heirs at law. The estate, which was appraised at about \$229,000 consisted entirely of personal property. Let-

ters of administration were issued to the widow by the superior court of the county of Los Angeles. Pursuant to orders of that court, she paid, as administratrix, to herself as widow, sums awarded as a family allowance, aggregating \$12,600. In due course the state inheritance tax appraiser filed her report. She did not deduct any of said sums paid as a family allowance in order to determine the clear market value of said property, but, having computed the market value at a sum including the family allowance, she then deducted the sum of \$10,800 (the amount which had been paid as family allowance to the date of the report), in order to, and "only in order to add said sum of \$10,800 to said taxable estate and thus tax said sum to the said Rose H. Steehler, widow, and Rosemary H. Steehler, minor daughter," in the proportions of two-thirds and one-third respectively. Having ascertained in the manner above indicated the amount of taxable property passing to the widow and daughter, the inheritance tax appraiser computed the tax in each instance by deducting the statutory exemption of \$24,000 from the first \$25,000 taxable to the distributee at 1 per cent. "instead of from the distributive share as a whole." Objections were filed to the report of the inheritance tax appraiser on the grounds: (1) That she erred in failing to deduct the amount paid as a family allowance and in holding that the same was taxable in the proportions of two-thirds and one-third, respectively, against the widow and daughter; (2) that she erred in computing the amounts taxable to the widow and daughter, in each case, by deducting the exemption of \$24,000 allowed by law from the first \$25,000 taxable at 1 per cent. under the terms of the Inheritance Tax Act of 1921, instead of deducting each of said exemptions of \$24,000 from each of the aggregate amounts of property transferred, respectively, and taxing each remainder, after making such deductions, at the rates at which it would have been taxed had no exemptions been allowed. The court overruled said objections and confirmed the report of the inheritance tax appraiser, holding that the family allowance was taxable, adopted the method of calculation employed by the inheritance tax appraiser, and fixed the total tax due from the widow and daughter at \$5,789.44. It is from this order that appellants prosecute this appeal. They renew their aforesaid objections upon this appeal. They contend: First, that a family allowance is not taxable under the terms of the Inheritance Tax Act of 1917 as amended in 1921, which act was in force at the date of the decedent's death; second, that the \$24,000 exemptions to which the widow and daughter of said decedent were and are entitled should have been deducted from the aggregate amount of property distributable to each heir, rather than from the

first \$25,000, as was done by said appraiser and approved by said court.

[1] In making each of these contentions the appellants invoke the well-established rule that statutes imposing taxes upon the persons or property of individuals for public purposes are to be strictly construed in favor of the individual and against the state. The respondent, while not denying the rule or opposing the authorities urged in its support, insists that it is not to be given application to the portion of the inheritance tax law which relates to the exemption from or inclusion of family allowances within the provisions of said law, for the reason that the appellants herein are seeking to claim the benefit of an exemption from a tax upon inheritance, the right to which inheritance is itself wholly statutory, and since exemptions from taxation are not favored by law the rule as to strict construction is to be applied to those seeking the exemption and not to the general terms of the act, which should be liberally construed in aid of the legislative intent, citing *Cornett's Ex'rs v. Commonwealth*, 127 Va. 640, 105 S. E. 231; *In re Ferrel's Estate*, 112 Wash. 231, 192 P. 12, 11 A. L. R. 820; *Dos Passos on Inheritance Tax Law* (2d Ed.) p. 74; *Estate of Bull*, 153 Cal. 715, 96 P. 366. In each of these cases above referred to, however, the courts, and in the case of the text-book citation the author, were dealing with express exemptions in statutes otherwise generally imposing inheritance taxes; and the appellants point out, and we think correctly, that in this branch of the case we are not dealing with the exemption clauses in the statute, but are dealing with the question as to whether the statute in fact imposes a tax upon family allowances, and that to such a case the general rule applies; and they cite in support of this view the cases of *Estate of Potter*, 188 Cal. 64, 204 P. 826; *McDougald v. Boyd*, 172 Cal. 753, 159 P. 168; and other earlier decisions of this court and which we think justify the application of the rule of strict construction to the provisions of the inheritance tax law here under review.

[2] The provisions of the Act of 1917 (Stats. 1917, p. 880) relating to inheritance taxes and which were carried into the act of 1921 (Stats. 1921, p. 1500), which amended said former act without change in the particular respect important to the consideration of the questions presented upon this appeal, read as follows:

"Section 1. (3) The word 'transfer' as used in this act shall be taken to include the passing of property or any interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise, succession, bequest, grant, deed, bargain, sale, gift, or appointment in the manner herein described. * * *

"Sec. 2. A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed, or of any interest therein or income therefrom in trust or otherwise, to

persons, institutions or corporations, not hereinafter exempted, to be paid to the treasurer of the proper county, as hereinafter directed, for the use of the state, said taxes to be upon the market value of such property at the rates hereinafter prescribed and only upon the excess over the exemptions hereinafter granted, in the following cases:

"(1) When the transfer is by will or by the intestate or homestead laws of this state, from any person dying seized or possessed of the property while a resident of the state, or by any order of court setting apart property pursuant to article one, chapter five, title eleven, part three of the Code of Civil Procedure."

In the attempt to so interpret the foregoing provisions of the act of 1917, as to support the conflicting claims of each of the parties to this appeal, their respective counsel have chosen to consider the language of the statute above quoted as sufficiently uncertain as to its meaning to require a reference to the provisions of the several earlier acts imposing inheritance taxes in this state, and to our decisions construing the same for the purpose of shedding light upon the proper interpretation of the foregoing provisions of the act here under review. We shall therefore pursue a similar inquiry.

By the Inheritance Tax Law of 1905 (Stats. 1905, p. 341) it was provided in section 1 thereof:

"All property which shall pass, by will or by the intestate laws of this state, from any person who may die seized or possessed of the same while a resident of this state * * * to any person or persons, or to any body politic or corporate, in trust or otherwise, * * * shall be and is subject to a tax hereinafter provided for," etc.

The interpretation of the foregoing provision of said statute came before this court for decision in the case of *Estate of Kennedy*, 157 Cal. 517, 108 P. 280, 29 L. R. A. (N. S.) 428, in which case the trial court, after making an order for family allowance under the provisions of section 1466 of the Code of Civil Procedure, and after making an order, under section 1465 of the same Code, designating, selecting, and setting apart a probate homestead to the widow, was called upon to fix the amount of the inheritance tax under the statute of 1905. In so doing the court deducted from the whole value of the estate subject to such tax the amount of the family allowance ordered and paid, but refused to deduct the value of the property set apart as a probate homestead. There were separate appeals; the treasurer of the city and county of San Francisco appealing from that portion of the court's order refusing to impose the inheritance tax upon the family allowance, and the widow appealing from the portion of said order subjecting the homestead to said tax. In passing upon both appeals in the same decision, this court held that neither the family allowance nor the probate homestead "passed by will or by the intestate

tate laws of this state," and hence that neither of said forms of property was subject to the inheritance tax, under the provisions of said statute. The decision in said case was handed down in April, 1910. The Legislature in 1911, with the decision of the Kennedy Case obviously in mind, amended section 1 of the act of 1905 to read in part as follows:

"Section 1. A tax shall be and is hereby imposed upon the transfer of any property * * * or of any interest therein or income therefrom * * * in the following cases:

"(1) When the transfer is by will or by the intestate or homestead laws of this state, from any person dying seized or possessed of the property while a resident of the state, or by any probate homestead [act] set apart from said property." Stats. 1911, p. 713.

It would seem clear that in thus amending the former statute the Legislature, while expressly intending to subject homesteads, both statutory and probate, to an inheritance tax, did not intend to include within the terms of said statute family allowances. Two years later, however, the Legislature adopted a new inheritance tax law, revising its prior legislation upon the subject and expressly repealing its former acts, and particularly the act of 1911. In so doing, however, it adopted without change the verbiage of section 1 of the act of 1911, except as to the numbering thereof, making it section 2 of the new act. In subdivision (c) of section 1 of the new statute, it undertook to define the word "transfer" as used in said act as follows:

"(c) The word 'transfer' as used in this act shall be taken to include the passing of property or any interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise, succession, bequest, grant, deed, bargain, sale, gift, or appointment in the manner herein described."

The Legislature also, in reframing section 4 of said act inserted the following significant provision:

"The tax so imposed shall be upon the market value of such property at the rates hereinafter prescribed and only upon the excess over the exemptions hereinafter granted; and provided, that in determining said market value no deduction shall be made for any family allowance made out of said estate." Stats. 1913, pp. 1066-1069.

The effect of the incorporation of this provision in section 4 of said act, which has relation to the lien imposed by, and the method and procedure for, the collection of inheritance taxes, would apparently be that of imposing the burden of the tax not upon the person or persons receiving the family allowance, but upon those persons to whom the property of the estate was otherwise transferred under the terms of section 2 of said act, which, as we have seen, did not, under the former act, include family allow-

ances, and hence cannot be held to have done so under section 2 of the act of 1915, which took over said section of the former act without any change in the verbiage thereof. The Legislature of 1915 undertook to make several amendments to the act of 1913, but made no change in the wording of those portions of sections 1, 2 or 4 to which reference has above been made. The Legislature of 1917 again undertook to enact a new inheritance tax law and to repeal the act of 1913 and all later amendments thereof. It adopted the definition of the term "transfer" as given in said former act, and also adopted much of the language of section 2 of said act. It, however, materially modified the language of subdivision 1 of section 2 of said former act so as to make the same read as follows:

"(1) When the transfer is by will or by the intestate or homestead laws of this state, from any person dying seized or possessed of the property while a resident of the state, or by any order of court setting apart property pursuant to article one, chapter five, title eleven, part three of the Code of Civil Procedure."

It also, in reframing said law, omitted therefrom the provision which had been a part of section 4 of the former act, relating to family allowances and to their inclusion in determining the market value of the estate to be burdened by the tax. It is argued by the respondent herein that such omission was not due to any intent on the part of the lawmakers to relieve those persons who had received family allowances from the burden of inheritance taxes, but that it was due to the change in the wording of subdivision 1 of section 2 of said act, bringing family allowances within its terms. But if, as above stated, we conclude that the provision in section 4 of the act of 1913 did not lay the burden of inheritance taxes upon the recipients of family allowances, at least directly, the above argument would lose its potency, and the respondent would thus be driven to take and maintain the position that the changed language of subdivision 1 of section 2 of the statute of 1917 must in and of itself be interpreted as evincing an intent in the lawmakers to impose upon family allowances an inheritance tax which had not theretofore been imposed by any previous statute. Looking, therefore, to the language of said subdivision, and applying to its terms the principle of strict construction above held to be applicable generally to inheritance tax laws, we find that in addition to the inclusion of transfers by will, or by the intestate or homestead laws of this state within the scope of such taxes, the subdivision also purports to include therein such property of the decedent as had been transferred "by any order of court setting apart property pursuant to article three, chapter five, title eleven, part three of the Code of Civil Procedure." Comparing this subdivision with subdivision 1 of section 1 of the act of 1911, we

discover that by the use of the term "homestead laws," in the opening clause in each subdivision, the Legislature intended to refer to homesteads created under statutory homestead laws, as distinguished from so-called "probate homesteads," since the latter are separately specified in the succeeding clause in subdivision 1 of the previous statute; and since in subdivision 1 of the later statute the first clause of the former act is copied in *hæc verba*, but the succeeding clause thereof relating to "probate homesteads" is omitted, we thus have the situation that, but for the inclusion of the latter portion of subdivision 1, above quoted, in the act of 1917, "probate homesteads" would not have been subjected to an inheritance tax. It is also to be borne in mind that prior to the adoption of the act of 1915 property of an estate exempt from execution and set apart as such for the use of the surviving husband or wife, or in the event of the death of each such survivor to the use of the minor children of the decedent, under the provisions of section 1465 of the Code of Civil Procedure, had never been subjected to the burden of inheritance taxes. *Estate of Kennedy*, *supra*.

The purpose of the lawmakers in reframing subdivision 1 of section 2 of the previous inheritance tax law was to embrace within its terms "probate homesteads" which had theretofore been subjected to the tax by the express terms of the previous act, and to further extend its provisions so as to include "exempt property" which had not theretofore been made subject to the tax. This is made clear by the use of the term "set apart" in said subdivision, and by its reference to the title, chapter, and article of the Code of Civil Procedure in which this term is used in relation to orders of the probate court dealing with the creation of probate homesteads and with the sequestration of those portions of the decedent's property which was by other statutes exempt from execution. When we turn to the said title, chapter, and article of the Code thus referred to we find that it embraces sections 1464 to 1470, inclusive, of said Code, and that these sections deal generally with the subject of provision for the support of the decedent's family; and that among these is section 1466, by the terms of which the probate court is empowered, under certain conditions, "to make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances during the progress of the settlement of the estate." Certain other sections of said article refer to probate homesteads and to exempt property; and as to each of these the orders of the court sequestering these forms of the estate's properties are expressly designated as orders "setting apart" such properties for the use of the surviving member or members of the decedent's family. In other portions of the same Code these orders when referred

to are designated as orders "setting apart" such homestead or exempt properties. Code Civ. Proc. §§ 963, 1486, 1719. It would thus appear that the phrase "setting apart" has been given a particular meaning as applicable to orders affecting those forms of property to which it is applied in the foregoing sections of the Code of Civil Procedure, and that this being so the lawmakers made use of this expression in subdivision 1 of section 2 of the Inheritance Tax Law of 1917, as having reference to the particular kinds of property to which it had been applied in the article, chapter and title referred to in said subdivision.

There is much reason for holding that its said use in said subdivision should not be extended to family allowances. The provision for the family of the decedent is one which arises out of the necessities of the situation. By the very terms of the section of the Code, which permits the court to make such allowance, it is only to be made "if the property set apart," that is to say the homestead and exempt property, "is insufficient for the support of the widow and children or either." It is in the nature of a continuance of that contribution to the daily or regular maintenance of the household and its occupants which the decedent himself was accustomed to provide, and would have continued to supply but for his death, and which, if so supplied, would to that extent have diminished the substance of his assets subject to this form of taxation. When allowed by the court in such reasonable amount, and under such circumstances as are prescribed by the statute, it would in the nature of things be disbursed and dissipated in providing for the family necessities pending the settlement of the estate. There is every reason, therefore, why this perishable part of decedent's estate ought not to be diminished by the imposition of an inheritance tax in the absence of a clear intent on the part of the Legislature to so prescribe. We discover no such clear intent either in the past history of inheritance tax legislation in this state, or in the terms of the existing statute, and hence find no difficulty in the way of holding that in so far as the inheritance tax appraiser undertook to impose such tax upon the family allowance made to the widow and minor daughter of said deceased, and in so far as the trial court undertook by its order to approve the action of the inheritance tax appraiser in that regard each of these was in error and that such order should be reversed.

[3] The second contention of the appellants herein is that the inheritance tax appraiser was also in error in computing the amounts taxable to the widow and daughter of the decedent in each case, by the plan of deducting the exemption of \$24,000 allowed by the Inheritance Tax Law of 1921, from the first \$25,000 taxable at 1 per cent., under the terms of the said law instead of deducting

each of said exemptions of \$24,000 from each of the aggregate amounts of property transferred respectively, and taxing each remainder after making such deductions at the rates at which it would have been taxed had no exemptions been allowed; and that the trial court was also in error in approving the report of the inheritance tax appraiser based upon such erroneous plan of computation. The appellants use the term "aggregate" as referring to the last \$25,000 of the transferred estate. It is claimed that the difference to each of the appellants resulting from this alleged improper method of calculation would amount approximately to \$800. It may be here stated that since we are now dealing with the exemptions provided for in the Inheritance Tax Law the provisions of said law applicable to this phase of the present appeal should, under the principles heretofore announced, be construed liberally in favor of the state and strictly as to those claiming the benefit of such exemptions. See *Dos Passos on Inheritance Tax Law*, and cases cited, *supra*. In determining the state of the present law as applicable to the question here presented we are again required to have access to the earlier statutes upon the subject and to decisions of this court interpreting the same. The Inheritance Tax Law enacted in 1905 (Stats. 1905, p. 341), after declaring in section 1 thereof that all property passing by will, etc., shall be subject to such tax, provides that "the tax so imposed shall be upon the market value of such property at the rates hereinafter prescribed and only upon the excess over the exemptions hereinafter granted." Section 2 fixes certain rates, varying according to the degree of kinship between the decedent and the successor, "when the property * * * exceeds in value the exemption hereinafter specified and shall not exceed in value \$25,000." Section 3 declares that the "rates in section 2 are for convenience termed the primary rates" and fixes an increasing scale of rates, consisting of multiples of the primary rates, for the property in excess of \$25,000. Section 4 allows exemptions of different amounts to various classes of persons and corporations. In the matter of the Estate of Timken, 158 Cal. 51, 109 P. 608, this court was called upon to interpret the foregoing provisions of the act of 1905 in a case wherein the appellant (in that matter the state) contended that the exemptions provided for in section 4 of said act should be deducted from the amount to which the primary rates were to be applied under the language of section 2 thereof. This court upheld this contention, holding that the entire amount of the property transferred whether exempt or not, was to be considered for the purpose of fixing the rate of taxation, and that it followed necessarily that where the property including the exemption exceeds \$25,000 the excess is taxable at the increased rates provided for

in section 3 of said act; and that the only way in which this could be accomplished was by deducting the exemption from the first \$25,000 rather than from the entire value of the property transferred, and that such interpretation involved no inconsistency between section 1 and the succeeding sections of said act. In so deciding, this court followed the rule of computation which had been already approved in the case of *Estate of Bull*, 153 Cal. 715, 96 P. 366, although in that case the direct point involved in the *Timken Case* was not under review. The act of 1905 underwent a number of amendments and revisions, both after its passage in that year and after its interpretation by this court in the foregoing cases, and it is to be noted that during these several amendments to and revisions of said act down even to the year 1921, the foregoing provisions thereof remained practically unchanged, except in a particular hereafter to be noted, the several succeeding Legislatures being apparently satisfied with the terms of the foregoing provisions of the original act and with the interpretation which this court had placed upon the same in the above-cited cases. The act of 1921 (Stats. 1921, p. 1500) corresponds as to sections 2, 4, and 5 thereof, in practically identical language with sections 1, 2, and 3 of the Act of 1905, and it would seem to follow that, but for a certain other provision in the act of 1921 which, as claimed by the appellants herein, evinces a different intent, the same interpretation must be given to sections 2, 4, and 5 of the Act of 1921 which this court gave to the similar provisions of the act of 1905 in the cases already referred to. Such was in fact the interpretation given to said sections and in fact to the entire act of 1921 by the respondent in computing the inheritance taxes involved in this branch of this appeal.

[4] The appellants herein, however, contend that an entirely different intent has been expressed by the Legislature in its revision of the inheritance tax laws through the incorporation in the act of 1921 of subdivision 6 of section 6 of said act reading as follows:

"(6) In computing the tax upon transfers subject to tax under the provisions of this act, the exemptions in this section allowed shall be deducted from the aggregate amount of property transferred, and the transfer of the remainder of the property after making such deduction shall be taxed at the rates at which it would have been taxed had no exemption whatever been allowed."

It is the contention of the appellants herein that the insertion of this provision in the act of 1921 evinces a clear intention on the part of the Legislature to abandon the rule for the computation of inheritance taxes declared by this court in *Estate of Timken*, *supra*. To adopt this view would be to confess that the earlier provisions in the said

act of 1921, and which were retained in it in practically identical form in which were phrased the like provisions in the act of 1905, and which were interpreted to mean what that case said they did mean, are irreconcilable with the said amendment as the appellants interpret it, and to so conclude would be to refuse to give any further force and effect to said earlier provisions in said statute in so far as they relate to the method of computation of such taxes upon the theory that when two provisions in a statute are found to be irreconcilable the one last adopted is to be given effect as the latest expression of the legislative intent. That such is the rule applicable to such a situation may not be gainsaid (*Alameda County v. Dalton*, 148 Cal. 246, 82 P. 1050, and cases cited), but it is a rule of necessity and ought not to be given application unless and until it shall be made to clearly appear that such irreconcilable conflict between the earlier and the later provisions of the law exists.

[5] Looking to the terms of subdivision 6 of section 6 of the Statute of 1921, we are not satisfied that the interpretation which the appellants insist in placing upon it is the only one which its language, when read as a whole, will bear. It is argued by the appellants that the first half of said provision declaring that "The exemptions in this section allowed shall be deducted from the aggregate amount of property transferred," was intended to provide a different method of computation than that laid down in *Estate of Timken*, wherein it is stated that the only way to accomplish the result intended by the sections 2 and 3 of the Act of 1905 was by deducting the exemption from the first \$25,000 rather than from the entire estate transferred. It is to be clearly kept in mind, however, that exemptions in any event are but deductions from the whole of the estate transferred and are important as affecting the inheritance tax to be computed only when the bases of computation of such tax upon the remainder of such property are to be affected by such deduction. The remainder of the property to be affected by the deduction of the stated exemptions could only be differently affected by taking the exempted amount from the first \$25,000, as contrasted with taking it from the last \$25,000 of the estate transferred, because the inheritance tax is a progressive tax; or as it is sometimes termed, a "step tax" which increase progressively with the size of the estate transferred. To illustrate: Taking the rule of computation laid down in *Estate of Timken*, supra, as exemplified in the computation given in that decision and applying it to the instant case we would have the following result in so far as it affects the widow of decedent, one of these appellants herein: Total amount of estate transferred \$102,699; exempt under section 6 of said act, \$24,000; remainder of estate

subject to tax, \$78,699; balance of first \$25,000 subject to tax (\$1,000) of 1 per cent. under section 4 of said act, tax \$10; balance under \$50,000 subject to tax of 2 per cent. (\$25,000) under section 5 of said act, tax \$500; balance above \$50,000 subject to tax of 4 per cent. (\$50,000) under section 5 of said act, tax \$2,000; balance of remaining estate subject to tax of 7 per cent. (\$2,699) under section 5 of said act, tax \$188.94; total tax, \$2,698.94. Such would doubtless be the computation if the rule in the *Timken Case* remained unchanged. Under the appellants' contention that the rule in the *Timken Estate* has been changed by the provision in the first clause of subdivision 6 of section 6, above quoted, so as to require the exemptions to be deducted from the last instead of the first \$25,000 in value of said estate, the result would be that of reducing the tax upon the widow's share to \$1,897.67. It is to be noted, however, that the language of the first clause in said subdivision 6, of section 6 of said act above quoted, does not expressly require that the exemptions allowed under said section, while required to be taken from the "aggregate" of the estate transferred, shall be taken out of either the first or the middle or the last of the several classes of said estate to be progressively taxed. In any event, whether taken out of the first or the middle or the last of said classifications, the exemptions to the extent thereof diminish the taxable amount of the estate transferred and are therefore taken out of the aggregate of said estate. If the Legislature had intended by this particular clause in subdivision 6, of section 6 of said act, to effectuate a change in the amount of the tax to be placed upon the unexempted portion of said estate after allowing such exemptions, it would have said so in the latter clause of said subdivision. But when we read the latter clause of said subdivision it would seem to express an exactly contrary intention. Said latter clause in said subdivision reads as follows:

"And the transfer of the remainder of the property after making such deduction shall be taxed at the rates at which it would have been taxed had no exemption whatever been allowed."

This portion of said subdivision is clearly susceptible of the interpretation that the exemptions provided for in the earlier portions of said section may be deducted from the first part of the property transferred which is to be subjected to said exemptions, and afterwards the remainder of the property is to be subjected to such tax. The foregoing interpretation of subdivision 6, of section 6 of said act, either when read separately or together, harmonizes with sections 2, 4, and 5 of the Act of 1921, which, as we have seen, were substantially, and in the main verbally, re-enactments of sections 1, 2, and 3 of the Act of 1905.

The appellants contend, however, that in

making such re-enactments of the sections of said earlier statute the Legislature has omitted from section 3 thereof, as it read prior to such re-enactment, the provision that the "rates in section 2 are for convenience termed the primary rates," and that this court, in *Estate of Timken*, supra, emphasized the phrase "the primary rates" in giving to said sections of said earlier act the interpretation which it is claimed by the respondent their counterpart in the latter statute should bear. It appears, however, that the foregoing sentence in section 3 of the Act of 1905, and which was retained in the revision of said act in 1913 (Stats. 1913, p. 1066), referring to "primary rates," was eliminated therefrom in the amendments of the statute of 1913 by the act of 1915 (Stats. 1915, p. 419). Notwithstanding this elimination of said phrase in the latter year, this court, in the case of *Estate of Potter*, 188 Cal. 64, 204 P. 826, gave to the act of 1915 the same interpretation as that given by it to the act of 1905 in *Estate of Timken*. It would seem therefore that the omission of the phrase "the primary rates," made in 1915, could have no significance in determining the meaning of the phrase "the aggregate amount of property transferred" as found in the first clause of subdivision 6 of section 6 of the Statute of 1921. We must therefore look elsewhere for the meaning to be given to the latter phrase in order to determine whether it was the intent of the Legislature by its use to change the rule laid down in *Estate of Timken*. Subdivision 6 of section 6 of the Act of 1921 was adopted and made a part of section 6 of said act at the same time that another important change was made in the matter of exemptions as allowed in former acts. That change is to be found in clause (b) of subdivision 2 of said section 6, which provides for the exemption of "All property transferred by a decedent to any person described in the first subdivision of section four, providing the same was transferred to such decedent not more than five years prior to his death by another decedent of the class described in the first subdivision of section four, and a tax paid thereon." By reading the clause just quoted in connection with clause (a), which immediately precedes it, and also in connection with subdivision 1 of section 4 of the same act to which it refers, it will be seen that the persons described in clause (a) of said section 6, and who are also embraced in the enumeration of relatives of the decedent given in subdivision 1 of section 4 of said act, are or may become the beneficiaries to two different kinds of exemptions under the terms of section 6 of the Act of 1921. This condition having for the first time been recognized and dealt with in our inheritance tax laws, it became necessary to define the method of making these two sorts of exemptions in estates wherein the facts

justified their application and of computing the inheritance tax upon the remainder of such estates after such exemptions had been made. Hence, the addition of subdivision 6 to said section 6 so as to provide that in those estates where these two sorts of exemptions might occur the aggregate of the estate transferred was in each case to be taken in making the deductions due to these and each of these exemptions, and that as to the remainder of the estate, it should be taxed at the rates at which it would have been taxed had no exemptions been allowed. When the entire content of section 6 of said act is thus considered the scope and purpose of subdivision 6 thereof would seem to be entirely plain, and thus interpreted it is again found to be in entire harmony with the earlier provisions of said act and with the interpretation thereof as given by this court in *Estate of Timken*, supra.

[6] It may further be suggested that where two interpretations of the provisions of a statute imposing taxes are urged, that one should, if possible, be adopted which lays the burden of taxation uniformly upon those who bear that burden and who stand in the same degree with relation to the tax, and a like rule would apply to those who stand in the same degree with regard to their statutory right, if any, to exemption from the burden of the tax. For example, widows of decedents are entitled to those exemptions from inheritance taxes to the extent provided in section 6 of the Act of 1921, and this being so the act should be so interpreted that all widows should be equally affected by the making of the deductions from the estates transferred arising from these exemptions. If the exemption is in every case to be deducted from the first \$25,000 of every estate, then the benefit to each widow would in every case be the same; that is to say, she would save the tax of 1 per cent. upon the amount of her said exemption. But, if the rule insisted upon by the appellants herein were to be followed this equality of benefit would be destroyed, since the wealthier the widow, by virtue of the estate transferred, the greater would be the percentage of her saving in the amount of her tax. For example, the widow whose transferred share in the estate of her deceased husband was \$124,000 would, by the application of her exemption of \$24,000 to the last \$24,000 of her said transferred estate, save 7 per cent. in her inheritance tax, while a widow whose whole transferred estate was \$24,000 would only save a tax of 1 per cent. in her inheritance tax upon the amount of her exemption.

For the foregoing reasons we are of the opinion that the inheritance tax appraiser was correct in the application of the rule declared in the *Estate of Timken*, supra, to the method of appraising and computing inheritance taxes under section 6 of the Act of 1921, and hence we conclude that the portion

of the order of the probate court in approving that portion of her said appraisement was and is correct.

The order of this court will therefore be that the order of the trial court, in so far as it undertook to impose an inheritance tax upon the family allowance allowed the appellants is reversed; and that the portion of its said order approving the report of the inheritance tax appraisers as to the amount of inheritance tax to be imposed upon the estate transferred to said appellants and each of them, after the deduction of the exemptions to which said appellants and each of them are entitled, is affirmed. The trial court is directed to make and enter such order or orders in the matter of such inheritance taxes as shall conform to this opinion.

We concur: MEYERS, C. J.; LAWLOR, J.; SHENK, J.; WASTE, J.; SEAWELL, J.; LENNON, J.

70 Cal. App. 531

PEOPLE v. CLARK. (Cr. No. 1149.)

(District Court of Appeal, Second District, Division 1, California. Jan. 8, 1925. Hearing Denied by Supreme Court March 9, 1925.)

1. Homicide $\S$ 228(2) — Circumstances surrounding disappearance of alleged victim, if convincing to moral certainty as to his death, are sufficient to establish corpus delicti.

Circumstances surrounding disappearance of alleged victim, if convincing to moral certainty of his death, are sufficient to establish the corpus delicti.

2. Homicide $\S$ 228(4)—In establishing corpus delicti, means by which death was caused need not be proved beyond reasonable doubt.

In establishing the corpus delicti, the means by or through which death resulted need not be proved beyond reasonable doubt; the only requirement being that criminal agency as the direct cause be shown by some evidence.

3. Homicide $\S$ 228(2)—Corpus delicti may be established by circumstantial evidence.

Corpus delicti may be established by circumstantial evidence.

4. Homicide $\S$ 228(2) — Circumstantial evidence independent of accused's confession or admissions held sufficient to establish corpus delicti.

Circumstantial evidence independent of accused's confession or admissions held sufficient to establish the corpus delicti.

5. Criminal law $\S$ 680(2)—Order of proof is discretionary with trial court.

Though it is the better practice to establish the corpus delicti as early in the proceedings of the trial as may be practicable, the order of proof is discretionary with trial court.

6. Criminal law $\S$ 1168(2)—Admission of certain testimony before proof of corpus delicti, if erroneous, held not prejudicial, where corpus delicti was finally established.

Admission of certain testimony before proof of corpus delicti, if erroneous, held not prejudicial, where corpus delicti was finally established.

7. Criminal law $\S$ 369(2)—Evidence involving admission of another crime is admissible, when it is necessary or pertinent to proof of crime charged.

Evidence involving admission of another crime is admissible, when it is necessary or pertinent to proof of crime charged.

8. Criminal law $\S$ 369(3)—Testimony that accused procured and co-operated with deceased's wife to forge documents held admissible.

Testimony that accused procured and co-operated with wife of deceased to forge documents held admissible, where pertinent to proof of the murder charged, though tending to prejudice accused with jury by proof of other crime.

9. Criminal law $\S$ 407(1)—Statements of other persons in accused's presence are admissible when material, as bearing upon his conduct.

Statements of other persons in accused's presence are admissible when material as bearing on his conduct.

10. Criminal law $\S$ 1169(2)—Erroneous admission of evidence not prejudicial, where evidence properly admitted covered same matters.

Erroneous admission of evidence held not prejudicial, where evidence properly admitted covered same matters.

11. Criminal law $\S$ 342—Evidence of acts or conduct of accused showing motive for crime held admissible.

Evidence of acts or conduct of accused showing motive for commission of crime held admissible, where the evidence relied upon to convict was circumstantial.

12. Homicide $\S$ 166(8)—Evidence of accused's sexual relations with victim's wife after victim's disappearance held admissible as showing motive for commission of crime.

Evidence of accused's sexual relations with victim's wife after victim's disappearance held admissible as showing motive for commission of crime.

13. Criminal law $\S$ 1171(1)—Remark of district attorney apparently conceded to be true held not prejudicial.

Remark of district attorney, not ordinarily permissible, held not prejudicial, where its truth was apparently conceded.

14. Criminal law $\S$ 1166½(12)—Remarks of court, if erroneous, held cured by instructions.

Remarks of court, if erroneous, held cured by instructions emphasizing rule that jury was exclusive judge of facts, and that expression of any opinion thereon by judge was to be disregarded by them.

15. Criminal law ☞1170½(5)—Refusal to permit cross-examination until in ordinary course of procedure such time had properly arrived, if erroneous, held not prejudicial.

Refusal to permit cross-examination until in ordinary course of procedure such time had properly arrived, if erroneous, held not prejudicial, where subsequent cross-examination did not disclose anything of a prejudicial nature to accused's right in the premises by reason of the action of the court in delaying the cross-examination.

16. Witnesses ☞267—Postponement of cross-examination of witness until after establishment of corpus delicti held discretionary with trial court.

Denial of request that cross-examination of witness by accused be postponed until after establishment of corpus delicti held within discretion of trial court.

17. Criminal law ☞1168(2)—Reception in evidence of admissions of accused before proof of corpus delicti held not prejudicial.

Reception in evidence of admissions of accused before proof of corpus delicti held not prejudicial, where the remaining evidence sufficiently established death of victim by criminal agency.

18. Witnesses ☞48(5)—Testimony of convicted murderer sentenced to death as to confession of accused held admissible.

Testimony of convicted murderer under sentence of death as to confession by accused was properly received, in view of Code Civ. Proc. §§ 1879, 1880, 1881.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

E. Drew Clark was convicted of murder, and he appeals. Affirmed.

Shreve, Dorn, Shreve & Tyler, of San Diego, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Chester C. Kempley, Dist. Atty., of San Diego, for the People.

HOUSER, J. Defendant was convicted of murdering one George E. Schick, a human being, and, in accordance with the recommendation of the jury which rendered the verdict, was sentenced to the state prison for the term of his natural life. From the judgment of conviction and the order denying his motion for a new trial defendant appeals to this court.

The evidence adduced on the trial of the case warranted the jury in believing that the following facts, among others, were true: That Mr. and Mrs. George E. Schick were married in 1913; that in the fall of 1922 they went to live in the city of San Diego, Cal.; that two children were born of the marriage of Mr. and Mrs. Schick, and at the time of the trial of the action such children were aged respectively four and sev-

en years; that with the exception of two occasions averaging about three or four weeks each Mr. and Mrs. Schick were never separated one from the other during their married life; that during each of such separations Mrs. Schick heard from Mr. Schick nearly every day; that within a very short time after Mr. and Mrs. Schick arrived in San Diego Mr. Schick purchased a house and lot; that near the end of the month of October, 1922, Mr. and Mrs. Schick became acquainted with defendant and the wife of defendant, who thereupon became frequent visitors at the Schick residence, often dining with the Schicks and on many occasions remaining at the Schick home over night; that the Schicks resided in a suburb of San Diego known as Kensington Park; that in the month of November, 1922, Mr. Schick purchased another house and lot, which is known as the Mission Drive house, and shortly after the first of the year 1923 defendant and Mrs. Clark moved into the Mission Drive house where, without paying any rent therefor, they continued to reside until the day of Mr. Schick's disappearance; that during the fall of 1922 Mr. Schick purchased a real estate business, also a millinery shop; that Mr. Schick was in the habit of making statements to the effect that he was a man of considerable financial means; that some time prior to the 7th day of February, 1923, Mr. Schick had lent to defendant the sum of \$400, and had taken defendant's note for the same.

On the morning of February 7, 1923, Mr. Schick left his home as usual. At that time some conversation occurred between him and Mrs. Schick relative to Mr. Schick's going to South America, but for years prior thereto Mr. Schick had talked of removing to South America, and on that particular morning said nothing which would indicate that he would leave for South America on that day. To quote Mrs. Schick's testimony:

"He said if I would say that I would go down, that he would sell out all the property and we would all go down there any time that I would say that I would go."

That was the last time Mrs. Schick ever saw or heard from her husband. After Mr. Schick's arrival in California in the fall of 1922, and up to the 7th day of February, 1923, he wrote regularly each week to his mother in the East. After the 7th day of February, 1923, Mr. Schick's mother received no letter from him. On the day following Mr. Schick's disappearance he had a business engagement of considerable importance, but which engagement he failed to keep.

On the afternoon of February 7, 1923, defendant called Mrs. Schick on the phone, and stated that Mr. Schick had been called out of town, and that he (defendant) would

come to the Schick home that evening and tell her all about it. About 8 o'clock that evening defendant and his wife arrived at the Schick residence in the Studebaker automobile which had been owned and driven by Mr. Schick and which he had driven away from his home on the morning of that day.

Upon his arrival defendant told Mrs. Schick of the circumstances surrounding the alleged departure of her husband, stating to Mrs. Schick that her husband had been "tipped off" that morning at the bank; that detectives were after him on account of some financial difficulties in the East; that Mr. Schick had gotten hold of a Russian from Los Angeles, and had departed in a red Stutz car belonging to the Russian; that Mr. Schick had furnished the money for the trip, and the Russian had furnished the automobile; that they had equipped themselves with khaki clothes and ammunition, but that Mr. Schick had been afraid to go to the bank for funds; that therefore he (defendant) had given Mr. Schick \$5,000 in sugar bonds, and that Mr. Schick had sent word to Mrs. Schick that she was to go to the safe deposit box and pay defendant out of the government bonds. Defendant at that time gave Mrs. Schick the keys to the safe deposit box and to the Studebaker automobile, stating that Mr. Schick had directed him so to do. The defendant further stated that Mr. Schick, before his departure, had torn up the \$400 note given him previously by defendant, and that Mr. Schick had left instructions to Mrs. Schick to sell the property, and for all of them to live together; that he, Mr. Schick, was going into Mexico, and from there to South America; that Mrs. Schick should not let anyone know which way he had gone; that Mrs. Schick would not hear from him for three months; that he was going into business down there, and would send for Mrs. Schick. Defendant at that time further stated that Mr. Schick had told him that Mrs. Schick would be the first one to turn yellow and tell people which way he had gone, so that detectives could get him.

From the time the Clarks commenced to live in the Mission Drive house, which was at least a month previous to Schick's disappearance, the Clarks never remained all night at the Schick home until the night of the 7th of February; they remained at the Schick home that night and never spent another night in the Mission Drive house where they had been living.

When Mrs. Schick awakened the morning of the 8th of February, 1923, about 9 o'clock, defendant was absent from the house; he returned later in the forenoon.

During the month of January, 1923, defendant had induced Mr. Schick to transfer to Mrs. Schick the title to the two houses which he owned in the city of San Diego.

Almost immediately following Mr. Schick's disappearance, to wit, on the 8th or the 9th day of February, 1923, defendant, Mrs. Clark, and Mrs. Schick removed some papers and bank books from Mr. Schick's safe deposit box. Admission to the box was secured through a letter purporting to have been written and signed by Mr. Schick, but which in reality bore his forged signature, which forgery had been perpetrated by Mrs. Schick at defendant's suggestion and with his co-operation therein. Very soon thereafter defendant also induced Mrs. Schick to forge Mr. Schick's signature to a general power of attorney, as well as to several letters written to various banks in the East, requesting the payment to Mr. Schick of balances of accounts in such banks. Among the keys belonging to Mr. Schick, which were given to Mrs. Schick by defendant on the night of Mr. Schick's disappearance, were safe deposit box keys which defendant stated he believed were on some bank in the East. Those keys were likewise sent to the bank inclosed in letters with the signature of George E. Schick forged on them by Mrs. Schick at defendant's solicitation and request. A few days following Mr. Schick's disappearance, defendant purchased a new Hupmobile. Prior thereto defendant had not been the owner of an automobile. At the time defendant purchased the automobile he secured from Mrs. Schick the sum of \$4,000 in the following manner: \$750 credit was allowed for the automobile belonging to Mr. Schick, and which was taken in part exchange on the Hupmobile; \$400 credit for a promissory note owned by defendant to Mr. Schick, and which defendant stated to Mrs. Schick had been destroyed by Mr. Schick on the day of his disappearance, and the balance in cash. The \$4,000 was for the purported purpose of paying defendant for certain bonds which he claimed to have given Mr. Schick on the day of his disappearance. Shortly after Mr. Schick disappeared defendant stated that it would be necessary to tell the story that Mr. Schick had been back to his home two or three times in order to fit the dates of the various papers on which Mr. Schick's signature had been forged. Later defendant told Mrs. Schick that because of her pregnant condition it would be necessary to state that Mr. Schick had been back to his home on the 23d of April. Mrs. Schick and defendant had engaged in illicit sexual relations with each other, beginning in November, prior to Mr. Schick's disappearance in the following February, which relations continued up to and after Mr. Schick disappeared. About two months after Mr. Schick's disappearance defendant asked Mrs. Schick to make a will in his favor, naming him trustee of the estate and guardian of Mrs. Schick's children. At the same time he also requested her to turn over her money to him

in order that he might go into business; that he (defendant) could not make any money if she did not give him a freer hand with the funds. In July, 1923, defendant and Mrs. Schick removed from the city of San Diego to the city of El Cajon, and took the two Schick children with them; Mrs. Clark taking an apartment in San Diego, but occasionally spending days at El Cajon. At about the same time Mrs. Schick turned over to defendant a \$1,000 Liberty bond and several smaller amounts in cash, totaling several hundred dollars. In August, 1923, defendant requested Mrs. Schick to give him \$3,000, stating that unless she would turn over more money to him he would have to leave and get a position elsewhere. A short time after the disappearance of Mr. Schick defendant stated to Mrs. Schick that he had a clairvoyant vision in which he saw Mr. Schick killed in Mexico; full details of the vision being narrated. On numerous occasions thereafter defendant insisted that he knew this vision was true.

In a conversation in July, 1923, when the question of giving out information as to the fact that Mr. Schick had disappeared was under discussion, defendant stated that Mrs. Schick would have to give out the fact that some man had told her of the manner in which Mr. Schick came to his death; that the world would not believe in a clairvoyant vision; and that in telling this story Mrs. Schick was to be the only one who had seen the man who had communicated to her the manner of Schick's death. In conformity with this story, defendant dictated a letter which Mrs. Schick signed and sent to the department of justice setting forth the same facts occurring in defendant's alleged vision, except that it was stated that a certain man, whose name was Peter Hawkins, had witnessed the occurrence, and had brought the news to Mrs. Schick. This letter was sent to the department of justice after an effort had been made to collect insurance. In the attempt to collect this insurance, Mr. Atkinson, local representative of the insurance company, was called out to the home in El Cajon, and the story of Mr. Schick's disappearance told to him. This story was told by both the defendant and Mrs. Schick, and agreed with defendant's alleged vision, except, also, in this instance claim was made that the news of Mr. Schick's death had been brought by one Peter Hawkins.

Defendant and Mrs. Schick learned from a clipping in an Eastern newspaper, which was sent to Mrs. Schick, that detectives were working on the disappearance of Mr. Schick, and that Mr. Schick's brother, Martin Schick, was coming to California. Upon learning that Martin Schick was coming to California to investigate regarding the absence of George E. Schick, defendant stated to Mrs.

Schick that the first thing Martin Schick would do would be to try to implicate defendant in the disappearance of George E. Schick, but that no one could arrest defendant or charge him with anything until the body of George E. Schick had been found, and that if they would all "stick to the same story" and give the same dates on which Mr. Schick was supposed to have returned, there could be no trouble. Within a very few days after the disappearance of George E. Schick defendant appeared in possession and claimed to be the owner of a watch formerly owned by George E. Schick, which had been given to him by his father; a Shrine emblem worn by Schick, which had been given to him by his wife; and a thirty-second degree Masonic diamond ring owned and worn by Schick. Immediately thereafter defendant had each of such articles altered so that none of them could be recognized. Defendant made statements to the effect that he had received these various articles through inheritance from his father. Defendant also appropriated to his own use some of Mr. Schick's neckties and silk hose. On the night of the day on which Mr. Schick disappeared a commotion occurred in the house occupied by defendant, in which loud voices of two men and unusual noises, such as chairs being knocked over, were heard, and which noises suddenly ceased. The next day, or shortly thereafter, there was a fire in the rear of the house in which defendant resided, kindled underneath an oil drum, of the size 18 inches in diameter and 30 inches tall, which gave off a most offensive odor like burning bones or egg shells. Prior to that time defendant had never burned anything in that manner at that place. The Clarks never remained in that house another night, although for a month thereafter defendant visited the house nearly every day, twice in company with his wife, who on each of such occasions remained outside. The house was in an out of the way place. On the second morning after the 7th day of February, which was the date of the disappearance of Mr. Schick, defendant was seen in a lonely canyon, and shortly thereafter went to a garage, his automobile covered with red adobe mud and brush. The shift fork of the automobile had been bent so that the automobile could be driven only in low gear or in reverse. The clutch had been burned out from slipping or pulling.

In addition to the foregoing, there was evidence of many admissions made by defendant to officers, among which were statements that he could not be convicted of murder unless they could find the body. Also the testimony of a witness detailing a confession made to him by defendant. There was other evidence in the record which favored defendant's innocence.

The principal point relied upon by appellant for reversal of the judgment is that the corpus delicti was not established.

Appellant contends that the elements of the corpus delicti in the charge against defendant necessitated either direct evidence that Schick was dead as established by the production of his dead body, or of the testimony of at least one witness of his own knowledge that Schick was deceased, together with further proof that Schick's death was brought about by criminal agency. Many authorities are cited to support such contention. They are, however, either general in their nature or based upon a state of facts which make such a rule in all its strictness inapplicable to the facts in the instant case. Where cases are found which in their facts are analogous to those as shown by the evidence introduced on the trial of the present case, the general rule is greatly relaxed. A few illustrations will suffice for the purpose of demonstrating the attitude of the courts.

In the case of *State v. Williams* (1905) 46 Or. 287, 80 P. 655, the defendant was convicted of murder. The body of the victim was never found; nor was there testimony of any eyewitness to any act of violence upon the person alleged to have been murdered. The incriminating facts were purely circumstantial, and, while weak in character, pointed not only to the commission of the crime, but as well to the defendant's participation therein. With reference to the necessity of proving by direct evidence the fact of death of the supposed victim, the court reviewed many decisions on the subject, and in discussing the matter, among other things, said:

"To require direct proof of the killing or the production of the body of the alleged victim in all cases of homicide would be manifestly unreasonable, and lead to absurdity and injustice; and it is believed that it is now clearly established by the authorities that the fact of the death as well as the guilt of the defendant may be legally inferred from such strong and unequivocal circumstances as produce conviction to a moral certainty. * * * The strict rule contended for by defendant would operate completely to shield a criminal from punishment for the most atrocious crime, and afford him absolute immunity if he were cunning enough to consume or destroy the body of his victim by fire or some chemical agency, or completely hide it away or otherwise destroy its identity, although the proof of his guilt might be of the most clear and convincing kind, and remove all possible doubt in the premises. * * * Where, as here, the entire circumstances point with one accord to the death of the person alleged to have been murdered, the finding of fragments of a human body or of metallic articles which are positively identified as part of the body of the alleged victim, or as articles worn by him, will be sufficient, if believed by the jury, to establish the fact of death, when this is the best evidence that can be obtained under the circumstances [citing cases]. No

universal and unvariable rule can be laid down in regard to the proof of the corpus delicti. Each case depends upon its own peculiar circumstances. The body of the crime may be proved by the best evidence which is capable of being adduced, if it is sufficient for the purpose. Such an amount of accompanying or relative facts, whether direct or circumstantial, must be produced as establish the fact beyond a moral certainty, and to the exclusion of every other reasonable hypothesis."

The case of the *United States v. Williams*, reported in 28 Fed. Cas. 636, No. 16,707, presents a state of facts which, without the aid of a confession, resemble the case last cited, in that there was no discovery of the body of the victim of the murder, nor was there any direct evidence that a murder had been committed. It was a case of apparent mutiny on board a brig; the murder of the master and mates thereof; abandonment of the brig by the assassins in a small boat; their subsequent rescue in the open sea by another vessel; their possession of the brig's compass, register, water, and provisions, besides certain articles of a personal nature, such as a watch and clothing which belonged to the master and to the first and second mates. On the phase of the case regarding the requirement of absolute proof of death, the court said, in part:

"Cases, however, have occurred, and it is greatly to be feared may hereafter occur, where the application of this rule would secure impunity to the murderer, and therefore would be unreasonable, as it would be in the highest degree prejudicial to the court of criminal justice. A murderer would only have to consume the body by fire, or decompose it by chemical means, or sink it in the depth of the sea, and the laws of society would be powerless to punish the offender."

Speaking to the question of the necessity of production of proof of death, Judge Story, in *United States v. Gibert*, 25 Fed. Cas. 1287, No. 15,204, made the following statement:

"The first proposition [that there ought to be no conviction for murder unless the murdered body is actually found] certainly cannot be admitted as correct in point of common reason, or of law, unless courts of justice are to establish a positive rule to screen persons from punishment, who may be guilty of the most flagitious crimes. In the cases of murders committed on the high seas, the body is rarely, if ever, found; and a more complete encouragement and protection for the worst offenses of this sort could not be invented than a rule of this strictness. It would amount to a universal condonation of all murders committed on the high seas."

In the case of *State v. Lamb*, 28 Mo. 218, where the defendant had confessed to the murder of his wife by drowning her in the Mississippi river, the court said:

"Although the dead body has not been found, and although no witness swore that he saw the perpetration of the murder, yet the cir-

cumstances extrinsic to the confession, and established by other evidence, are so strong that they cannot fail to satisfy any unbiased mind that the accused is guilty of the crime of which he has been convicted. We consider the true rule, as deduced from the current of authorities, to be, that an extrajudicial confession, with extrinsic circumstantial evidence satisfying the minds of a jury beyond a reasonable doubt that the crime has been committed, will warrant a conviction, although the dead body has not been discovered and seen, so that its existence and identity can be testified to by an eyewitness."

It is said in the case of *People v. Alviso*, 55 Cal. 230, 233, that—

"It is very seldom that a conviction occurs without positive proof of the former [death], either by eyewitnesses of the homicide, or the subsequent discovery of the body; and, while the general rule is clearly laid down, yet the authorities concede that there may be exceptions. Thus, Wharton, in his work on Homicide, § 637, relates instances of the human body being disposed of by fire, or boiled in potash, or dissolved by acids, rendering it impossible that it should ever be produced; and concludes: 'It is clear that in such cases the corpus delicti may be proved circumstantially or inferentially.'"

[1-3] From a reading of the cases to which reference has been had, as well as to other authorities which might be cited, it is clear that the general rule requiring either the production of the body of the person supposed to have been murdered or some circumstance from which death would necessarily follow cannot be applied in all cases. If the circumstances surrounding the disappearance of the alleged victim be such as to convince the mind to a moral certainty as to his death, the demands of the law will be satisfied. Nor is it necessary in establishing the corpus delicti that the means by or through which such death resulted be established beyond a reasonable doubt. The only requirement is that there be some evidence to justify the conclusion that criminal agency was the direct cause. The case of *People v. Jones*, 123 Cal. 65, 55 P. 698, is authority for the statement that, "to justify a conviction, the jury must be satisfied beyond a reasonable doubt of the existence of every fact necessary to constitute the offense and to identify the defendant as the perpetrator; but it is not necessary that the evidence of the criminal act should be of that conclusive character in order to justify the admission of the defendant's confessions," which language, as we understand it, is to be taken in connection with the laying of a foundation for the admission of a confession.

It is said in *People v. Alba*, 52 Cal. App. 603, 199 P. 894, that (syllabus):

"It is not required that the corpus delicti be established beyond a reasonable doubt, but it is sufficient if there is some evidence tending

to establish a criminal agency as the cause of the facts forming its basis."

And in *People v. Wagner*, 29 Cal. App. 366, 155 P. 651, the following language is pertinent to the question of the amount of evidence required regarding the criminal character of the act in question:

"Proof of the corpus delicti of the conclusive and convincing character required to support a conviction of the crime charged was not a prerequisite to the reception in evidence of the extrajudicial statements of the defendant that he had killed the deceased. * * * *People v. Vertrees*, 169 Cal. 404 (146 Pac. 890); *People v. Rowland*, 12 Cal. App. 6 (106 Pac. 428); *People v. Spencer*, 16 Cal. App. 756 [117 Pac. 1039]."

That the corpus delicti need not be proven beyond a reasonable doubt before the admissions of the confession of the defendant may be received in evidence, see *U. S. v. Williams*, 28 Fed. Cas. 636, No. 16,707; *People v. Hatch*, 13 Cal. App. 531, 109 P. 1097; *People v. Rowland*, 12 Cal. App. 10, 106 P. 428.

In addition to the authorities which have already been cited herein, the following cases will illustrate the rule that the corpus delicti may be established by circumstantial evidence, to wit: *People v. Wilkins*, 154 Cal. 530, 111 P. 612; *People v. Wilkison*, 30 Cal. App. 473, 158 P. 1067; *People v. Spencer*, 16 Cal. App. 756, 117 P. 1039.

In the case of *People v. Wilkins*, supra, quoting from 3 *Rice on Evidence*, 465, 466, it is said:

"Nor is it necessary that the corpus delicti should be proved by direct and positive evidence. It would be most unreasonable to require such evidence. Crimes, and especially those of the worst kinds, are naturally committed at chosen times, and in darkness and secrecy; and human tribunals must act upon such indications as the circumstances of the case present or admit, or society must be broken up. Nor is it very often that adequate evidence is not afforded by the attendant and surrounding facts, to remove all mystery and to afford such a reasonable degree of certainty as men are daily accustomed to regard as sufficient in the most important concerns of life; to expect more would be equally needless and absurd."

[4] Without again attempting to repeat the substance of the incriminating evidence, exclusive of defendant's admissions, adduced on the trial, we are content to hold that it was ample in quantity and quality to sustain the conclusion reached by the trial court that, independent of any confession or admissions made by defendant, the corpus delicti was established.

[5, 6] Appellant's brief contains many specifications of error dependent upon the rulings of the trial court either in admitting or in rejecting certain testimony. Nearly all of them which have to do with the admission of testimony over defendant's objections relate

to the state of the evidence at the time of the reception of the evidence in question; that is, that the corpus delicti had not been established. While it is recognized as better practice to establish the corpus delicti as early in the proceedings of the trial as may be practicable, it is well settled that the order of proof is discretionary with the court; and where, as in the instant case, the corpus delicti was finally established, the error, if any, resulted in no prejudice to defendant's rights. *People v. Wilkins*, 158 Cal. 530, 111 P. 612.

[7, 8] One of appellant's objections to the admission of evidence by the trial court was occasioned by Mrs. Schick's testimony to the effect that, at defendant's suggestion and request, and with his active co-operation, she forged the name of George E. Schick to several different documents. It is contended that, because such evidence tended to prove the commission by defendant of an independent offense, and was calculated to prejudice defendant in the minds of the jury, the objections thereto should have been sustained. By many decisions of the courts of this state it is declared to be the law that—

"If the evidence of another crime is necessary or pertinent to the proof of the one charged, the law will not thwart justice by excluding that evidence, simply because it involves the commission of another crime." *People v. Sanders*, 114 Cal. 230, 46 P. 157.

And see *People v. Klopfer*, 61 Cal. App. 291, 214 P. 878, where cases bearing on the subject are cited, and where the rule is said to be that—

"Where the evidence tending to prove such independent offense also tends to prove a fact material to the commission of the offense charged, such evidence is admissible, and the fact that such evidence may appear to prejudice the defendant with the jury is no ground for its exclusion."

[9, 10] Certain testimony was admitted by the court over defendant's objections regarding statements made by other persons in the presence of defendant. While it is the rule that such statements are not admissible simply because they are made in the presence and in the hearing of the accused, it is also true that, if such statements are material as bearing upon conduct of the defendant, in such circumstances they may be introduced in evidence. *People v. Weber*, 149 Cal. 325, 338, 86 P. 671, and 8 Cal. Jur. § 196, and cases therein cited. With so much in mind, but considering the further fact that much of the evidence to which objection was made was fully covered by other evidence which was unobjectionable, it cannot be said that any injury resulted to defendant by reason of any erroneous ruling of the court (assuming it to be such) to which attention is directed. As to that part thereof not covered

by other evidence which was properly admitted, it need only be said that it comes within the rule which permits such evidence for the purpose of showing defendant's attitude when incriminating statements are made against him in his presence; also as part of the *res gestæ* of a material conversation in which defendant joined.

[11, 12] On the trial of the case defendant objected to the introduction of evidence by the prosecution to the effect that after the disappearance of George E. Schick defendant and Mrs. Schick engaged one with the other in acts of illicit sexual intercourse. The objection was overruled by the court, and such ruling is assigned as error. In the prosecution of an offense of the nature of that before the court it is universally conceded that evidence of acts or conduct of the defendant showing motive for the commission of the crime may be presented to the jury. In the instant case, in view of such testimony, it would seem unnecessary to look for a motive in defendant in the doing away with Schick other than to be free from the possible fear of detection by the husband of the relations sustained by defendant with Schick's wife. The evidence was clearly admissible.

[13] Complaint is made of a certain remark made by the district attorney in the presence of the jury. It is apparent that the statement by the district attorney was not intended as any testimony in the case, but was simply an inadvertent comment. There was ample evidence in the case which justified the conclusion stated by the district attorney, and, while not ordinarily permissible practice for an attorney in the course of the trial, outside of argument, to comment upon the evidence, the statement to which objection is made was a fact which, so far as the attention of the court has been directed, was uncontradicted by any testimony, and apparently was conceded to be correct. In such circumstances, no prejudicial injury resulted to defendant.

[14] It is urged that during the trial the court was guilty of misconduct in that on two or three occasions the judge made certain remarks in the presence of the jury from which the jury might have inferred that the judge was of the opinion that the evidence showed the existence of certain disputed facts, such, for example, as the death of George E. Schick. An examination of the transcript of the proceedings to which attention has been directed fails to disclose any clear violation of the rule which forbids any expression of opinion by the judge on the effect or the value of the evidence. Furthermore, instructions given by the court to the jury emphasized the rule that the jury was the exclusive judge of the facts of the case, and that the expression of any opinion thereon by the judge was to be disre-

garded by the jury. It would therefore follow that any slight error which inadvertently might have crept into the record because of some vague remark by the court was cured by the court's instructions to which reference has just been had.

[15] Appellant further complains because, before a certain witness had finished his testimony on direct examination, the court refused defendant permission to "cross-examine" such witness regarding the condition of certain checks and their whereabouts prior to their being produced in court. Even assuming the existence of such a right as is the basis of defendant's contention, in view of the fact that subsequent cross-examination failed to disclose anything of a prejudicial nature to defendant's rights in the premises by reason of the action of the court in delaying the cross-examination until in the ordinary course of procedure such time had properly arrived, it cannot be said that any harm resulted to defendant.

[16] During the early part of the trial defendant requested of the court that the cross-examination by defendant of a witness be postponed until "after the evidence of the corpus delicti has been established." The request was denied, and error is predicated thereon. It is a well-settled rule of procedure that such matters rest within the discretion of the trial court. No abuse of such discretion can be reasonably said to exist in the action of the trial court in the instance to which we have adverted, and in such circumstances it must be held that no error was committed in connection therewith.

[17] It is objected by appellant that within the evidence going to make up the corpus delicti there are certain admissions made by defendant; and the point is advanced that the rule forbidding the introduction in evidence of a confession by a defendant until after the corpus delicti has been established should operate in a similar way to the exclusion of an admission. The California cases seem to uphold appellant in his contention to the effect that the corpus delicti must be established without the aid of any admission by a defendant. *People v. Simonsen*, 107 Cal. 345, 40 P. 440; *People v. Tapia*, 131 Cal. 647, 63 P. 1001; *People v. Ward*, 145 Cal. 736, 79 P. 448; *People v. Besold*, 154 Cal. 368, 97 P. 871.

The admission made by defendant, to which most importance is attached, is that in which he is credited with stating in effect that there could be no conviction of a person charged with murder, unless and until the dead body of the supposed victim was discovered. But, if we are to be guided by precedents, as announced in adjudications in analogous cases, every admission made by defendant herein may be excluded, and there will still remain in the record ample evi-

dence to justify the jury in its determination of the fact that Schick was dead and that his death was caused by criminal agency. In no one of the several cases herein cited on the point that no absolute necessity exists for the actual discovery of the dead body of the victim in order that the corpus delicti may be established were the incriminating facts against the defendant of greater strength than the facts against this defendant (exclusive of his admissions), as hereinbefore set forth, and yet they were held sufficient. Take, for example, the following facts as narrated in the case of *U. S. v. Williams*, 28 Fed. Cas. 636, No. 16,707:

"Many facts and circumstances were proved at the trial, independently of the confessions, tending to show that the crime had been committed; and some of the circumstances thus proved were of a character strongly to implicate the prisoners in the transaction. It was proved that the prisoners left Portland on the 7th of July, 1857, in the same vessel with Quinton D. Smith and the other men supposed to have been murdered, and that neither Smith, the other men, or the vessel have ever since been seen or heard from except through the confessions of the prisoners and of Lahey, who died before the trial. Neither the vessel nor the officers or men ever arrived at the port of destination or returned to the home port. At the time, or about the time, when the vessel should have arrived at Cardenas, the prisoners were picked up in a boat in the open sea, which boat was subsequently brought home and identified, and proved to be the only boat of the vessel in which they sailed. It was tarred inside in a manner to indicate that they had not left the vessel without preparation, and that fact was still more strongly indicated by the circumstance that they had in the boat the ship's compass, and a supply of water and provisions. They had in their possession also the watch of the captain, and the clothing of the murdered men, and all these articles were fully identified at the trial, as was the ship's register, which was also in their possession. After they were picked up, they gave contradictory and false accounts of what had occurred before they left the vessel, and persisted in the falsehood until Lahey disclosed the truth; and, when they saw that detection was certain, they freely and voluntarily confessed their crimes. All these facts and circumstances were fully proved at the trial before the confessions were admitted, and we think they were of a character to be regarded as tending to prove, not only that the crime had been committed, but that it had been committed by the prisoners."

In the case of *State v. Lamb*, 28 Mo. 218, aside from the confession of the defendant, the evidence was most meager—immeasurably weaker than the evidence adduced in the instant case—notwithstanding which fact the evidence was held sufficient to uphold the verdict.

[18] Near the close of the case, as presented by the prosecution, a witness by the name of Hendrix testified in detail to a confession

made to him by defendant. Before the witness was sworn defendant objected "to this person being sworn in this courtroom for the reason that he is incompetent to testify in the court, based upon this: That the oath administered is such an oath as would tend to cause a witness to speak the truth, and this, that he is immune from punishment for perjury, and also that he is in effect immune from contempt of court, and that there is no oath that can be administered to him that would cover those points." The objection was overruled. A motion to strike from the record all the testimony of the witness on the ground that he was incompetent to testify for the reason that theretofore he has been found guilty of murder and at the time he gave his testimony was under sentence of death was denied by the court. Such rulings are assigned as prejudicial error.

Appellant cites no authority in support of his contention.

Section 1879 of the Code of Civil Procedure provides:

"All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case the credibility of the witness may be drawn in question, as provided in section eighteen hundred and forty-seven."

Sections 1880 and 1881 of the Code of Civil Procedure, aside from covering privileged communications by which certain persons are precluded from giving their testimony, relate to persons of unsound mind, children, and parties in actions against executors and administrators. It would therefore appear that by the express provisions of the statutes the witness was competent to testify.

Other specifications of error regarding either the admission or the rejection of evidence are either not seriously pressed by appellant or are of so little comparative consequence that no discussion thereon is deemed necessary. Suffice it to say that each of them has received consideration, but that in the judgment of this court none of them is of that importance which would justify either the space or the time in indicating a specific ruling thereon.

The judgment and the order denying defendant's motion for a new trial are affirmed.

We concur: CONREY, P. J.; CURTIS, J.

70 Cal. App. 607

LYON v. LYON et al. (Civ. 2859.)

(District Court of Appeal, Third District, California. Jan. 14, 1925.)

1. Husband and wife ⇨270(9)—Whether evidence sufficient to overthrow presumption that conveyance vested title in wife as her separate property held for court.

In suit to quiet title to land which plaintiff had deeded to his wife, whether evidence was sufficient to overthrow presumption of Civ. Code, § 164, that such conveyance vested title in her as her separate property, *held* for court.

2. Husband and wife ⇨262(2)—Burden on plaintiff to show that conveyance was not intended as gift to his wife.

Where purchase of property was made with community funds, burden was on plaintiff to show that conveyance thereof was not intended as a gift to his wife.

3. Husband and wife ⇨264—Evidence held to support finding that plaintiff had no interest in property which he deeded to his wife.

In suit to quiet title to property which plaintiff deeded to his wife, evidence *held* to support finding that plaintiff had no interest therein.

4. Appeal and error ⇨994(3)—Credibility of witnesses is for trial court.

It is for court to determine credibility of witnesses.

5. Deeds ⇨71—Mere request to execute deed does not constitute duress.

A mere request to execute a deed does not constitute menace or duress.

6. Contracts ⇨99(1) — Presumption of good faith prevails in absence of evidence to contrary.

Presumption of good faith prevails in absence of evidence to contrary.

7. Deeds ⇨71—Duress in procuring execution of deed held not shown.

Duress in procuring execution of deed was not shown under Civ. Code, §§ 1569 and 1570, because a prosecuting officer asked grantor, who was being prosecuted for failure to support his wife, whether he was willing to convey property to her for her support.

8. Deeds ⇨208(6) — Evidence held to show that quitclaim deed was delivered and accepted by grantee.

Evidence *held* to show that deed by which husband quitclaimed property to his wife was delivered and accepted by grantee.

9. Deeds ⇨59(1)—Deed delivered by grantor to third person to be recorded held a sufficient delivery.

Delivery of deed by grantor to third person to be recorded was sufficient delivery on his part.

10. Deeds **65—Grantee's assent to delivery of deed at time of execution or knowledge thereof held immaterial.**

That grantee may not have assented to delivery at time deed was executed, or have then known of its execution, was immaterial, where no other party than herself was claiming under grantor.

Appeal from Superior Court, Stanislaus County; E. N. Rector, Judge.

Suit to quiet title by Oscar B. Lyon against Ida B. Lyon and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Webster, Webster & Blewett and Stephen N. Blewett, all of Stockton, for appellant.

L. J. Maddux and Albert L. Johnson, both of Modesto, for respondents.

FINCH, P. J. The complaint in this action is in the ordinary form in a suit to quiet title. The defendants were given judgment, and the plaintiff appeals. The plaintiff and the defendant Ida B. Lyon are and at all times mentioned herein were husband and wife. During the same time J. R. Broughton was president of the defendant bank.

The property in dispute is block 31 of "what is known as Maze addition to the city of Modesto." The answer of defendants Geo. Cressey, J. J. McMahon, and the Modesto Bank denies the plaintiff's title and alleges that on the 8th day of November, 1897, the land was conveyed to defendant Ida B. Lyon as her separate property; that on the 10th day of February, 1913, the plaintiff executed and delivered to Ida B. Lyon a conveyance of the land; that on the 28th day of October, 1916, he conveyed to Ida B. Lyon, by quitclaim deed, all of his interest in the land; that on the 12th day of January, 1921, Ida B. Lyon executed and delivered to "Geo. A. Cressey and J. J. McMahon, as parties of the second part, and the Modesto Bank, a corporation, party of the third part," her deed of trust conveying the land to secure an indebtedness to the bank of \$3,227.60, evidenced by her promissory note of even date for that sum; that the indebtedness is unpaid and that the promissory note and deed of trust "are now in full force and effect"; and prays "that said promissory note be declared valid, and that said trust deed be declared to be a valid lien on said land." The answer of defendant Ida B. Lyon denies plaintiff's title; alleges "that each of said defendants have some right, title, estate, or interest in or to the said land or premises, and the whole thereof," that she is and ever since the 8th day of November, 1897, has been "the sole owner of the said land and premises, and is entitled to have the same quieted against each and every one of the other parties to this suit"; and prays for a decree adjudging that plaintiff has no in-

terest in the land and that her codefendants have no lien thereon. After the commencement of the action, and after lis pendens had been recorded therein, the land was sold, pursuant to the terms of the trust deed, to satisfy the indebtedness secured thereby.

The land was purchased in the year 1897 with community funds and the conveyance thereof made to Ida B. Lyon by direction of the plaintiff. He testified that it was not intended as a gift to his wife. She testified that at the time of the purchase the plaintiff "was getting ready to go to Alaska in the spring, * * * and when he bought this property in the fall he put it in my name, saying that if he never returned I would not have any trouble over the property"; that nothing was said about making her a gift of the property. Broughton acted for plaintiff in the purchase of the property, prepared the deed, and, as notary public, took the grantor's acknowledgment of the execution thereof. Broughton testified that "possibly" he knew at the time of the purchase that it was made with community funds, but that the plaintiff never made any claim to the witness that he had any interest in the property but "always maintained it belonged to" Mrs. Lyon. Plaintiff testified that he never told Broughton that the property belonged to Mrs. Lyon. Several times after the purchase the plaintiff and his wife executed mortgages and trust deeds of the property to the defendant bank to secure the payment of their indebtedness to it. Thereafter, on January 16, 1912, they executed a trust deed to secure an indebtedness of \$970 to the bank.

On the 10th of February, 1913, the plaintiff signed a printed form of deed and left it with Broughton. The latter testified:

"He was going away, and I told him his wife was talking about selling the property for a school site, and some people was particular about having their husband sign a deed whether he had any interest in it or not. * * * And so I suggested he sign this deed and, not knowing who she might sell to, that she could sign the same deed afterwards and it would probably answer. * * * And I told him at the time if she didn't sell it, I could insert her name later and then she surely would have no trouble in selling it.

"Q. Yes. And that was done with an understanding with him? A. Yes, sir; said he didn't want her to have any trouble selling it."

Broughton later wrote the description of the property in the blank form of deed and inserted the wife's name as grantee. The deed purports to convey the property to Mrs. Lyon expressly "as her separate property."

For about three years prior to the execution of the quitclaim deed the plaintiff had not been living with his wife, but was working in another part of the state. She caused his arrest for failure to provide her with

necessaries and he was imprisoned in the county jail to await his preliminary examination. Broughton called on plaintiff in the jail and "talked to him about" the execution of a quitclaim deed to Mrs. Lyon. Plaintiff testified that at his preliminary examination "the district attorney says to me, 'Will you give Mrs. Lyon a quitclaim deed to this property?' I thought for a moment, and I could easily see that if I hadn't done so that possibly I might have been held over to the superior court, and I says, 'Yes,' and then he speaks to Mr. Rice and says, 'Have you got a deed there to be signed—made out?' And he looked and he says, 'No.' And Mr. Rice rang up the bank and conversed with the bank for a few moments and then he told me that I could go down to the bank and sign it." It does not appear whether Mr. Rice was connected with any of the parties. Plaintiff was discharged and thereafter called at the bank and executed the quitclaim deed. Broughton testified:

"Mrs. Lyon told me she had legal advice that the first deed was not any good on account of it not being filled out at the time her husband had signed it. * * * So the first time I saw him after she told me that, or a few days afterwards, I prepared another one * * * and asked him to sign it and he said, 'All right,' if the other one wasn't good he wanted to make it good. * * * He signed it. * * * Paid me the money to record it."

Mrs. Lyon testified that Broughton told her that "he had made Mr. Lyon sign the quitclaim deed." Broughton testified that he never at any time told anybody that he made Mr. Lyon sign any deed.

On the 9th of November, 1916, Mrs. Lyon executed a trust deed of the property to secure an indebtedness to the bank of \$2,137.70. January 12, 1921, she executed the trust deed alleged in the answer of Cressey, McMahon, and the bank. There is no dispute as to the amount of the indebtedness to the bank.

The appellant contends that the land in controversy is community property; that the bank had knowledge of that fact through its president, J. R. Broughton; that the deed of February 10, 1913, is "void for the reason that it was signed in blank by plaintiff, and wrongfully filled in by J. R. Broughton, officer of the Modesto Bank, against the express instructions of the grantor"; that the quitclaim deed is "void by reason of menace and duress exercised upon plaintiff by the Modesto Bank through its president, J. R. Broughton"; that there was no delivery of the quitclaim deed. The other points made are included in the foregoing.

[1-3] At the time of the conveyance of the land to Mrs. Lyon on the 8th of November, 1897, and at all times since, section 164 of the Civil Code provided:

"Whenever any property is conveyed to a married woman by an instrument in writing,

the presumption is that the title is thereby vested in her as her separate property. * * * The presumption in this section mentioned is conclusive in favor of a purchaser or incumbrancer in good faith and for a valuable consideration."

It was a question of fact for the court to determine whether the evidence against the presumption was sufficient to overthrow it. *Stafford v. Martinoni*, 192 Cal. 724, 738, 221 P. 919. The purchase being made with community funds, the burden was on plaintiff to show that the conveyance was not intended as a gift to his wife. *Pabst v. Shearer*, 172 Cal. 239, 156 P. 466. There is no evidence to show that Broughton or the bank had information of any facts which would rebut this presumption. Broughton testified that the plaintiff always maintained that the property belonged to his wife. This evidence, notwithstanding plaintiff's testimony to the contrary, together with the presumption arising from the conveyance to the wife, was sufficient to support the finding, in favor of the bank, that the plaintiff has no interest in the property. The deed of February 10, 1913, may be left out of consideration. That would be the effect of holding it to be void as contended for by plaintiff.

[4-7] Relative to the circumstances under which the quitclaim deed was executed, it was for the trial court to determine whether to believe the testimony of plaintiff or that of Broughton, and, in view of the findings, it must be presumed that the court believed the latter. According to Broughton's testimony, he merely requested the plaintiff to execute the quitclaim deed. A mere request to execute a deed does not constitute menace or duress. There is no evidence to show that either Broughton or the bank was instrumental in causing the arrest or prosecution of the plaintiff for the alleged nonsupport of his wife. It is not shown that either Broughton or the bank had knowledge of the fact, if it be a fact, that the plaintiff executed the quitclaim deed to escape prosecution under the criminal charge of nonsupport. Neither did such prosecution constitute either menace or duress, unless fraudulently obtained or conducted. Civ. Code, §§ 1569 and 1570. The presumption of good faith must prevail in the absence of evidence to the contrary. It certainly is not duress or menace for a prosecuting officer merely to ask a husband, who is being prosecuted for failure to support his wife, whether he is willing to convey property to her for her support.

[8-10] It is contended that there was no delivery of the quitclaim deed to Mrs. Lyon, the particular point urged being that there is no evidence to show her acceptance thereof. The plaintiff executed the deed and left it with Broughton, giving him the money necessary to pay for recording the same. Broughton

caused the deed to be recorded and for a few years thereafter kept it, together with the deeds of 1897 and 1913 herein mentioned. He testified that it was his custom to keep instruments of that nature until the parties in whose favor they were made called for them. Mrs. Lyon did not testify whether she had knowledge of her husband's promise to the district attorney that he would execute the quitclaim deed. She testified that she first saw it between the 5th and the 10th of November, 1921, but that in March, 1919, Broughton told her of its existence; that from that time until January, 1921, she "tried continuously" to sell the property. While nominally a defendant, it is apparent that it was to the interest of Mrs. Lyon to support the contentions of the plaintiff to the effect that the land in controversy is community property and that the deeds from plaintiff to her are invalid, because there is no other theory presented by the record on which she could hope to defeat the lien of the bank. She answered questions by counsel for plaintiff as follows:

"Q. * * * You recognize you owe this indebtedness, do you not, Mrs. Lyon? A. Why, certainly.

"Q. And you hope to pay it, intend to pay it, don't you, if you can? A. Yes, sir."

The court, in weighing her testimony, was justified in taking into consideration her verified answer which alleged "that she has been the owner in fee and entitled to the possession of the hereinabove described real property, and has been such ever since the 8th day of November, 1897." The court was not obliged to accept her explanation that such allegation was made at the suggestion of her attorney. After knowledge of the execution of the quitclaim deed, Mrs. Lyon endeavored for nearly two years to sell the property and then executed the trust deed under which the bank caused the property to be sold. Under the facts stated the court could not well have drawn any other inference than that the quitclaim deed was delivered and accepted. The delivery of the deed to Broughton to be recorded was a sufficient delivery on the part of plaintiff. *Wedel v. Herman*, 59 Cal. 507.

The acts of Mrs. Lyon with relation to the property, after knowledge of the execution of the deed, constituted an acceptance thereof. The fact that she may not have assented to the delivery at the time the deed was executed, or may not have then known of such execution, is not material in this case, because no party other than Mrs. Lyon is here claiming under the plaintiff.

"Such assent when given will, as between the grantor and the grantee, relate back to the time when the grantor first handed the deed over to a third person to be delivered to the

grantee." *Green v. Skinner*, 185 Cal. 435, 438, 197 P. 60, 61.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

70 Cal. App. 635

LARKEY v. CITY OF LOS ANGELES.
(Civ. 4247.)

(District Court of Appeal, Second District, Division 1, California. Jan. 17, 1925.)

1. Adverse possession §8(2)—No title by adverse possession can be acquired to land dedicated to public as an alley.

Where land was dedicated to public as an alley, no title thereto as against public could thereafter be acquired by adverse possession.

2. Dedication §19(5)—Filing map of record and sale of lots with reference thereto constitutes irrevocable dedication of streets and alleys thereon.

When an owner, after filing a map of record designating certain portion of tract as streets and alleys, sells lots designated thereon by reference to such map, he thereby irrevocably dedicates streets and alleys shown thereon to use of public.

3. Dedication §19(5)—Owners selling lots adjacent to alley estopped from claiming any land between lot and alley.

Where original owners of tract filed map of record showing lots were bounded by streets and alleys, and thereafter sold a lot adjacent to an alley, they are estopped from claiming ownership of any land between such lot and alley.

4. Dedication §46—Owners filing map of record bound thereby, and conflict on face thereof construed most strongly against them.

Original owners of tract filing map thereof of record are bound thereby, and all doubts as to meaning of map and conflict appearing on its face are to be construed most strongly against them.

5. Adverse possession §8(2)—Lot owner held not to have acquired adverse possession of strip of land lying between his lot and alley.

Where original owners filed map of record showing lots were bounded by streets and alleys, and lot purchased by plaintiff did not border on alley, but strip of land existed between plaintiff's lot and alley, held that, as original owners are bound by map showing lots were bordered by alleys and streets and by selling lots with reference thereto, plaintiff could acquire no better title than such original owners, and hence could not acquire adverse possession of such strip of land.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action to quiet title by Muriel B. Larkey against the City of Los Angeles. Judgment for plaintiff, and defendant appeals. Reversed.

Jess E. Stephens, City Atty., and Lucius P. Green, Asst. City Atty., both of Los Angeles, for appellant.

F. A. Waters and Newby & Palmer, all of Los Angeles, for respondent.

CURTIS, J. This action was instituted to quiet title to lot 22 of block 21 of the Arlington heights tract, according to the official map of said tract of record in the office of the county recorder of the county of Los Angeles, and to a strip of land 6 feet in width and 142 feet in length, lying immediately north of and parallel to said lot 22. The defendant, the city of Los Angeles, concedes that plaintiff is the owner of said lot 22, but asserts that said 6-foot strip is part of a public alley, and that defendant has an easement in and over the same for highway purposes.

On May 19, 1887, and for some time prior thereto, T. Weisendanger and others were the owners of a tract of land lying westerly of the city of Los Angeles, which they subdivided into lots and blocks under the name of the Arlington Heights Tract. They made a map of this tract, and filed the same of record in the office of the county of Los Angeles, being the county in which the land was situated. This tract was bounded on the north by Washington street and blocks 20, 21, and 22 of said tract front on said street. Block 20, the most easterly of the three blocks, is bounded on the east by First avenue, now known as Arlington avenue. Block 21 lies just west of block 20, and the two are separated from each other by Second avenue; and block 22, the most westerly of the three blocks, is separated from block 21 by Third avenue. Each of these blocks consists of 22 lots. Lots numbered 1 to 6, inclusive, in each block face on Washington street, and extend south to an alley running east and west through said tract, and are 50 feet in width and 200 feet in depth. The remaining 16 lots in each block lie south of the alley. They consisted of two tiers of 8 lots each, one tier of lots facing east and the other tier of lots facing west. These lots are 50 feet in width and 142 feet in depth. Through the center of each of the blocks 20 and 21 an alley extends from the south boundary line of said blocks, northerly to the east and west alley above mentioned. One of these alleys is 16 feet in width, and is so indicated on the recorded map. The other appears to be designated on the map as 10 feet in width. The alley running east and west is indicated on the map as 10 feet in width, although by actual measurements made on the ground the distance between the lots on the north side of said alley and those on the south side thereof is 16 feet. On the north side of this alley, and just opposite to said lot 22, belonging to plaintiff, are three lots, being lots numbered 1, 2, and 3 in said block 21. These three lots face on Washington street

and abut on said alley. Lots 1 and 2 in said block 21 were sold by the original owners of said tract on August 8, 1888, to Warren P. Love, and on December 10th of the same year they sold said lot 3 to Nannie E. Todd. It does not appear when lot 22 of said block was sold by the original owners of the tract. About the first we learn of this lot is in the year 1908, at which time it was owned by one Roseen. In this year Roseen built a fence along what he claimed to be the north boundary line of this lot. This fence extended in an easterly and westerly direction, and was parallel to, and 56 feet north of, the south boundary line of said lot. In 1914 plaintiff purchased said lot 22, and at this time the fence constructed by Roseen was still standing, and plaintiff continued to occupy the land inclosed by said fence, and claimed to own the whole thereof up to the time of the commencement of this action, and during this time plaintiff has paid all the taxes that have been assessed against said lot 22. It does not appear that any taxes were ever assessed against said 6-foot strip, unless it can be said that taxes were assessed against it as a part of said lot 22. The lot of plaintiff lies just south of the alley running east and west through said tract, and faces east on Second avenue. Since the filing of said map, and some years prior to the commencement of this action, said tract was annexed to and became a part of the city of Los Angeles.

[1, 2] The court found that plaintiff had acquired title by adverse possession to that portion of said 6-foot strip lying north of and adjacent to her said lot 22. There is no direct finding as to whether this 6-foot strip was a part of the alley, or whether it had ever been dedicated to the public. It is conceded, however, that, if it had ever been dedicated to the public as an alley, as against the public no title thereto could be acquired by adverse possession. This is undoubtedly the law. *Orena v. City of Santa Barbara*, 91 Cal. 621, 631, 28 P. 268. If, therefore, this 6-foot strip had ever been dedicated to the public as a part of the alley, then the finding of the court that plaintiff is the owner thereof cannot stand. We might first determine when the act resulting in the dedication of the alley, independent of its width, and whether it be 10 or 16 feet, actually took place. The mere filing of the map of record, designating certain portions of the tract as streets and alleys, is simply an offer to dedicate the spaces designated on said map as streets and alleys to the public for highway purposes. *Elliott v. McIntosh*, 41 Cal. App. 763, 766, 183 P. 692. But when the owner, after recording such a map, sells lots designated thereon by reference to said recorded map, he thereby irrevocably dedicates the streets and alleys shown thereon to the use of the public. *San Leandro v. Le Breton*, 72 Cal. 170, 13 P. 405; *Archer v. Salinas*

City, 93 Cal. 43, 28 P. 839, 16 L. R. A. 145; Davidow v. Griswold, 23 Cal. App. 188, 137 P. 619; Daly City v. Holbrook, 39 Cal. App. 326, 178 P. 725; Elliott v. McIntosh, 41 Cal. App. 763, 183 P. 692; Berton v. All Persons, etc., 176 Cal. 610, 170 P. 151. Therefore, when the original owners of the Arlington heights tract filed for record the map of this tract, and sold said lots in said tract according to said map, the streets and alleys designated thereon became dedicated to the public, and no further action was necessary either upon the part of the public authorities or upon the public in the use of said streets and alleys in order to constitute the streets and alleys of said tract public highways. As we have already seen, said map was filed for record on May 19, 1887, and 3 of the lots of said tract abutting on said alleys and lying immediately opposite to, and to the north of, plaintiff's said lot 22 were sold by the original owner by the 10th day of December, 1888. Accordingly said alley became irrevocably dedicated as a public alley on December 10, 1888. Therefore no title to any portion of said alley could be acquired by plaintiff or her predecessors in interest by adverse possession subsequent to said last-named date. As was said by the court in a similar case:

"The property dedicated has become public property, impressed with the use for which it was dedicated, and neither can the public divert it from that use nor can it be lost by adverse possession. Nor is the effect of such dedication impaired by any delay in the use of the land for which it was set apart. Such failure to make use of the land does not authorize the owner to resume possession. The public can thereafter appropriate the land to the use for which it was dedicated whenever convenience or necessity may suggest." *Davidow v. Griswold*, supra.

[3-5] This brings us to the real question in the case, and that is the width of the alley running easterly and westerly through said tract, which the original owners set apart or dedicated to the public for highway purposes. If this alley is only 10 feet in width, and must be measured from the south line of the adjacent lots, then this disputed strip of 6 feet is no part of it and plaintiff is undoubtedly the owner thereof. On the other hand, if the alley is 16 feet in width, then it includes this disputed strip, and the defendant has an easement thereon as claimed by it in its answer. As we have before stated, the figures "10" appear on the map within the lines indicating this alley and near the easterly end thereof. Figures placed like these on the alleys, streets, and lots shown on the map undoubtedly were so placed thereon for the purpose of showing the dimensions of the different pieces of land embraced within the tract, and shown on the map. These figures "10" appearing on the map, are unquestionably intended to

indicate that this alley is 10 feet in width. If this were the only fact shown by the map regarding the width of the alley, there would be no question of the correctness of plaintiff's claim as to its width. There is, however, another fact shown on the map which we think must be given consideration. This fact is the location of the said alley between two sets of lots. The map shows that the lots facing on Washington street are separated from those to the south by this alley, and that this alley extends the entire distance from the southern boundary line of the Washington street lots to the northern boundary line of those lots situated to the south. This would indicate that the width of the alley was the distance between the lots facing on Washington street and those to the south, which by actual measurement is shown to be 16 feet. Which of these two features shown on the map are to control in this case? It is evident that they both cannot stand, as they are in direct conflict with each other. According to the plaintiff's contention, the original owners set apart only 10 feet for this alley, and that in so doing they left a strip 6 feet in width just south of the alley and running the entire width of the block. This strip of land plaintiff contends lies between the 10-foot alley, as claimed by her, and her lot and those of other owners similarly situated on the south. Just why this 6-foot strip should be located south of this supposed 10-foot alley and not north of it plaintiff has not explained. It appears to us that the same argument used by plaintiff for locating it adjacent to her lot could with equal force be used by the owners of the lots north of the alley to locate it contiguous to their lots. But, accepting plaintiff's contention as to its location, we are faced with this condition: The original locators have filed a map and sold to plaintiff or her predecessor a lot which this map shows is adjacent to an alley. It appears, however, upon a survey of the premises that this lot, according to plaintiff's contention, does not border upon said alley, but that there is a strip of land 6 feet in width between this lot and the said alley, which the original owners (we will suppose) claim was neither a part of said lot, nor of said alley, but that it belongs to them, and they proceed to occupy the same and to exclude the owner of said lot from any right to pass therefrom onto said alley. Could any such claim of the original owners be maintained? We think not. Having sold to plaintiff, or her predecessor, a lot adjacent to an alley, we think the original owners would be estopped from claiming that they were the owners of any land between said lot and said alley, and that when they filed for record a map and sold lots according thereto, which map showed that the lots were bounded by streets and alleys, that they would be bound by said map. This we think would be true even if,

by so holding, the width of certain of the streets or alleys were extended beyond the apparent width shown on the map. The original owners, having filed the map, are bound thereby, and all doubts as to the meaning of the map, and any conflict appearing upon its face, are to be construed most strongly against them. 18 Cor. Jur. 110; *Maheer v. Brown*, 183 Ill. 575, 56 N. E. 181, 186; *Florida East Coast Ry. Co. v. Worley*, 49 Fla. 297, 38 So. 618, 622. Plaintiff stands in this action in no better position than the original owners would in an action brought by them to recover this strip of land prior to the running of the statute of limitations against them. Plaintiff has by adverse possession succeeded to only such rights in this strip of land as were held by the original owners after they had parted with their title to the lots bordering on this alley. The original owners having parted with all their rights in this strip of land when they filed for record the map and sold lots bordering on this alley, there was nothing for the plaintiff to acquire by adverse possession as against them. The finding therefore of the court that the plaintiff had acquired title to that portion of said 6-foot strip lying adjacent and north of said lot 22 in our opinion finds no support in the evidence.

There was other evidence in the case which we have not heretofore referred to. We have arrived at the above conclusion independent of this evidence. Nevertheless, we think it was both material and competent, and that it affords an additional ground in support of appellant's contention that the original owners intended and did actually dedicate an easterly and westerly alley 16 feet in width. This evidence was that of the civil engineer who made the original survey of the Arlington heights tract and subdivided the tract into lots, blocks etc. He stated at the trial that the alley in question, as originally surveyed and laid out, was 16 feet in width; that he made the original plat or map of the tract which designated said alley on said plat as 16 feet in width. This original map, however, was not produced at the trial, and there was evidence that it had been lost. At the time this map was filed for record in the office of the county recorder the law did not require, as it does now, that the original map should remain on file in said office. On the other hand, the law then in force required the re-

cord to make a copy of the map filed and to return the original to the owner. This witness further testified that this and all other alleys in the tract were, at the time of the survey of said tract, staked out on the ground as 16 feet in width. No attempt was made to dispute this testimony. The evidence in the case further shows that all of the owners of lots bordering upon any of the alleys in said tract, where improvements have been made contiguous to any of said alleys, have erected their buildings, fences, and other structures so as to allow 16 feet for the width of said alleys, with the single exception of the plaintiff. As stated above, while we have not based our opinion upon this evidence, we consider it of material importance in the case.

There is a further finding of the court upon which plaintiff relies for an affirmance of the judgment rendered herein. By this finding the court found that "the whole of the land as described in said complaint lies within the city of Los Angeles, and is described as lot 22 of block 21 of said Arlington heights tract, and has a width of 56 feet." We seriously question whether this finding can either be harmonized with the pleadings in the case or sustained by the evidence. By the complaint, plaintiff claims to be the owner of said lot 22 "and a parcel of land 6 feet in width and 142 feet in length lying parallel with, adjacent to, and contiguous with, and northerly of, the northerly line of said lot 22; the northerly line of said 6-foot strip also being parallel with and uniformly distant 210 feet southerly from the southerly line of Washington street." From this description of the property in dispute, given in the complaint, it is plain that the 6-foot strip is not claimed to be a part of said lot 22, but that it lies parallel with, adjacent to, and northerly of, the north line of said lot 22. Furthermore, the map of said tract shows that said lot 22 and every other lot in said tract is 50 feet in width, and there was no evidence in the case which conflicts in any manner with the map in this respect.

For the reasons stated herein, we are of the opinion that the judgment should be reversed, and it is so ordered.

I concur: CONREY, P. J.

Mr. Justice HOUSER, being disqualified, took no part in the above decision.

70 Cal. App. 552

RIEDY et al. v. BIDWELL.

COOK v. SAME.

(Civ. 4284.)

(District Court of Appeal, Second District, Division 1, California. Jan. 9, 1925. Hearing Denied by Supreme Court March 9, 1925.)

1. Appeal and error — 1011(1)—Trial court's findings of fact not disturbed, where based on substantial evidence.

Trial court's findings of facts, based on substantial evidence, will not be disturbed, even though evidence preponderates against decision thereon.

2. Executors and administrators — 93(1)—Not duty of executor to carry on business formerly conducted by testator, unless power expressly given by testator's will or necessary to preserve estate.

An executor need not carry on for benefit of estate a business formerly conducted by testator, unless will of testator expressly creates power so to do or it is necessary to preserve estate.

3. Executors and administrators — 93(1)—Executor managing former business of testator personally liable for losses, unless expressly authorized.

Unless expressly authorized, an executor assuming to conduct former business of testator assumes risk as to losses incurred, but net profits become property of estate.

4. Executors and administrators — 96—Independent contract of executor binding on him personally.

Contracts by executor made on independent consideration do not bind estate, even though for its benefit, but are binding on executor personally.

5. Executors and administrators — 97—Court may make allowance to executor for expenses in connection with continuance of business of testator, where presumably made to preserve estate.

A contract between an executor and employees of business formerly conducted by testator whereby employees were to continue to conduct such business and receive a certain portion of profits being presumably for purpose of preserving estate and not illegal in itself, court could have made allowance to executor for expenses in connection therewith.

6. Executors and administrators — 97—Executor contracting with employees of testator's business whereby employees were to continue to conduct such business in return for percentage of profits held required to compensate such employees who fulfilled their part of contract.

Where executor contracted with employees of business formerly conducted by testator whereby such employees were to continue to conduct business, and in return receive a certain percentage of profits made, which contract

was carried out in good faith by employees, and resulted in profit, *held*, that executor must compensate employees according to terms of such contract.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Separate actions by Elizabeth Riedy and husband and by Charles Cook against George M. Bidwell. Judgments for defendant, and plaintiffs appeal. Reversed.

L. E. Dadmun, of Los Angeles, for appellants.

Adam Thompson and Ren Thompson, both of San Diego, for respondent.

HOUSER, J. On December 11, 1918, Chester Bidwell died, leaving a considerable estate. In his will he made several devises and bequests, including one to his brother George M. Bidwell, the defendant in this action, which devise and bequest consisted in certain real estate and personal property known as the San Diego Feed Mills. Defendant was also appointed executor of the will. Immediately after the death of Chester Bidwell the feed mill was "closed down." On the 1st day of the following February defendant entered into an oral contract with the plaintiffs Elizabeth Riedy, Charles Cook, and E. M. Tinney (who before the death of Chester Bidwell had been in his employ) to the effect that, if they would manage and conduct the business of the feed mill, each of them for such services would respectively be paid a certain stipulated salary, and, in addition thereto and as further compensation for such services, after deducting from the net profits of the business an amount equal to 6 per cent. on the investment to be paid to said Bidwell, the sum so remaining would be divided among said Riedy, Cook, and Tinney. Under such arrangement the feed mill was operated for a period of about 13 months at a net profit of somewhere between about \$13,000 and approximately \$18,000—dependent upon the testimony of which accountant the court believed was a correct statement of fact.

Defendant having failed and refused to pay to his said employees any part of the net profits earned from the operation of the feed mill, two actions for damages were brought against defendant; one by Charles Cook and the other by Elizabeth Riedy, who sued, not only for her own original cause of action against defendant, but also upon an assigned claim made to her by her co-worker E. M. Tinney.

On the trial of the actions it was shown that, although certain profits had arisen from the operation of the business of conducting the feed mill, defendant had never accounted to the estate of Chester Bidwell therefor, but had assumed that such profits were his

personal property, and accordingly, had appropriated them to his own use.

The findings of the court included the facts "that on the 1st day of January, 1919, George M. Bidwell was not the owner, nor was he in possession for himself, or running or conducting for himself," the said feed mill; "that on the 10th day of January, 1919, and up to the 28th day of November, 1919, the said George M. Bidwell was the duly and regularly appointed, qualified, and acting executor of the last will and testament of Chester Bidwell, deceased, * * * and that as said executor he was in possession for the estate of said deceased (and running said business as said executor for said estate)." The court further found that during all such time plaintiffs had full knowledge of all such facts.

Judgment was rendered in favor of defendant, and the plaintiffs have appealed therefrom.

[1] Appellant's first point for reversal of the judgment is that the findings of fact are not sustained by the evidence. An examination of the record herein leads to the conclusion that there is substantial evidence upon which to base the findings to which objection is made, and the rule is so well settled as to require no citation of authority that in such circumstances, even though it may appear that the evidence preponderates to the contrary of the decision thereon as reached by the trial judge, the appellant court will not interfere. It must therefore be assumed that in his individual capacity George M. Bidwell did not enter into the contract with plaintiffs, and that such contract was made by George M. Bidwell as executor of the last will of Chester Bidwell, deceased.

[2, 3] The law appears to be well settled that it is no part of the duty of an executor to carry on for the benefit of the estate a business formerly conducted by the testator in his lifetime. Exceptions to such rule may exist where the will of the testator expressly creates the power so to do, or where the carrying on of a business would be cast upon the executor as a necessary means for the preservation of the estate. If, in the absence of such authority, or other compelling reason, the executor assume to conduct the former business of the testator, it must be at his own risk as to losses incurred, but all net profits derived therefrom become the property of the estate. In *re Rose*, 80 Cal. 166, 22 P. 86; *Estate of Broome*, 162 Cal. 258, 122 P. 470; *Estate of Smith*, 118 Cal. 462, 50 P. 701; *Brenham v. Story*, 39 Cal. 179; *Estate of Freud*, 131 Cal. 667, 63 P. 1080, 82 Am. St. Rep. 407; *Estate of De Rome*, 175 Cal. 399, 165 P. 919.

In the case entitled *In re Rose*, 80 Cal. 166, at page 173, 22 P. 86, it is said:

"If, as in this case, the administrator elects to assume the peril, and is permitted by the court and parties interested, without objection,

to so conduct and manage the business, the liabilities growing out of the management are not claims which could be enforced against the estate by the holders thereof. They are his liabilities. He has a right to pay them out of the increase of the business, but if by so doing a loss is sustained to the estate, he must make the loss good. Protected from loss and from liability at all times, the estate is interested in the business only to the extent of its profits; and in them, not because it is the business of the estate, but because the administrator is using the property of the estate in a way he is not authorized to do, and consequently, is required to account for all the profit made by its use."

[4] It is likewise a general rule, supported by a host of authorities, that contracts made by an executor, even though for the benefit of the estate, if made upon a new and independent consideration as between the promisee and executor, do not bind the estate, but are binding upon the executor personally. 24 Corp. Jur. § 483, and cases there cited; also 11 Cal. Jur. § 673.

In the early case of *Dwinelle v. Henriquez*, 1 Cal. 388, it was held that a public administrator was personally liable for the services of an attorney, performed by him at the request of the public administrator and in the interests of the particular estate involved. Although the point is not necessary to the decision, the same principle is indicated in the case of *Gurnee v. Maloney*, 38 Cal. 85, 99 Am. Dec. 352.

In *Estate of Page*, 57 Cal. 238, it appears that an administrator had made a contract with an attorney to give him an interest in certain property of the estate contingent upon recovery thereof. The court held that it was not within the power of the administrator to bind the estate by such a contract, but that "the administrator might be personally liable."

The case of *Briggs v. Breen*, 123 Cal. 657, 56 P. 633, 886, was another case where it was held that executors were personally liable for attorneys' fees. Touching the point, the court said:

"Since there was no agreement that the attorneys should look for their fees to the estate or an allowance therefrom by the court, it follows that the executors were liable personally to them for their reasonable compensation; it was so decided in *Dwinelle v. Henriquez*, 1 Cal. 387, and has been more or less distinctly asserted in several cases since [citing cases]."

In the case of *Maxon v. Jones*, 128 Cal. 77, 60 P. 516, the administrator of the estate entered into a contract by which he authorized a broker to procure a loan for and on behalf of the estate, and agreed to pay to the broker a commission of \$1,500 for his services in obtaining the loan. It was held that the administrator was personally liable. In the course of the opinion it is said:

"We understand the well-settled rule to be that the administrator or executor of an estate is personally liable on his contract for services rendered the estate, unless there is an agreement to the contrary."

In the case of *Moffitt v. Rosencrans*, 136 Cal. 416, 69 P. 87, an executrix, who was sole residuary legatee under the will, without any order of court, had made a contract to sell certain land, and had given possession thereof to the vendee. Suit was afterwards brought by the executrix to recover possession of the land, and it was held that, in view of the fact that she was the sole residuary legatee of the estate, and that at the time of her agreement to sell the land the time for claims against the estate had expired, and all debts and legacies had been paid, leaving in her hands more than sufficient money to close the administration, she had thus become the sole beneficial owner of the land; and that the contract of sale was binding on her personally.

In *Melone v. Ruffino*, 129 Cal. 514, 62 P. 93, 79 Am. St. Rep. 127, it is held (syllabus):

"There is nothing unlawful in an administrator binding himself personally by a contract to sell the property of the estate in good faith for the benefit of himself and other heirs; and, though he may not be able to make a title by the decree of the court within the time limited, he may bind himself personally by a valid agreement for the return of the deposit made by his authority."

See, also, *McKee v. Hunt*, 142 Cal. 526, 77 P. 1103; *Estate of Kruger*, 143 Cal. 141, 76 P. 891; *Golden Gate Undertaking Co. v. Taylor*, 168 Cal. 94, 141 P. 922, 52 L. R. A. (N. S.) 1152, Ann. Cas. 1915D, 742; *Estate of Kasson*, 119 Cal. 489, 51 P. 706; *Sterrett v. Barker*, 119 Cal. 494, 51 P. 695.

The only case which in any manner militates against the principle of law expressed in the forgoing cases to which attention of the court has been directed is that of *Danielwitz v. Sheppard*, 62 Cal. 339, in which it appeared that an administratrix, under an order of court, sold certain real property belonging to the estate for a specified sum of money, and reported the sale to the court for confirmation, pending which proceedings the administratrix, joining with an heir of the deceased, made an agreement with a broker to the effect that whatever sum he might be able to procure to be bid for said property on the hearing of the petition for confirmation of the sale which would be over and above the amount already bid thereon should be paid to such broker as his commission for effecting such sale at a higher price. The sale was made at an advanced price, and the administratrix and the heir declined to comply with the terms of the agreement. An action was brought against them on the contract. The trial court found that the contract was executed by the defendants as heirs of the estate and not in any representa-

tive capacity, and that it was so understood and agreed at the time of its execution. The court held that the contract was illegal and contrary to the policy of the law, and that there could be no recovery thereon.

A somewhat similar case in principle is that to be found in *Estate of Willard*, 139 Cal. 501, 73 P. 240, 64 L. R. A. 554, wherein it appears that the property was sold at public auction (subject to confirmation by the court) for the sum of \$15,500. After the public sale of the property the administrator of the estate made an agreement with a broker to the effect that, so far as he had the power or was able, he would pay to the broker the sum of \$1,400, provided that at the time set for the confirmation by the court of the sale of the property the broker would procure a bid of \$20,000 therefor; and thereupon that the administrator would ask the judge of the probate court, in fairness to the broker, to order payment to the broker of said sum of \$1,400. It was held that, while the administrator had no power to make a contract for services which would bind the court in the settlement of his final account, the court had authority to make an allowance to the administrator for a reasonable compensation to the broker who had rendered valuable services affecting the sale of real estate at a largely increased bid whereby a profit accrued to the estate.

In the case of *Hickman-Coleman Co. v. Leggett*, 10 Cal. App. 29, 100 P. 1072, an action was brought against the defendant individually for services rendered to the defendant by the plaintiff in procuring a purchaser for real estate belonging to the estate wherein the defendant was the sole executor of the will of the deceased. In the course of the opinion it is said:

"It is well settled that an executor or administrator cannot create any liability against the estate in his charge by his employment of attorneys, brokers, or others to assist him in the performance of his duties. The attorney, broker, or other person employed has no action or claim against the estate. Whatever claim he has, whether it be absolute or conditional, is against the executor or administrator in his individual capacity, who in turn may, if the expenditure was made in good faith and was proper, be credited therewith in the settlement of his accounts with the estate [citing cases]."

The appeal was from a judgment entered against the plaintiff upon an order sustaining the defendant's demurrer to the complaint. The court held that the plaintiff, having fully performed its contract, was entitled to its commissions, and reversed the judgment.

With reference to the contract in the case of *Danielwitz v. Sheppard*, 62 Cal. 339, to which attention has heretofore been directed, it appears that the purpose of the agreement between the parties was not to benefit the

estate, but was solely to advantage the person with whom the contract was made. No part of the increase in price to be paid for the property to be sold was to inure to the benefit of the estate, but the whole thereof was to be paid to the broker, who was to induce some one to make a bid higher than the bid already received by the administratrix. Without the intervention of the broker, it is possible that the identical person who offered the increase in price for the property might have offered a higher price, and thus enriched the estate. But by the contract entered into between the administratrix and the broker there was no possibility of procuring a better price for the property, so far as the estate was concerned, from any person who might be induced to bid therefor by or through the efforts of the broker.

[5, 6] By virtue of the carrying out of the terms of the contract in the instant case the estate stood to receive a very considerable benefit: First, in the fact that the business would be more presentable to any intending or prospective purchaser as a "going concern," and hence more salable and at a higher price than though it were "closed down"; secondly, as a "going concern," and by reason of its reasonable use the various machinery, equipment, and property generally would not deteriorate and therefore depreciate in value to the same extent as though standing idle; and, thirdly, there was a possibility not only of having the taxes and general upkeep bills paid by reason of the operation of the business, but as well a net profit to the estate of 6 per cent. on the investment. The contract was not illegal in itself. Having been made by the executor presumably for the purpose of preserving the property of the estate, as well as with the expectation of earning a profit therefrom, it would have been within the power of the court to make allowance to the executor in his account for his proper and necessary expenses in connection therewith. In *re Rose*, 80 Cal. 166, 22 P. 86. Had there been no net profit over and above the stipulated fixed salaries of the respective employees, or had the net profit, as estimated solely by dollars and cents, been nominal in amount, no good reason would appear why in effect the contract should not have been recognized and ratified. That under the apparently skillful guidance and management of the plaintiffs the result of business operations was changed from a loss to a considerable gain should in no way militate against the legitimacy of the contract. The plaintiffs in all good faith performed their part of the agreement. It is but right and just that the defendant should be compelled to compensate the plaintiffs in accordance with the terms of the agreement. The judgment is reversed.

We concur: CONREY, P. J.; CURTIS, J.

MEMORANDUM DECISIONS

70 Cal. App. 168

ANAHEIM CO-OPERATIVE ORANGE ASSOCIATION and Ocean Accident & Guarantee Corporation, Limited, of London, England (a Corporation), Petitioners, v. INDUSTRIAL ACCIDENT COMMISSION of the State of CALIFORNIA and Stephen A. Rimpau, Respondents. (Civ. 4956.) (District Court of Appeal, Second District, Division 2, California. December 9, 1924. Hearing Denied by Supreme Court Feb. 5, 1925.) Application for certiorari to review an order of the Industrial Accident Commission awarding compensation for injuries. Writ denied. George H. Moore, of Los Angeles, for petitioners. Warren H. Pillsbury, of San Francisco, for respondents.

PER CURIAM. The question presented by this petition for a writ of certiorari against the Industrial Accident Commission is the same as that which was presented to the Supreme Court in *Imperial Ice & Development Co. et al. v. Industrial Accident Commission* (L. A. No. 8334).¹ There the court denied the petition. Upon the authority of that case, the petition for the writ in the instant case is denied.

¹ No opinion was filed in this case by the Supreme Court.

CALIFORNIA REPORTER

234 PACIFIC REPORTER

195 Cal. 473

**ECKARD v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.
(L. A. 8373.)**

(Supreme Court of California. Feb. 25, 1925.)

- 1. Justices of the peace** ⚭167(3) — Statute requires dismissal of appeal not brought to trial within one year rather than dismissal of action.

Code Civ. Proc. § 981a, relating to dismissal of appeal from justice court to superior court, when not set for trial within one year, requires dismissal of the appeal and not of the action.

- 2. Justices of the peace** ⚭166(2)—Statute requiring dismissal of appeal from justice to superior court, if not brought to trial within one year, is mandatory.

Code Civ. Proc. § 981a, requiring dismissal of appeals from justice court to superior court when not brought to trial within one year, is mandatory.

- 3. Justices of the peace** ⚭140—Proviso in statute relating to dismissal of appeals not brought to trial within one year inapplicable to case where trial set on day prior to effective date of act.

The proviso in Code Civ. Proc. § 981a, relating to dismissal of appeals from justice to superior court when not brought to trial within one year, was intended to allow time for disposition of appeals pending at time act took effect, and is not applicable to case where trial had been set on day prior to effective date of act.

- 4. Justices of the peace** ⚭140—Legislature has power to prescribe appellate jurisdiction of superior courts.

Under Const. art. 6, § 5, the Legislature has power to prescribe appellate jurisdiction of superior courts, and Code Civ. Proc. § 981a, requiring dismissal of appeals from justice to superior court when not brought to trial within one year, is a legitimate exercise of that power.

- 5. Justices of the peace** ⚭166(2)—Appeal from justice to superior court not brought to trial within one year should be dismissed, notwithstanding continuance granted for illness of a party, where no showing that trial could not have been had before expiration of year.

An appeal from justice court to superior court, which was not brought to trial within

one year, as required by Code Civ. Proc. § 981a, should be dismissed, notwithstanding that case was continued because one of parties was ill and could not attend, where there was no showing that appeal could not have been brought to trial with such party in attendance prior to expiration of year.

In Bank.

Application for writ of mandate by A. M. Eckard against the Superior Court in and for Los Angeles County and Merle J. Rogers, one of the judges presiding, to compel dismissal of appeal from justice court. Writ issued.

Otto & Linn, of Los Angeles, for petitioner.

W. R. Law, of Los Angeles, for respondents.

SHENK, J. This is a petition for a writ of mandate to compel the superior court in and for the county of Los Angeles to enter an order dismissing an appeal from the justice's court, in an action wherein the petitioner is plaintiff, and Everett P. Wilson and Juanita Wilson are defendants.

The plaintiff in said action obtained a judgment against the defendants therein in the sum of \$200 and costs. The defendant Juanita Wilson appealed therefrom. The papers in connection with the appeal were filed with the clerk of the superior court on March 13, 1923. On July 31, 1923, the superior court entered an order setting the case for trial *de novo* on June 2, 1924. On application of the appellant, but over the objection and against the protest of the plaintiff, the court continued the trial of the case to September 23, 1924. On September 17, 1924, the plaintiff served and filed a notice of motion to dismiss the appeal on the ground that the appellant had failed and neglected to bring her appeal to trial within one year from the date of the filing of the notice of appeal in the superior court, as required by section 981a of the Code of Civil Procedure. Said motion was based on the papers, records, and files in said action, and on an affidavit which disclosed that no written stipulation had been entered into and filed with the clerk of the superior court extending the time of trial beyond the statutory period. On September 22, 1924, the court granted the motion and entered an order dismissing the appeal. Thereafter the court on motion of the appellant, duly noticed, made and entered an order setting aside its order dismissing the appeal, and a further order refusing to dismiss the appeal. The present proceeding followed. It is admitted that the petition states all of the facts material to the controversy. One of those facts is that no written stipulation, as required by section 981a of the Code of Civil Procedure, was entered into between the parties, and filed with the clerk of the superior court. The section of the code referred to provides that:

"No action heretofore or hereafter appealed from the justice court to the superior court

shall be further prosecuted, and no further proceedings shall be had therein, and all such actions heretofore, or hereafter appealed, must be dismissed by the court to which the same shall have been appealed, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, where the appealing party fails to bring such appeal to trial within one year from the date of filing such appeal in said superior court, unless such time be otherwise extended by a written stipulation by the parties to the action filed with the clerk of the superior court to which the appeal is taken; provided, however, that in any appeal pending when this section takes effect, a judgment or dismissal shall not be entered under the direction hereof sooner than January first, 1924. * * *

[1, 2] In an action properly coming within its purview the foregoing section requires the dismissal of the appeal and not the dismissal of the action (*Meier v. Sup. Ct. [Cal. App.] 227 P. 490*; *Reynolds v. Sup. Ct. [Cal. App.] 231 P. 354*); and the provisions of the section are mandatory (*Swim v. Sup. Ct. [Cal. Sup.] 26 P. 2*). See, also, *Miller & Lux v. Sup. Ct., 192 Cal. 333, 219 P. 1006*.

[3, 4] The respondent court vacated its order dismissing the appeal, and thereafter refused to dismiss the same apparently on the theory that the section did not apply to a case where, as here, the trial had been set on a day prior to the effective date of the act, thus following the ruling of the District Court of Appeal in *Grafton v. Sup. Ct. (Cal. App.) 226 P. 9*. But the legislative intent to provide for pending appeals is evidenced by the proviso that, as to any appeal pending when the act went into effect, a judgment of dismissal should not be entered under the section prior to January 1, 1924. This proviso without any doubt was intended to allow time for the disposition of appeals pending at the time the act took effect. No particular significance is to be attached to the fact that the case had been placed on the calendar for trial prior to that date. *Ravn v. Planz, 37 Cal. App. 735, 174 P. 690*. The Legislature has power to prescribe the appellate jurisdiction of superior courts (Const. art. 6, § 5) and section 981a is a legitimate exercise of that power. *Pacific, etc., Co. v. Sup. Ct. (Cal. App.) 232 P. 995*. Any alleged hardship which may ensue by reason of the mandatory provision of the section is subject to control and correction by the Legislature.

[5] It was insisted by counsel for appellant on oral argument that the trial of this case was continued to September 23, 1924, upon a sufficient showing that the appellant was ill and could not for that reason be in attendance at the trial. Assuming, but not deciding, that, when an appeal from a justice's court has been set down for trial within the one-year period, and a necessary party to the action is unable to be present in court on the day of trial, or on any other day designated by the court for the trial thereof, be-

fore the expiration of the statutory period, solely because of illness, the court could, upon a proper showing, continue the trial beyond the one year and still preserve its jurisdiction to try the same, there is no showing herein that said appeal could not have been brought to trial with the appellant in attendance prior to the expiration of the year, to wit, prior to March 13, 1924.

Let the peremptory writ issue.

We concur: MYERS, C. J.; RICHARDS, J.; SEAWELL, J.; LAWLOR, J.; LENNON, J.; WASTE, J.

195 Cal. 404

RUTLEDGE et al. v. CITY OF EUREKA et al.
(S. F. 10474.)

(Supreme Court of California. Feb. 19, 1925.)

1. Appeal and error ⚡931(1)—On appeal, findings construed most favorable to judgment.

On appeal, findings must be construed most favorable to judgment.

2. Municipal corporations ⚡513(7)—Evidence held to warrant finding superintendent of streets made assessment, though prepared by another.

Evidence held to warrant finding that superintendent of streets signed assessment certificate and warrant, prepared by another under contract with superintendent with knowledge of contents of assessment roll, intending that assessments therein should be for improvement.

3. Evidence ⚡48—Common knowledge that work of preparing assessments for street improvements is done by skilled assistants.

It is common knowledge that in large cities work of preparing assessments for street improvements is done by skilled assistants in office of person or board having supervision of streets.

4. Municipal corporations ⚡515(1)—Employment of another by superintendent of streets to prepare assessment held irregularity not invalidating assessment.

Contract, whereby city superintendent of streets employed another to prepare assessment for street improvements, was not delegation of power to make assessment, in violation of Street Improvement Act 1911, § 20, subd. 10, as amended, where superintendent did not delegate power to act officially, but adopted assessment as his own, but was mere irregularity which did not invalidate assessment in view of sections 26 and 82.

5. Municipal corporations ⚡493(6)—Improvement assessment confirmed by council conclusive.

Street improvement assessment made by proper officer confirmed on appeal by city council is conclusive in absence of fraud on part of council.

6. Municipal corporations ⚡493(6)—Evidence of unequal assessment must be clear and convincing.

To set aside assessment for street improvements, confirmed by city council on appeal, on ground that whole assessment designedly preferred one section over remainder of district, record on its face must show clear and convincing evidence that under no circumstances could individual parcels have been benefited in proportion stated in assessment.

7. Municipal corporations ⚡513(7)—Evidence held not to show assessment for street improvement was arbitrary, unjust, or discriminatory.

Evidence held not to show that assessment of benefits for street improvement was arbitrary, unjust, or discriminatory.

8. Municipal corporations ⚡460—Inclusion in assessment of compensation of third person preparing assessment held proper as "incidental expenses."

Inclusion in assessment for street improvement of compensation to third person for making up assessment under contract with superintendent of streets held not improper as constituting increase in salary of superintendent, in violation of Const. art. 11, § 9, in view of Improvement Act, §§ 18, 79, which defines "incidental expenses."

[Ed. Note.—For other definitions, see Words and Phrases, Incidental Expenses.]

9. Municipal corporations ⚡425(1)—Railroad property assessable for street improvements.

Railroad property may be assessed for street improvements on same basis as other property, in view of Improvement Act, § 20, subd. 11.

10. Municipal corporations ⚡294(2)—Torrens Land Title Law, requiring filing of notice of resolution for improvement, applies to resolution for work and not of intention.

Provision of Torrens Land Title Law, § 94, requiring filing in registrar's office of notice of resolution for street improvements affecting registered land within five days after its passage, refers to resolution ordering work, and not to resolution of intention.

11. Pleading ⚡433(1)—Insufficiency of complaints to raise issue of effect of want of notice held cured by allegations of answer and findings.

Insufficiency of complaints to raise issue of effect of want of notice of passage of resolution ordering work, because of failure to file notice of resolution in registrar's office within five days, as required by Torrens Land Title Law, §§ 94, 95, held cured by allegations of answer and findings of court.

12. Municipal corporations ⚡294(2)—Provision of Torrens Land Title Law for registering memorial of lien does not apply to street improvement resolution not creating lien.

Torrens Land Title Law, § 95, providing that no lien shall affect registered land until memorial thereof is entered on register, does not apply to memorial of resolution for street

improvement which could not create lien on land.

13. Municipal corporations ⚡266—Provision of Improvement Act as to jurisdiction held not repealed by Torrens Land Title Law.

Improvement Act, § 7, giving council jurisdiction to order street improvement work on complying with certain requirements, was not repealed by Torrens Land Title Law, § 94.

14. Municipal corporations ⚡302(1) — Filing notice of resolution for street improvement before recording assessment held sufficient compliance with Torrens Land Title Law.

Filing notice of resolution for street improvement work required by Torrens Land Title Act, § 94, within five days after passage of resolution, is not mandatory, "must" and "will" being construed as directory, in view of section 34, subd. 4, and filing of notice of resolution before recording of assessment was sufficient compliance with statute.

15. Municipal corporations ⚡513(7)—Assessment roll held admissible in evidence to determine whether assessments were discriminatory.

In action to have assessments declared void, assessment roll was properly received in evidence to determine whether assessments were so arbitrary and discriminatory as to amount to constructive fraud.

16. Municipal corporations ⚡493(6) — Evidence showing inequality in assessments for street improvement inadmissible on question of benefits.

In action to declare street improvement assessments void, evidence showing that certain property was favored *held* inadmissible on question of benefits; determination of city council being conclusive.

17. Municipal corporations ⚡493(6) — Evidence showing inequality in assessments held inadmissible on question of constructive fraud.

In action to have street improvement assessments declared void, evidence showing certain property was favored *held* inadmissible on question of constructive fraud, which must be determined by conditions shown by record or coming within judicial knowledge.

In Bank.

Appeal from Superior Court, Humboldt County; C. O. Busick, Judge.

Consolidated actions by Mary E. Rutledge and others against the City of Eureka and others to have certain assessments levied against property declared void. Judgment for defendants, and plaintiffs appeal. Affirmed.

F. A. Cutler and J. F. Coonan, both of Eureka, J. M. Mannon, Jr., of San Francisco, and J. H. G. Weaver and Mahan & Mahan, all of Eureka, for appellants.

Alfred C. Skaife and Guy Le Roy Stevick, both of San Francisco, and Arthur M. Ellis, of Los Angeles, for respondent Citizens' Nat. Bank of Los Angeles.

James W. Henderson, of San Jose, for respondents City of Eureka and officials thereof.

Kirkbride & Gordon, of San Mateo, Charles W. Cobb, of San Francisco, Edward T. Bishop, Co. Counsel, and Everett W. Mattoon, Chief Deputy Co. Counsel, both of Los Angeles, *amicus curiæ* in support of respondents' contention.

SHENK, J. Ten complaints were filed by the plaintiffs and appellants in the superior court in and for the county of Humboldt to enjoin the respondent city of Eureka and its officers from issuing bonds to represent certain special assessments in a street improvement proceeding. The actions were consolidated and tried together. Findings of fact and conclusions of law in favor of the defendants and respondents were signed and filed by the trial court, and from a judgment entered in accordance therewith the plaintiffs have appealed. The record is presented pursuant to section 953a et seq. of the Code of Civil Procedure.

The street improvement proceeding was initiated by the adoption on the 20th day of May, 1919, of an ordinance of intention to order certain improvements to be made and work performed in said city pursuant to the improvement act of 1911 (Stats. 1911, p. 730) and amendments thereto. As therein contemplated the work was to consist, among other things, of grading, paving, and the construction of culverts, sanitary sewers, and storm sewers. The improvement was to extend from the southerly limits of the city along Broadway, Highway avenue, and Fourth street to the northerly city limits. No improvement, however, was to be constructed on Fourth street between E and H streets. The council declared and determined that the proposed improvement would be of more than local or ordinary public benefit and prescribed a district deemed to be benefited thereby, which district covered practically the entire city of Eureka. It also gave notice that serial bonds would be issued to represent unpaid assessments pursuant to the Improvement Bond Act of 1915 (Stats. 1915, p. 1441). Following the adoption of the resolution of intention, all of the steps necessary to enable the council to acquire jurisdiction to order the work were admittedly duly taken. The contract was let to the Worswick Construction Company, the work was performed by that company in accordance with the requirements of the contract and was approved and accepted by the city. To this point the appellants make no objections to any of the proceedings under said improvement laws. Thereafter an assessment was made to cover the cost of the work, and on June 9, 1921, the said assess-

ment together with the warrant were recorded in the office of the superintendent of streets and the diagram was there filed.

It is contended by appellants that the assessment so made and recorded was not the assessment of the superintendent of streets as required by the Improvement Act and was therefore void because of the alleged unlawful delegation of authority by the superintendent of streets to one A. J. Larson of the firm of Endicott & Larson in connection with the making of the assessment. It appears that on or about the 16th day of September, 1920, the superintendent of streets entered into a contract with Endicott & Larson to make up the assessment and the contractor's return and to furnish all necessary records and bonds, all for 1 per cent. of the contract price. When the improvement contract had been completed and the work accepted, the said Larson proceeded to and did make his estimate of the proper assessment to be charged against each lot, piece, or parcel of land in the assessment district, spreading the entire cost of the proceeding over the land in the district in accordance with his ideas of benefits. These estimates he delivered to the superintendent of streets, who thereafter adopted the same as his own and made the assessment accordingly.

The superintendent of streets certified, among other things, as follows:

"Pursuant to and in accordance with the statutes, I, W. H. Colwell, street superintendent of said city of Eureka, do hereby certify that that certain contract entered into between Worswick Construction Company and myself as the street superintendent of said city, on the 25th day of July, 1919, for the grading, paving, constructing sanitary sewers, storm sewers, catch-basin laterals, culverts, curbs, shoulders, ditches, bulkheads, manholes, lampholes, survey monuments, storm water inlets and fill in said streets above set forth in the said city of Eureka, has been fulfilled and is performed to my satisfaction, as said street superintendent, and I have accepted the work contracted for, and that I have estimated upon the land, lots or portions of lots, within the said assessment district, described in said resolution of intention, and shown upon the diagram herewith attached, prepared by the city engineer and approved by the city council, the benefits arising from the work performed under said contract and to be received by each lot, portion of such lot, piece or subdivision of land within said district, in the manner provided by law, and as such street superintendent I do now hereby assess upon and against said lands in said assessment district the sum of three hundred twenty nine thousand and fifty-three and fifty-four one-hundred (\$329,053.54) dollars, the same being the total amount of the costs and expenses on said work done on said contract and the sum due for the work performed and specified in said contract (including incidental expenses) to wit: The amount to be paid under said contract \$303,823.54; and the amount of incidental expenses incurred as provided by law, \$25,230.00, making a total of \$329,053.54, * * * as follows: (Here follows in tabulat-

ed form itemized cost of the several classes of work.) And I do hereby assess such total sum of \$329,053.54 upon the several pieces, parcels, lots, portions of lots and subdivisions of land in said district benefited thereby, to wit: Upon each respectively in proportion to said estimated benefits to be received by each of said several lots, portions of lots or subdivisions of land * * * as follows: (Here follows descriptions of some 13,000 parcels of land with a separate number opposite each description and the amount of assessment charged against each.)"

To this certificate and assessment is appended the signature of W. H. Colwell, street superintendent of the city of Eureka, dated Eureka, Cal., May 12, 1921. The assessment was duly recorded in the office of the superintendent of streets on May 12, 1921. On the same day the superintendent of streets signed a warrant to the assignee of the contractor to demand and receive the several assessments and recorded the same in his office.

The allegations of the several complaints are substantially in accord, and it is there averred:

"That said superintendent of streets did not upon or after the delivery to him of said diagram or any time make said assessment in conformity with the provisions of section 20, subdivision 10, of the said street improvement act of 1911 and the amendments thereto, but said assessment was previously made by one Larson and was delivered at the time and date of the delivery of said diagram to said superintendent of streets; that in making said assessment said Larson intruded upon and usurped the duties of said office of superintendent of streets of the city of Eureka, and in making said assessments said Larson did not consult, advise or co-operate with said Colwell, but at all times in making such assessment exercised his own judgment and discretion independent of and without the knowledge, consent or acquiescence of said Colwell; that all of said acts and proceedings were had and done by said Larson willfully, knowingly and perpetrated a fraud upon these plaintiffs and each one of them in that each plaintiff as the owner of land within said assessment district was and is entitled to have the official elected by the electors of said city of Eureka and as the official designated by law to use and exercise his judgment and discretion in making said assessments."

Pursuant to issue joined on the foregoing allegations and the affirmative averments of the answers of the defendants, the court found as follows:

"That on or about the 15th day of August, 1920, the superintendent of streets of said city of Eureka entered into a contract with Endicott & Larson, a copartnership, wherein and whereby the said Endicott & Larson agreed to do and perform the work of making up and furnishing an assessment roll of and for the aforesaid work, and to compute and estimate the assessment for the aforesaid work, on each lot, piece, parcel, and subdivision of land within the aforesaid assessment district. * * * That said diagram so prepared by said engineer as

aforesaid was on the 3d day of May, 1921, duly approved by the council of the city of Eureka and certified by the city clerk of said city, and that the said diagram as the same was prepared by said city engineer, approved by said city council, and certified by said city clerk, was delivered to such superintendent of streets, and said Endicott & Larson * * * did proceed to compute and estimate, and did compute and estimate upon and against the lots, lands, portions of lots, pieces, parcels, and subdivisions of land within said assessment district as shown on said diagram, the benefits arising from the aforesaid work, and to be received by each such lot, piece, and parcel and subdivision of land, and in making up said assessment pursuant to said agreement did thereupon apportion upon and against said land in said assessment district, the total amount of the cost and expense of the aforesaid work, and in making up said assessment pursuant to said agreement did apportion the total cost and expense of the aforesaid work upon the several pieces, parcels, lots, portions of lots, and subdivisions of land in said assessment district benefited by the aforesaid work, to wit: Upon each respectively in proportion to the estimated benefits to be re-lots, and subdivisions of land. * * * That on ceived by each of said several lots, portions of the 12th day of May, 1921, such superintendent of streets, in his official capacity, did adopt the assessment so made by Endicott & Larson pursuant to said agreement as the assessment in said proceeding, and did sign said assessment in his official capacity and did attach thereto a warrant which warrant was in the form provided by said 'Improvement Act of 1911.' That said warrant was signed by the superintendent of streets and countersigned by the mayor of the city of Eureka and that said warrant, said diagram, and said assessment together with a certificate, prepared and signed by said city engineer, showing the quantity and character of the aforesaid work done, was on the 12th day of May, 1921, duly recorded in the office of the superintendent of streets of the city of Eureka. That in said assessment said W. H. Colwell as superintendent of streets of the city of Eureka did certify, pursuant to and in accordance with the Improvement Act of 1911, that the contract entered into between the Worswick Construction Company and W. H. Colwell as street superintendent of said city of Eureka, on the 25th day of July, 1919, for the work provided in said resolution of intention No. 113, had been fulfilled and performed to his satisfaction as such street superintendent, that he had accepted the work contracted for, that he had estimated upon the land, lots, or portions of lots within the said assessment district described in said resolution of intention and shown upon the diagram attached to said assessment prepared by the city engineer and approved by the city council, the benefits arising from the work performed under said contract and to be received by each lot, portion of such lot, pieces, or subdivisions of land within said district in the manner provided by law. In said assessment said W. H. Colwell as such street superintendent did declare that he did then and thereby assess upon and against such lands in said assessment district the total amount of the cost and expense on said work done on said contract, being the sum due for the work performed and specified in said contract including incidental expenses, and did fur-

ther declare in said assessment that he did thereby assess such total sum upon the several pieces, parcels, lots, and subdivisions of land in said district benefited by said work, to wit, upon such respectively in proportion to the said designated benefits to be received by each of said several lots, portions, of lots or subdivisions of land. That it is not true that the said superintendent of streets did not upon, or after, the delivery to him of said diagram, or at any time make said assessment in conformity with the provisions of section 20, subdivision 10, of said Improvement Act of 1911, and the amendments thereto, nor that said assessment was previously made by one Larson or was delivered at the time or date of the delivery of said diagram to said superintendent of streets, nor that in making said assessment said Larson intruded upon and usurped the duties of said office of superintendent of streets of the said city of Eureka, nor that in making said assessment said Larson did not consult or advise or co-operate with said Colwell, or that at all times in making said assessment said Larson exercised his own judgment or discretion independent of, or without the knowledge, consent, or acquiescence of, said Colwell or that all or any of said acts or proceedings * * * perpetrated a, or any, fraud upon said plaintiffs, or each of them, or any of them. * * *

[1, 2] The foregoing findings were supported by the evidence. The testimony of the superintendent of streets was somewhat equivocal, but we are required on appeal to consider the evidence in its aspect most favorable to upholding the findings and judgment. *Breese v. Brooks*, 97 Cal. 72, 31 P. 742, 22 L. R. A. 257; *Paine v. San Bernardino, etc., Co.*, 143 Cal. 654, 77 P. 659; *Estate of Hill*, 167 Cal. 59, 138 P. 690. When so considered, his testimony was that when he signed the certificate and warrant he signed the same in his official capacity as superintendent of streets, that he knew the contents of the assessment roll and intended when he signed the certificate that the assessments therein provided for should be the assessments for the work described. This formal record of the official action of the superintendent of streets under the circumstances here shown was sufficient upon which to base the findings of the court.

[3, 4] It is earnestly insisted, however, that even the facts as found disclose an unlawful delegation of authority to Endicott & Larson by the superintendent of streets arising from the contract of employment. Numerous cases are cited wherein improvement proceedings have been held invalid because of an unlawful or unauthorized delegation of authority. It is deemed unnecessary to review them for the reason that in those cases discretionary power to act finally on the subject was placed or was attempted to be placed out of the hands of those in whom the law vested the power to act and into the hands of the person to whom the authority was delegated. Here the superin-

tendent of streets actually exercised the power conferred upon him by the statute to make the assessment. While the correspondence between Endicott & Larson and the superintendent of streets shows that the former offered, among other things, "to make and record the assessment" for the stipulated price and the offer in that form was accepted by the superintendent of streets, it is plain from what was done under the agreement that it was intended by the parties that the work of Endicott & Larson was to "make up" or prepare an assessment for the assistance and advice of the superintendent of streets. No case has been cited which would operate to prevent the furnishing of assistance to the superintendent of streets in the performance of such work. It is apparent that the task of preparing the assessment here involved would have been impossible on the part of the respondent superintendent of streets without assistance. It is a matter of common knowledge that in large cities where street improvements are carried on extensively, the work here performed by Larson is done by an assistant skilled in the work in the office of the superintendent of streets or of the lawfully constituted board, commission, or officer exercising his functions. In such circumstances it has never been held, as far as we are aware, that the superintendent of streets or the board, commission, or officer acting lawfully in his stead has relinquished or delegated the statutory power to make the assessment when it appeared, as it does in this case, that the power to act officially was not delegated or relinquished and the act required to be done by the statutory officer was actually performed by him. When the superintendent of streets signed the certificate to the assessment roll, he adopted the work of Larson as his own. See *Witter v. Bachman*, 117 Cal. 318, 49 P. 202. And having made and authenticated the assessment in his official capacity, it would not be competent for the superintendent of streets to repudiate it. *Hadley v. Dague*, 130 Cal. 207, 215, 65 P. 500.

We entertain no doubt that it would be within the power of the Legislature to authorize the street superintendent to employ persons to assist him in preparing the assessment. Assuming that he did so in this case without express statutory authority, such action would be a mere irregularity which would not affect the jurisdiction of the council, already acquired, to order the improvement nor invalidate any assessment for the cost of the work, under section 26 of the Improvement Act, which provides that—

"No assessment * * * and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality, or other defect in the same, where the resolution of intention of the council to do the work, has been

actually published as herein provided, and said notices of improvement have been posted along the line of the work, as provided in section five of this act, before the passage of the resolution ordering the work to be done."

The constitutional and statutory requirements were complied with and the exclusive remedy of the appellants, in the absence of fraud, and none is here shown, was by appeal to the council as declared in section 82 of the act. Appeals were so taken by the appellants, and after hearings before the council extending over a period of approximately three weeks the objections of the appellants were overruled and the assessments confirmed. Said section 82 provides:

"This act shall be liberally construed to the end that its purposes may be effective. No error, irregularity, informality, and no neglect or omission of any officer of the city, in any procedure taken hereunder, which does not directly affect the jurisdiction of the city council to order the improvement, shall avoid or invalidate such proceeding or any assessment for the cost of work done thereunder. The exclusive remedy of any person affected or aggrieved thereby shall be by appeal to the city council as herein provided."

This is a most comprehensive curative provision. It is more than a curative act. A curative act is retrospective. Here the same statute which prescribed certain requirements provides that failure to comply with such requirements shall not avoid the assessment. It is competent to provide in the law itself that a disregard of the provisions not essential to confer jurisdiction on the council to order the work may in turn be disregarded. *Chase v. Trout*, 146 Cal. 350, 80 P. 81; *Imperial Land Co. v. Imperial Irr. Dist.*, 173 Cal. 660, 161 P. 113; *Bienfield v. Van Ness*, 176 Cal. 585, 169 P. 225; *Oakland Pav. Co. v. Whittell Realty Co.*, 185 Cal. 113, 195 P. 1058; *City Street Imp. Co. v. Watson*, 50 Cal. App. 687, 195 P. 967. See, also, *Watkinson v. Vaughn*, 182 Cal. 55, 186 P. 753.

[5-7] It is contended that the assessments charged against the lands of the appellants are unjust, arbitrary, and discriminatory, and deprive them of their property without due process of law and deny to them the equal protection of the law. In this connection it is alleged that a plan of assessment was adopted not based upon the use, status, value, or location of the said lots and land as affected by the benefit received from said improvements; that the benefit plan as prescribed by the statute was not followed; that unimproved land, residential property, and land fronting on Fourth street and Broadway (except the land fronting on Fourth street between E and H streets and the land of the appellant railroad company) were overassessed and 26 blocks in the business district were underassessed "in pursuance of an unlawful and fraudulent scheme in

order that credit might and should be given to the property within said business district." These allegations were denied by the answers, and the court found the allegations to be untrue. The appellants concede that it is well settled that when a proper official has exercised his discretion and made the assessment, and the council has on appeal confirmed the same, the matter is foreclosed in the absence of specific fraud on the part of the council. But it is urged that the law in such cases is confined to the consideration of isolated assessments where it is claimed on the part of the property owner appealing to the city council that the assessment upon his particular lot exceeds the benefit conferred upon that particular piece of land and that it does not apply to a case where, as it is claimed it appears in this case, a scheme of assessment was willfully and designedly adopted whereby an entire section of the district was preferred to the detriment of the balance of the district. The finding of the trial court was against the allegations and contentions of the appellants on this point, but notwithstanding such finding it is insisted that the assessment is so unequal on its face as to render it invalid. It is urged that the record herein brings the case within the ruling of *Spring Street Co. v. City of Los Angeles*, 170 Cal. 31, 148 P. 217, L. R. A. 1918E, 197, wherein it was held that the assessment might be so manifestly and so grossly unjust upon its face as to justify the court in setting it aside despite the decision of the council on appeal. But in order to set aside an assessment on the authority of that case the record on its face must furnish clear and convincing evidence that under no conditions could the several parcels of land have been benefited in the proportion stated by the assessment. *Cutting v. Vaughn*, 182 Cal. 151, 187 P. 19. The entire record is before us, including the assessment and diagram. It is voluminous and has been examined with care. An inspection thereof shows that certain properties in the so-called business district of the city were assessed at sums less than and greatly disproportionate to the assessment of property in other sections of the city, and at first glance it would seem that this property had been unduly favored in the making of the assessment. But counsel for the respondents has stated, and it is not denied by the appellants, that the portion of the district alleged to be so favored is adjacent to that part of Fourth street between E and H streets which had theretofore been graded and paved. This fact also appears on the face of the record and furnishes some explanation why the property in that particular vicinity was not assessed at a greater amount. No actual fraud is alleged, and it must be assumed that the city council exercised an honest discretion in determining

the appeals. It will not be presumed that the evidence before the city council was not sufficient to support its conclusions. *Rockbridge Place Co. v. City Council*, 178 Cal. 58, 172 P. 1110. It is conceivable that the city council might have determined that the assessment as to the appellants' property and the assessment on said portion of the business district were not disproportionate as to benefits received for the reason that the business property in question had theretofore been assessed to pay the cost of the grading and paving on Fourth street between E and H streets. It must be conceded that reasonable minds might differ as to the extent of benefits received by the particular business property referred to, and that a much higher assessment on this property could have been made; but from an examination of the entire record and the circumstances as disclosed by the respondents, it cannot be said that there was no reasonable ground upon which the council might conclude that the assessments which were actually made were not unjust nor discriminatory.

[8] It is contended that the inclusion in the assessment of the item of \$3,033.23 as the compensation of Endicott & Larson was an improper item and not chargeable to the assessment district, in that it would in effect constitute an increase in the salary of the superintendent of streets in violation of section 9 of article 11 of the Constitution. The amount referred to was the contract price at which Endicott & Larson performed their work and was included in the assessment as an incidental expense. The third paragraph of section 79 of the act defines "incidental expenses." Many items are included, among which is found "the expenses of making the assessment for any work authorized by this act." The statute contemplates that costs and expenses will accrue in addition to the contract price and makes provision for payment thereof. By the terms of section 42 of the act the superintendent of streets is authorized to employ inspectors to take charge and superintend the construction of the work and to report to him any departure from the requirements of the contract. Payment for such inspection and superintendence is provided for and included in the cost of the work as an incidental expense. Under the Improvement Act all work must be done under the direction and to the satisfaction of the superintendent of streets. It is his official duty to see that the work is so done and performed. Obviously it would be impossible in many instances for him to do so personally. In contemplation of that fact the statute provides for his assistance by the appointment of inspectors. It may not be said that payment for these services under such circumstances would operate in such manner as to increase the salary of the su-

perintendent of streets in violation of section 9 of article 11 of the Constitution. Such a holding would in some instances render the act inoperative and defeat its purposes. The same reason would seem to apply to the employment of assistance in the preparation of the assessment roll. Section 18 of the act authorizes the superintendent of streets to enter into all written contracts provided for in the act and to do all other things that expressly or impliedly pertain to the street department under the act. Because of the magnitude of the task in preparing the assessment roll here involved, the need of assistance is apparent, and the employment of persons for that purpose would reasonably be necessary to accomplish the purposes of the act.

The appellants rely on the case of *Forward v. County of San Diego*, 189 Cal. 704, 209 P. 993, in support of the contention that the allowance of compensation to Endicott & Larson would be an increase in the compensation of the superintendent of streets in contravention of section 9 of article 11 of the Constitution. It was there held that section 4041b of the Political Code, enacted in 1919, and providing that a county board of supervisors in its discretion should have the power to appoint an advisory board to cooperate with the county assessor in making the annual assessment of real property and providing for the compensation of the members of the board from the county treasury was unconstitutional, in that the effect of the section would be to increase the compensation of the county assessor during his term of office. In that case emphasis was placed on the provisions of section 4290 of the Political Code, which provides that the salaries and fees fixed in the title of that Code of which section 4290 is a part shall be in full compensation for all services of any kind or description rendered by the officers named in said title either by the officers themselves or by their deputies or assistants. The title referred to is title 2 of part 4 of the Political Code and contains provision for compensation of county officers. Those provisions do not refer to nor are they applicable to city officers of whom the respondent superintendent of streets is one. One of the purposes of section 9 of article 11 was to prevent the possibility of an officer using the power and influence of his official position to obtain an increase of compensation after his election or during his term of office. *Harrison v. Colgan*, 148 Cal. 69, 82 P. 674. It may also be said that this section was designed to prevent unwarranted demands upon the public treasury resulting from a possible concert of action between public officers or expectant candidates for public office. But in a street proceeding such as the one with which we are here concerned the public funds are in no

wise involved. The city acts merely as the agent of the property owners of the district and the city treasury is not required by the statute to bear any portion of the cost of the work. When a statute has imposed a special burden upon the superintendent of streets which is impossible of performance by him without assistance, it seems clear that it was contemplated that such assistance be available to him, especially when the cost thereof is not a charge upon the public funds. To hold that section 9 of article 11 would prohibit the employment of such assistance would not further the purpose of that section but would thwart the objects and purposes of the Improvement Act.

[9] On behalf of the appellant Northwestern Pacific Railroad Company, it is contended that it is a common carrier with a total track mileage of 640 miles; that it passes through the city of Eureka within the assessment district and has approximately four miles of main-line track lots, connected with depot grounds, freight and round houses, side tracks, etc., in the city, all used as a part of the general system. It is urged that there is no rational basis for an assessment upon the property within the district to the extent of \$13,418.29, which was the amount of its assessment. It is declared in subdivision 11 of section 20 of the Improvement Act that—

"The terms, lot, lots, lands, piece or parcel of land wherever mentioned in this act shall be deemed to include and shall include property owned or controlled by any person, firm or corporation as a railroad, street or interurban railroad right of way, and whenever a railroad, street or interurban railroad right of way shall front on or about or parallel or be included within or divide * * * any district to be assessed for the cost of any improvement provided in this act, such railroad right of way (whether the same is owned in fee or as an easement) shall be included in the warrant, assessment and diagram and shall be assessed in the manner and with the same effect as other lots, lands or pieces or parcels of land are assessed as provided in this act."

The appellants rely upon the case of *Kansas City Southern Ry. Co. v. Road Improvement Dist.*, 256 U. S. 658, 41 S. Ct. 604, 65 L. Ed. 1151, involving an assessment of railroad property in a road improvement district. It was held in that case that the particular assessment under attack was invalid for the reason that the amount thereof was arrived at "apparently according to some vague speculation as to present worth and possible future increased receipts from freight and passengers which would enhance its value, considered as a component part of the system," and not according to area and position as other property in the district was assessed. It was further said that—

"Railroad property may not be burdened with local improvements on a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality."

But in the case at bar it does not appear that any different method was employed in arriving at the assessment of the railroad property from that adopted in assessing other lands in the district. The right of the Legislature to provide for the assessment of railroad property has been recognized (see *McNeil v. South Pasadena*, 166 Cal. 153, 135 P. 32, 48 L. R. A. [N. S.] 138), and such assessments have been upheld in other jurisdictions (*Louisville & N. R. R. Co. v. Barber Asphalt Pav. Co.*, 197 U. S. 430, 25 S. Ct. 466, 49 L. Ed. 819; *Grand Rapids v. Railway System*, 214 Mich. 1, 182 N. W. 424; *Northern Pac. R. Co. v. Seattle*, 46 Wash. 674, 91 P. 244, 12 L. R. A. [N. S.] 121, 123 Am. St. Rep. 955; *Des Moines City Ry. Co. v. City*, 183 Iowa, 1261, 159 N. W. 450, 165 N. W. 398, L. R. A. 1918D, 839; *Heman Constr. Co. v. Wabash R. R.*, 206 Mo. 172, 104 S. W. 67, 12 L. R. A. [N. S.] 112, 121 Am. St. Rep. 649, 12 Ann. Cas. 630; *Superior v. Lake Superior T. & T. R. Co.*, 152 Wis. 389, 140 N. W. 26; *Georgia Ry. & E. Co. v. Atlanta*, 144 Ga. 722, 87 S. E. 1058; *Chicago, M. & St. Paul R. Co. v. Milwaukee*, 148 Wis. 39, 133 N. W. 1120). Full authority exists for the assessment of this railroad property and the objection to the assessments here complained of are not well taken.

[10, 11] Some of the appellants own or have an interest in certain lands in Clark's South Park addition, included within the assessment district, and which, prior to said Improvement proceeding and at all of the times involved therein, were registered under the Torrens Land Title Law (Stats. 1915, p. 1932). It is their contention that said assessment has never become effective and is void as to those lands because of the failure of the clerk of the council to file in the office of the registrar a notice of the passage of the resolution ordering the work within five days after the passage thereof. This contention is based on sections 94 and 95 of the Land Title Law. Section 94 provides:

"When in a city, town, or county, an ordinance, resolution, or order is passed or made, to lay out, establish, alter, widen, grade, regrade, relocate, or construct or repair a street, sidewalk, drain, or sewer, or to make any other public improvement, or to do any work, the whole or a portion of the expense for which assessments may be made upon real estate, if any registered land or any land included in an application for registration then pending is affected by the act or proceeding and liable to such assessment, the clerk of the board passing such ordinance, resolution, or order must, within five days after the passage of such ordinance, resolution, or order, file in the registrar's office a

notice of the passage thereof, and a memorial must thereupon be noted on the register. In case of the repeal of such ordinance, resolution, or order, the clerk of said board, and in case of the satisfaction of any lien thereunder, the superintendent of streets or other officer required by law to collect and receive such assessments, must within five days thereafter, notify the registrar, in writing, who shall thereupon cancel such memorial."

The complaints allege that "no copy of said resolution of intention No. 113 was filed in the recorder's office" within five days after its passage as required by sections 94 and 95 of said act. It is not alleged that such a notice was not filed within five days after the passage of the resolution ordering the work. The appellants who are attacking the assessment on this ground evidently at first construed section 94 to require the filing of the notice within five days after the passage of the resolution of intention. But it is obvious from the wording of the section that the resolution ordering the work is the resolution referred to. While the issue tendered by these appellants on the question of the effect of want of notice of the passage of the resolution ordering the work is apparently insufficient, the respondents allege that in May, 1921, and prior to the making, issuing, or recording the assessment, warrant, and diagram, the clerk duly filed in the office of the registrar "a notice of the passage of the resolution or order to make the public improvement described in plaintiffs' complaint," and that said registrar did thereupon make the notation on the certificate of each of the several lots involved. The court found:

"That neither within five days after the passage by said city council of said resolution of intention No. 113, nor within five days after the passage of said resolution No. 1075 ordering said street work, did the clerk of said city council of the city of Eureka file in the said registrar's office a notice of the passage of said resolutions or either of them. That on the 7th day of May, 1921, and prior to the making, filing, and recording of the assessment, warrant, and diagram in said proceeding, and prior to the accrual of the lien of the assessments herein, the said clerk of said city council did file within the office of said registrar a notice of the passage of said resolutions and each of them. That on the 7th day of May, 1921, the said registrar noted on each of the registers of all the said properties in Clark's South Park addition to the city of Eureka a memorial of said notice."

Because of the allegations in the answers of the respondents and the finding of the court, the issue will be deemed sufficiently raised for the purpose of determining the point.

[12] It is the contention of these appellants that the filing of the notice by the clerk in the office of the registrar is jurisdictional and mandatory, especially in view of the

language of section 95 of the act, which reads as follows:

"No statutory or other lien shall be deemed to affect the title to registered land until after a memorial thereof is entered upon the register, as herein provided."

It is to be noted that section 95 does not refer to the memorial of the passage of any ordinance, resolution, or order referred to in section 94, but only to the memorial of a *statutory or other lien* which shall not be deemed to affect the title to registered land until after a *memorial thereof* is entered *as herein provided*. The words last italicized cannot be said to refer to the memorial of the passage of the resolution either of intention or of ordering the work, for such a memorial would not refer to a statutory or other lien. No assessment lien has attached under the Improvement Act prior to the expiration of the five-day period and may never attach for numerous reasons arising during the course of the proceeding and prior to the recording of the assessment, warrant, and diagram in the office of the superintendent of streets. Until such recording takes place the lien does not attach under section 23 of the Improvement Act. Likewise, the words "as herein provided" do not refer to the entry of a memorial of a statutory or other lien provided for in said section 95 itself, for none is there provided for, but must refer only to the entry of a memorial of a statutory or other lien as elsewhere provided in the Land Title Act. A reference to other sections of the act shows what liens might be referred to. Section 59 provides for the registration of mortgages, leases, contracts to sell, and other instruments intended to create a lien. Section 91 provides how judgments, decrees, and other orders of court may become a lien. Section 92 provides how writs of attachment may become liens. Section 93 provides how mechanics' liens may become effective as to registered land. A careful reading of the act discloses that section 95 applies only to the memorial of statutory or other liens elsewhere mentioned in the act and does not apply to the memorial of the passage of the resolution in question which could not create a lien on property, either registered under the Land Title Law or not so registered.

[13, 14] Since section 95 has no reference to anything contained in section 94, what, then, was the effect of the failure of the clerk of the respondent city council to file in the office of the registrar a notice of the passage of the resolution ordering the work within five days after its passage? It cannot be assumed that in the enactment of the Land Title Law it was intended that the provisions of section 94 thereof should repeal or abrogate or affect in any way the declaration of section 7 of the Improvement Act to the effect that when certain steps had

been taken, and which admittedly were all taken in the present proceeding, the council should be deemed to have acquired jurisdiction to order the work. In fact, all of the constitutional requirements necessary to vest in the council jurisdiction to order the work have taken place before the adoption of the resolution ordering the work. The filing of the notice is therefore not jurisdictional. If the purpose of the filing was to apprise the owner of registered land that an assessment was about to become a charge upon his property, that purpose would be accomplished if the notice be filed before the recording of the assessment in the office of the superintendent of streets. The omission of the clerk here complained of was not an entire failure to file the notice, but a failure to file the same within the five-day period. There is no declaration in the section that its language is mandatory. The use of the word "must" is not necessarily determinative of its mandatory import. The words "shall" and "must" are frequently construed as directory terms. *Cake v. City of Los Angeles*, 164 Cal. 705, 130 P. 723; *People ex rel. Thompson v. San Bernardino High School Dist.*, 62 Cal. App. 67, 216 P. 959. There are in the section no negative words forbidding the filing of the notice after the time fixed. Nor is there language importing an intention to withdraw power to enforce the assessment following a belated notice. Nor is any right of the property owner shown to be lost or impaired by the failure to file the notice in time. Under such circumstances, it is proper to construe the time requirement to be directory. *Cake v. City of Los Angeles*, supra. This conclusion is fortified by a consideration of other provisions of the Land Title Law. It is provided in section 34 that—

"The registered owner of any estate or interest in land brought under this act shall * * * hold the same subject only to such estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the registrar's office, and free from all others, except: * * * (4) Any tax or special assessment for which a sale of the land has not been had at the date of the certificate of title."

None of the lands of the appellants has been sold to satisfy the assessment. The exception would indicate that even though a "tax or special assessment" which had not proceeded to sale be not noted on the last certificate of title in the registrar's office, the registered owner would hold the land subject to such tax or special assessment. But section 94 should be given the effect to which it is entitled when read in connection with the rest of the act. When this is done, its provisions are found to be directory only. It is concluded that the filing of the notice of the passage of the resolution ordering the work at the time and

in the manner found by the trial court, that is to say, before the recording of the assessment, was a sufficient compliance with the requirements of that section.

[15] The appellants assign numerous specifications of error of the trial court relating to the admissibility and exclusion of evidence. It is urged that the court erred in overruling the objections of appellants to the admission of the assessment in evidence. It was proper to receive the assessment roll in evidence in order that the court might determine whether the assessments were so arbitrary and discriminatory on the face thereof as to amount to a constructive fraud on the appellants. It was admissible even on the appellants' theory of the case.

[16, 17] Evidence was tendered by the appellants as to the assessed value of certain of their properties and properties in the business district claimed to have been favored, for the declared purpose of proving inequality and discrimination in the assessments. In so far as such evidence might have a bearing on the question of benefits, the determination of the council was conclusive. *Duncan v. Ramish*, 142 Cal. 686, 76 P. 661; *Cutting v. Vaughn*, supra. In so far as it related to the charge of constructive fraud, the conditions shown by the record or coming within judicial knowledge must furnish the basis of interference by the courts. *Spring Street Co. v. City of Los Angeles*, supra; *Larsen v. San Francisco*, 182 Cal. 1, 186 P. 757; *Swall v. County of Los Angeles*, 42 Cal. App. 758, 184 P. 406. There was no error in sustaining the objections to the proffered evidence.

The other alleged errors have been noted. It is deemed unnecessary to discuss them in detail. No serious objection appears to any of the rulings of the trial court.

The judgment is affirmed.

We concur: MYERS, C. J.; RICHARDS, J.; WASTE, J.; LAWLOR, J.; LENNON, J.; SEAWELL, J.

195 Cal. 445

PEOPLE v. McCLENNEGEN et al.
(Cr. 2718.)

(Supreme Court of California. Feb. 24, 1925.
Rehearing Denied March 26, 1925.)

1. Criminal law §1141(1)—All intendments are in favor of trial court, and error is not presumed.

On appeal all intendments are in favor of regularity of trial court, and error will not be presumed.

2. Criminal law §1159(2)—Verdict supported by any substantial evidence cannot be disturbed.

Verdict supported by any substantial evidence cannot be disturbed.

3. Criminal law §742(1)—Under statute credibility of witnesses and effect and value of testimony solely for jury.

Under Code Civ. Proc. § 2061, it is solely within province of jury to judge credibility of witnesses and effect and value of evidence.

4. Criminal law §552(1)—Evidence justifying verdict of conviction may be direct or indirect.

Evidence sufficient to justify verdict of conviction in criminal action may be direct or indirect.

5. Indictment and information §125(4)—All of facts enumerated by statute which separately or collectively constitute offense may be charged.

When statute enumerates series of acts which separately or together constitute offense, all of such acts may be charged in single count of indictment.

6. Insurrection and sedition §2—Proof of membership in I. W. W., its purposes, and of means of accomplishment held sufficient to support conviction for criminal syndicalism without proof of specific acts.

In prosecution under Criminal Syndicalism Act, § 2, subd. 4, proof that defendants were and remained members of I. W. W., and proof of aims and purposes of that organization and methods for accomplishment denounced by statute, held sufficient to sustain conviction without proof of specific acts.

7. Insurrection and sedition §2—Indictment for criminal syndicalism and for conspiracy to commit criminal syndicalism held sufficient.

Indictment for criminal syndicalism, under St. 1919, p. 281, which in one count followed language of section 2, subd. 4, and in second count charged conspiracy to commit criminal syndicalism, under Pen. Code, § 954, held sufficient.

8. Insurrection and sedition §2—Charge of membership in organization having purpose to promote criminal syndicalism amounts to charge of conspiracy which is sustained by proof of denounced acts by defendants in concert.

Charge of membership in organization, society, group, or such assembly to advocate, teach, or aid and abet criminal syndicalism, is in effect charge of conspiracy to advocate, teach, or aid and abet criminal syndicalism, and proof that defendants acting in concert committed any of acts denounced by Criminal Syndicalism Act would be sufficient to sustain a charge of conspiracy in such respect.

9. Insurrection and sedition §2—Evidence held to sustain conviction for conspiracy to promote criminal syndicalism.

Evidence held sufficient to sustain conviction, under Pen. Code, § 954, and Criminal Syndicalism Act, for conspiracy to accomplish change in industrial ownership and control, and in social and political systems, by means denounced.

10. Insurrection and sedition ⚡2—Proof of acts prior to adoption of Criminal Syndicalism Act held admissible.

In prosecution of members of I. W. W. for criminal syndicalism and for conspiracy to accomplish industrial and political changes by denounced methods, evidence of alleged acts prior to adoption of Criminal Syndicalism Act as tending to establish character of organization of which defendants were members held admissible.

11. Insurrection and sedition ⚡2—Statements made by officer of I. W. W. held admissible on issue whether change had been made in organization after enactment of Criminal Syndicalism Act.

In prosecution for criminal syndicalism and for conspiracy to further it, where defendants, members of I. W. W., alleged that change had been made in organization after enactment of Criminal Syndicalism Act, proof of statements made by secretary-treasurer of that organization condemning resolution adopted by particular branch of organization held admissible on question of whether or not change had been made.

12. Insurrection and sedition ⚡2—Purposes and anticipations of I. W. W. held proper matters for jury's consideration, in prosecution for criminal syndicalism.

In prosecution for criminal syndicalism and for conspiracy to promote it, the purposes sought to be accomplished by I. W. W. organization of which defendants were members, and that such organization anticipated collisions with the law, created defense fund, and provided that executive head should not forfeit his office by reason of being in jail, held proper matters for jury's consideration.

13. Criminal law ⚡21—It is within legislative power to provide that knowledge of criminal character of act shall or shall not be necessary element of offense.

It is within legislative power to declare that knowledge of criminal character of act shall or shall not be necessary element of offense.

14. Criminal law ⚡21—Intentional commission of forbidden act may constitute offense without specific intent to violate law.

Under Pen. Code, § 7, subds. 1, 5, it is not necessary to guilt of offense that person shall have specific intent to violate law but sufficient if he intentionally commits forbidden act and mistake of fact or want of intent is not in every case a defense.

15. Insurrection and sedition ⚡2—Proof of joining of organization denounced by criminal syndicalism act will sustain conviction without proof of knowledge of purposes of organization.

Under Criminal Syndicalism Act, § 2, subd. 4, proof of act of joining an organization such as statute denounces is sufficient to sustain conviction without proof of knowledge of purposes of such organization.

16. Constitutional law ⚡208(1)—Insurrection and sedition ⚡2—Criminal Syndicalism Act not unconstitutional as false and arbitrary classification.

Criminal Syndicalism Act is not unconstitutional as a false and arbitrary classification, being applicable to "whoever" shall do things prohibited.

17. Criminal law ⚡1169(2)—Admission in evidence of particular acts of violence in prosecution for criminal syndicalism, if error, held harmless.

In prosecution for criminal syndicalism, admission of evidence as to defendants' use of dynamite in particular instance, if error, held harmless, in view of abundant evidence of other acts of violence, including use of dynamite.

18. Insurrection and sedition ⚡2—Conviction for criminal syndicalism of one defendant not shown to have been connected with offenses charged to his codefendants held such as should have been reversed.

Where one of many defendants convicted of criminal syndicalism in joint prosecution was shown to have been arrested several days after indictment was found, and was not shown to have been within the state on day offense was alleged to have been committed, or to have been connected with alleged conspiracy, held judgment as to him should be reversed.

In Bank.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

F. E. McClennegen, J. C. Robinson, and others were convicted of criminal syndicalism, and they appeal. Affirmed, except as to J. C. Robinson, and as to him, reversed.

R. W. Henderson, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

SEAWELL, J. The defendants, twenty-seven in number, were jointly accused by an indictment presented against them by the grand jury of the county of Los Angeles of the crime of violating the Criminal Syndicalism Act of this state. Stats. 1919, p. 281. The indictment contains two separate counts, the first of which is framed under section 2, subd. 4, of said act, and the second count charges a conspiracy, plan, and agreement to accomplish a change in industrial ownership and control in the existing economic and social system, and also to effect political changes in this state and in the United States of America by means and methods denounced by said act. Defendants were tried jointly, and separate verdicts of guilty were returned against each of them under both counts of the indictment. Judgments were pronounced against sixteen of said defendants on both counts (sentences to run concurrently), and against the remaining eleven on said second count only. The appeal is taken jointly from the judgments of

conviction and the orders denying motions for new trials.

Defendants declined the aid of counsel at the trial, and elected to defend themselves. Each defendant took part in the conduct of his trial. Three or four of their number acted as general spokesmen for all, and, while none professed special training in the law or any knowledge of court procedure, they certainly displayed a degree of skill in the management of the trial, and a familiarity with the law of the case and with the general rules of evidence far exceeding that which the average layman might be expected to possess. The defendants requested and were supplied with a daily transcript of the proceedings and the motions subsequently made by them to strike out certain parts of the evidence which had been improperly admitted, and the pertinency of the instructions which they presented for the guidance of the jury in its deliberations clearly indicated that they had had the advantage of legal assistance from some source. Besides, the court accorded to them the fullest protection of the law, and assisted them upon many occasions in developing and presenting their several defenses. No complaint is made of unfairness on the part of the court in any respect or lack of opportunity to present the several defenses in the fullest possible manner.

[1, 2] One of the grounds of appeal involves the question of the insufficiency of the evidence to support the judgments of conviction. In considering this issue it must be borne in mind that we are a court of appeal, and, as such, we cannot usurp the functions of the triers of fact. It is a rule well settled by many of the decisions of this court that upon an appeal all intendments are in favor of the regularity of the action of the court below, and that error will not be presumed, but must affirmatively appear. If there is any substantial evidence in the case by which the verdict of the jury can be supported, it does not lie in our power to disturb the jury's findings on the ground of a failure of evidence to support the judgment. The rule is aptly stated in *People v. Tom Woo*, 181 Cal. 315, 326, 184 P. 389, 393, as follows:

"In passing upon this question [sufficiency of the evidence to sustain the verdict] we will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and, before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground we are discussing, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below."

[3, 4] So in this case the jury reached a verdict upon the evidence presented. It was the province of the jury alone, subject to the control of the court and in subordination to the rules of evidence to judge of the credibility of the witnesses and the effect and value of the evidence addressed to them. Code Civ. Proc., § 2061. Evidence may be indirect as well as direct, and as such it may be sufficiently convincing to justify a verdict of conviction in a criminal action. In considering this appeal we are required to keep before us the jury's conclusion, and if it be supported by substantial evidence we are bound by it, and we are not to engage in surmises as to what the conclusions of others may have been had the issue been submitted to them.

The Criminal Syndicalism Act of this state provides as follows:

"Section 1. The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching, or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.

"Sec. 2. Any person who:

"1. By spoken or written words or personal conduct advocates, teaches or aids and abets criminal syndicalism or the duty, necessity or propriety of committing crime, sabotage, violence or any unlawful method of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change; or

"2. Willfully and deliberately by spoken or written words justifies or attempts to justify criminal syndicalism or the commission or attempt to commit crime, sabotage, violence or unlawful methods of terrorism with intent to approve, advocate or further the doctrine of criminal syndicalism; or

"3. Prints, publishes, edits, issues or circulates or publicly displays any book, paper, pamphlet, document, poster or written or printed matter in any other form, containing or carrying written or printed advocacy, teaching, or aid and abetment of, or advising, criminal syndicalism; or

"4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism; or

"5. Willfully by personal act or conduct, practices or commits any act advised, advocated, taught or aided and abetted by the doctrine or precept of criminal syndicalism, with intent to accomplish a change in industrial ownership or control, or effecting any political change;

"Is guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than fourteen years."

The charging part of the first count of the indictment is substantially in the language of said section 2, subd. 4, of the act. The

allegation is that the defendants, on or about April 18, 1923, in the county of Los Angeles, state of California, "did then and there, willfully, unlawfully, and feloniously organize and assist in organizing and knowingly became and were members of an organization, society, group, and assemblage of persons known and designated as the Industrial Workers of the World, which Industrial Workers of the World * * * were then and there organized for the purpose of defending, advocating, teaching, and abetting criminal syndicalism, sabotage, violence, and unlawful methods of terrorism, as a means of accomplishing a change in industrial ownership and control and effecting political changes, all of which is contrary to the form, force and effect of the statutes in such cases made and provided," etc.

[5] It is the well-settled rule of law, as restated in *People v. Gusti*, 113 Cal. 177, 45 P. 263, that:

"When a statute enunciates a series of acts, either of which separately or all together may constitute the offense, all of such acts may be charged in a single count, for the reason that notwithstanding each act may, by itself, constitute the offense, all of them together do no more, and likewise constitute but one and the same offense."

See *People v. Gossett*, 93 Cal. 641, 29 P. 246; *People v. Harrold*, 84 Cal. 567, 24 P. 106; *People v. Frank*, 28 Cal. 507; *People v. Shotwell*, 27 Cal. 394; *State v. Hennessy*, 114 Wash. 351, 195 P. 211; *State v. Laundry*, 103 Or. 443, 204 P. 958, 206 P. 290. Therefore, if the evidence in the record sufficiently supports the sole allegation that the defendants were and remained members of the Industrial Workers of the World, as the evidence abundantly shows, and further, if the evidence justifies the jury's conclusion that the organization had for its aims and purposes and employed the means and methods for the accomplishment of said aims and purposes denounced by the statute, it would then become immaterial whether any other act or acts comprising the series of acts set out in the indictment had or had not been proved.

[6] Proof of any one of said acts would be sufficient to sustain the convictions. The proof offered to show that the defendants were and had been for a great while prior to the time named in the indictment members of the Industrial Workers of the World was overwhelming. This renders it unnecessary to determine whether knowledge of the unlawful purposes of the organization on the part of the defendants at the time each one became a member of said organization was a necessary ingredient of the offense, or whether the offense was complete upon his becoming a member without such knowledge. There is no ground for the claim that the defendants in this case did not have knowledge of the purposes, aims, and objects of the organization of which they were mem-

bers. Each defendant was an officer under the seal of the organization, known as a delegate, and had been such officer for many months, and in some instances for a period of several years prior to the day named in the indictment. As such officer each was authorized to collect dues, initiate new members, solicit memberships, raise moneys for the defense fund and other funds by the sale of stamps, distribute literature of various kinds issued by the organization, and to expound by speech and other methods the purposes sought to be accomplished by the organization, and to carry forward its doctrines to universal conquest. Said delegates were in frequent communication with the head officers at Chicago, and with the secretaries of "branch unions" in various cities in this state and elsewhere, working for the accomplishment of a definite purpose. Close bonds of fellowship united all active members in a common cause. In view of the facts as disclosed by the evidence in this case, the jury would be justified by every rational rule of human experience in concluding that the defendants had knowledge of the purposes of the organization of which they had been active advocates and defenders for long periods of time. We do not understand that full knowledge of the aims and purposes of the organization and its fundamental principles was denied by any one of the defendants. It was admitted by the defendants at the trial that the organization and the members thereof advocated and endeavored to bring about a change in the industrial ownership and control of the production, consumption, distribution, and exchange of wealth, and also to effect a political change, but it was denied that either the organization or the defendants as members advocated any of the means of accomplishing the changes that are denounced by the Criminal Syndicalism Act. The purpose of the organization being admitted, the remaining question left for determination on this particular branch of the case is whether the evidence was sufficient to sustain the issue that the means and methods advocated to bring about the designed changes were unlawful within the meaning of said act. We will consider this subject at a later period of the discussion.

The material portions of the second count of the indictment under which all of the defendants were convicted, and to which objection is made, omitting the specific means and methods employed, are as follows:

"And for a further and separate cause of action against the said defendants * * * and being a different statement of the same offense as that charged in count I of this indictment, the said defendants are accused by the grand jury of the county of Los Angeles, state of California, by this indictment of a felony, to wit, criminal syndicalism committed at and in the county of Los Angeles, state of California, on or about the 18th day of April, 1923, * * *

as follows, to wit: That the said defendants and each of them, * * * and the members of said Industrial Workers of the World, otherwise known as the I. W. W., and sometimes known as the Marine Transport Workers Industrial Union of the I. W. W., by joining and becoming members of said organization, agreed to enter and did enter into a conspiracy, scheme, plan, and agreement to bring about a change of industrial ownership and control, and effecting political changes in the county of Los Angeles, state of California, and the United States of America, and, as a part of said conspiracy, scheme, plan, to use force and violence and unlawful methods of terrorism, sabotage, strikes, and boycotts to bring about such changes, and as a part of such plan, scheme, and agreement to teach, advocate, aid and abet, commit and attempt to commit criminal syndicalism, sabotage, violence, unlawful methods of terrorism, strikes, and boycotts, as a means of accomplishing a change in industrial ownership and control and effecting political changes, by personal act and conduct of said organization, its members and the defendants herein did print, publish, edit, issue, distribute, and circulate and publicly display books, papers, pamphlets, documents, posters and other written and printed matter, to wit:" * * * (A list follows, enumerating books, booklets, pamphlets, documents, posters, and other written and printed matter which were issued, circulated, distributed and displayed by the organization and the defendants.)

[7] A number of excerpts taken from said books, papers, pamphlets, etc., which, it is claimed, taught, advocated, and defended criminal syndicalism, and which aided, advised, and abetted its commission, are set out at large. Both counts of the indictment are attacked as not being legally sufficient. The indictment follows the language of the act, and is sufficient. *People v. Steelik*, 187 Cal. 361, 203 P. 78; *McDermott*, In re, 180 Cal. 783, 183 P. 437; *People v. Malley*, 49 Cal. App. 597, 194 P. 48; *State v. Laundry*, 103 Or. 443, 204 P. 958, 966, 206 P. 290. The first count of the indictment is broader in terms than the language of subdivision 4, § 2, and alleges that the defendants did then and there, *willfully, unlawfully, and feloniously* organize and assist in organizing and *knowingly* became and were members of an organization," etc. The italicized words, excepting the word "knowingly," which is taken out of the order in which it appears in the act and so placed as to qualify "became" as well as "were," are words supplied by the pleader, and the meaning of the reconstructed clause is equivalent to an allegation that the defendants "knowingly became and knowingly were" members of said organization. There can be no doubt but that the first count is sufficient. The second count charges the defendants with the offense of conspiracy. Doubtless the authority upon which the prosecution relied to support that count is section 954 of the Penal Code, which provides that:

"The indictment or information may charge two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated. * * *"

It is the claim of the learned counsel for appellants that the evidence failed to establish the crime of conspiracy. Section 182, Penal Code, provides that if two or more persons conspire to commit any crime they are guilty of a criminal conspiracy. Section 184, Penal Code, provides that:

"No agreement amounts to a conspiracy, unless some act, besides such agreement, be done within this state to effect the object thereof, by one or more of the parties to such agreement and the trial of cases of conspiracy may be had in any county in which any such act be done."

Much of the evidence introduced in the instant case is in character and substance practically the same as the evidence considered in *People v. Steelik*, 187 Cal. 361, 203 P. 78; *People v. Taylor*, 187 Cal. 378, 203 P. 85; *People v. Wright et al.* (Cal. App.) 226 P. 952; *People v. La Rue*, 62 Cal. App. 276, 216 P. 627; *People v. Wagner et al.* (Cal. App.) 225 P. 464; *People v. Roe*, 58 Cal. App. 690, 209 P. 381; *People v. Malley*, 49 Cal. App. 597, 194 P. 48. Three former members of the organization testified as to the means and methods employed by the organization to bring about a change in the industrial ownership and control, and effecting political changes, to wit, Coutts, Dymond, and Townsend. They were also witnesses in several of the cases above cited, if not in all of them. While it is true that no criminal conspiracy based upon a violation of the act was directly charged in a separate count, or at all, in any of said cases, so far as said decisions disclose, it is nevertheless said in the *Steelik* Case that the defendant was, under the provisions of section 2, subd. 4, guilty of a conspiracy to commit criminal syndicalism. It is there said:

"* * * There was thus evidence before the jury that the defendant had violated section 2, subd. 4, of the statute, that is, he knowingly belonged to a conspiracy to commit crimes, in furtherance of industrial and political control. * * *"

[8] To charge a person with being a member of an organization, society, group, or assemblage of persons organized or assembled to advocate, teach, or aid and abet criminal syndicalism is, in effect, to charge them with conspiring to advocate, teach, or aid and abet criminal syndicalism. *People v. Flanagan* (Cal. App.) 223 P. 1014; *People v. La Rue*, supra; *People v. Steelik*, supra. If, therefore, there is any substantial evidence to

show that the defendants acting in concert committed the acts denounced by the statute, the conspiracy charge would be established by a sufficiency of evidence.

It is claimed by appellants that practically all of the written and printed matter, literature, and propaganda printed, published, and circulated by the organization and its members prior to the adoption of the syndicalism act was destroyed upon the passage of said act, and nothing resembling it in character has since been printed or circulated. It is further claimed that the means and methods formerly advocated or practiced by the organization and its members for the accomplishment of its purposes, if such were in fact criminal, have been discontinued since said act was adopted. In other words, it is insisted by the defendants that there has been a complete change in the means and methods advocated and practiced by said organization in its effort and purpose to bring about said changes, and, if unlawful acts or methods were at any time advocated or resorted to prior to the year 1919, no act of a criminal character has since been countenanced, encouraged, advocated, or practiced by the organization or by any of the defendants as members of said organization or otherwise. This was an issue of fact for the jury's consideration.

[9] The transcript of testimony together with the clerk's transcript consists of more than 3,000 typewritten pages. Notwithstanding the massiveness of the record, we have examined it with care. A résumé of the many exhibits alone would fill a large portion of our printed reports. The defendants had upon their person or under their control at the time they were arrested in addition to their credentials, etc., the preamble and the constitution of the organization, and other printed matter in various forms advocating criminal syndicalism and promoting its doctrines, which they were using as propaganda at San Pedro in keeping alive a prolonged and tumultuous strike that was there being conducted by the Marine Transport Workers' Union, a branch of the Industrial Workers of the World, in 1922-1923. The indictment sets out in full the preamble of the organization and a number of excerpts taken from pamphlets, leaflets, papers, and other publications which were being distributed by the defendants.

The preamble contains the following declaration of the organization's purposes:

"The working class and the employing class have nothing in common. There can be no peace as long as hunger and want are found among millions of working people and the few who make up the employing class have all the good things of life.

"Between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production and abolish the wage system.

"We find that the centering of the management of the industries into fewer and fewer hands makes the trade unions unable to cope with the ever-growing power of the employing class. The trade unions foster a state of affairs which allows one set of workers to be pitted against another set of workers in the same industry, thereby helping to defeat one another in wage wars. Moreover, the trade unions aid the employing class to mislead the workers into the belief that the working class has interests in common with their employers.

"These conditions can be changed and the interests of the working class upheld by an organization formed in such a way that all its members in any one industry or in all industries, if necessary, cease work whenever a strike or lockout is on in any department thereof, thus making an injury to one an injury to all.

"Instead of the conservative motto, 'a fair day's wage for a fair day's work,' we must inscribe on our banner the revolutionary watchword, 'Abolition of the wage system.'

"It is the historic mission of the working class to do away with capitalism. The army of production must be organized not only for the every-day struggle with capitalists, but also to carry on production when capitalism shall have been overthrown.

"By organizing industrially we are forming the structure of the new society within the shell of the old."

In making reference to a few of said articles, excerpts, publications, etc., whether the same were incorporated in the indictment or received as evidence in the case, we will refer only to so much of the publications, etc., or such parts of the same as will tend to fairly support the judgments. This is the rule on appeal. In so doing, we do not hold that all of the literature edited, issued, or circulated by the order comes within the ban of the act. Some of it is within the legitimate exercise of the right of liberty of speech and liberty of the press.

The indictment sets out a pamphlet called "The Revolutionary I. W. W.," from which we take the following passages:

"We are not satisfied with a fair day's wages for a fair day's work. Such a thing is impossible. Labor produces all wealth. Labor is therefore entitled to all wealth. We are going to do away with capitalism by taking possession of the land and the machinery of production. We don't intend to buy them either. The capitalist class took them because it had the power to control the muscle and brain of the working class in industry. Organized, we, the working class, will have the power. With that power we will take back what has been stolen from us. We will demand more and more wages from our employers. We will demand and enforce shorter and shorter hours. As we gain these demands we are diminishing the profits of the boss. We are taking away his power. We are gaining that power for ourselves. * * * We fold our arms. The mills close. Industry is at a standstill. We then make our proposition to our former masters. It is this: We, the workers, have labored long enough to support idlers. From

now on, he who does not toil, neither shall he eat. We tear down to build up. The Industrial Workers of the World are laying the foundation of a new government.

"The Industrial Workers of the World is an international movement. We are 'patriotic' for our class, the working class. We realize that as workers *we have no country.* [Italics ours.] The flags and symbols which once meant great things to us have been seized by our employers. To-day they mean naught to us but oppression and tyranny. * * * The practice of some craft unions is to bar men because of nationality or race. Not so with the I. W. W. * * * In our organization the Caucasian, the Malay, the Mongolian, and the Negro are all on the same footing. All are workers and as such their interests are the same. An injury to them is an injury to us."

A pamphlet issued by the organization, entitled "The I. W. W., Its History, Structure and Methods," by Vincent St. John, revised in 1919, was taken from one of the defendants. It contained the following treatise:

"As a revolutionary organization the Industrial Workers of the World aims to use tactics that will get the results sought with the least expenditure of time and energy. The tactics used are determined by the power of the organization to make good in their use. No terms made with an employer are final. All peace so long as the wage system lasts is only a truce. At any favorable opportunity the struggle for more control is renewed.

"As the organization gains control in the industries, and the knowledge among the workers of their power, when properly applied within the industries, becomes more general, the long drawn out strike will be a relic of the past. * * *

"No part of the organization is allowed to enter into time contracts with the employer. Where strikes are used, it aims to paralyze all branches of the industry involved, when the employer can least afford a cessation of work during the busy season and when there are rush orders to be filled. * * *

"During strikes the works are closely picketed and every effort made to persuade workers from taking the place of the strikers. All supplies are shut off from strike-bound shops. All shipments are refused wherever possible. Strike breakers are also isolated. Illegal interference by the government is resented by *open violation of the government's orders, going to jail en masse*, causing expense to the taxpayers—which is but another name of the employing class. In short, the I. W. W. advocates the use of *militant tactics to the full extent of its power to make good.*" (Italics ours.)

The foregoing excerpts contained in the indictment are from publications issued and circulated since 1919.

[10] Great quantities of printed matter consisting of sticketerettes, posters, pamphlets, booklets, books, songs, and pronouncements advocating the teachings of the organization, and which had formerly been circulated by it, were received in evidence. These publications differ in degree as to the directness

of the means and methods advisable to be employed in a preconceived effort to supplant the existing form of government by a system of industrial communism. The system of sabotage, which was advocated and practiced in 1917, 1918, and in the early part of 1919, and the destruction of property in the farming, fruit-growing, and industrial areas of the state by fires produced by means of phosphorus compounds of slow combustion called "kitties," which were stealthily placed in inflammable materials and so timed as to give the user an opportunity to be several miles distant from the conflagration at the time the fires started; the nightly expeditions in which long sections of copper wires were cut from transmission poles and sold; threats of driving copper nails into fruit trees, unless Ford and Suhr, who were serving terms of imprisonment arising out of the Wheatland riots, were released; demands for the release of all "war prisoners"; warnings against the use of California canned fruits and vegetables by suggestions that much of the pack had been poisoned in its preparation and that it was dangerous to use it; plans and attempts to destroy railroad bridges and to blockade tunnels as a means of stopping transportation; the disabling of engines and machinery of all kinds by the use of emery dust—were again related by witnesses produced by the prosecution. Such evidence, although the alleged acts are placed prior to the adoption of the act, was received as tending to establish the character of the organization and was admissible under the authorities already cited.

As against the claim of appellants that the organization had abandoned the practices that had formerly obtained, the respondent offered evidence bearing upon the conduct of the defendants during the Marine Transport Workers' Industrial Union I. W. W. strike at San Pedro. Some of the literature that defendants were circulating is the same as that which has been put into circulation by the organization and its members for several years past. There is evidence in the record to the effect that words and phrases were used in a cryptic sense to disguise the real meaning which was intended thereby to be conveyed. "Striking on the job," which means, primarily, to do as little work in a day as possible and to do it as inefficiently as possible, is also another way of encouraging the practice of sabotage, which is forbidden by the statute. That phrase, according to some of the witnesses, was not so well understood as the word sabotage. The picture of a black cat and a wooden shoe appears upon much of the literature and, according to testimony in the case, symbolizes sabotage.

As bearing upon the question whether or not a change had in fact been made by the organization in the means and methods formerly employed, there was placed before the

jury a photographic copy of a letter written by the acting general secretary-treasurer under date of April 8, 1919, in reply to a resolution that was passed by the San Francisco branch of the general recruiting union. The justification for the adoption of the resolution was placed upon the ground of necessity "in view of the fact that laws covering 'criminal syndicalism,' aimed ostensibly at the Industrial Workers of the World, were being enacted in various states within the United States of America." The resolution denied that the organization at any time had advocated or practiced sabotage or violence, and expressly repudiated such imputation as being unjustly made, and apparently in good faith adopted the following paragraph:

"Be it also resolved, that if any literature containing any word, sentence or paragraph condoning or advocating violence, destruction of, or injury to life or property printed by the general organization or elsewhere, be in our possession for sale or distribution at any time in the future, we hereby order all such objectionable matter censored and taken out. * * *

The above paragraph is referred to in the reply as section 5. The disapproval of the general secretary-treasurer to this part of the resolution is in the following words:

"* * * In regard to the resolutions I am instructed by the general executive board to state that section 5 of the resolution should be struck out entirely, as no part of the organization can order any literature printed by the I. W. W. censored or stricken out or destroyed. That is a question for the whole organization to determine. No doubt there will be resolutions on this subject at the coming convention, but in the meantime if the intent of this resolution is to be placed on the wall of the halls in California as a camouflage by striking out the word sabotage wherever it occurs and cutting out paragraph 5 it would answer its purpose without placing a part of the organization in a position to do what the whole organization alone has a right to do. I am returning this resolution with those words marked out and 5 clause marked out which should be cut out. Trust the matter will be clear and you will understand the proposition or the need for the same."

[11] The observations made by the general secretary-treasurer were properly admitted as affecting the question of whether or not a change had been made in the means and methods of prosecuting the plans of the organization. The question of good faith was involved. The evidence was admissible and relevant to that issue.

The Industrial Worker, an official organ of the Industrial Workers of the World, recent copies of which were found in the possession of some of the defendants, in its issue of December 30, 1922, contained an article from which we quote in part:

"In Herrin, Illinois, the same game goes on. The coal miners of that little town were shot

down by the mine guards imported from Chicago, quite in the good old Ludlow way. This business of imported thugs, mercenaries of the local capitalists killing strikers at their own sweet will received a set back. You can never tell just how far these meek American laborers can be pushed back. Sometimes they yield so often, submit as in Pennsylvania and a hundred other places to having their rights, their lives, their liberties taken away with force and violence, you would say labor is for peace at any place. And then *again*, you think they have raised the price; there is a Centralia, or a Herrin. The Herrin trial drags on. The prosecution and defense both recognize there is a class war. * * * Labor, conservative and radical, stands back of the Herrin defendants. The time has gone by when the American working class is afraid of bloodshed. In the three years since Centralia, the opinion of the workers of America has turned from a hasty belief in the capitalist side of a labor war in the Herrin sense, to a prejudice in favor of the defendants. Capitalism itself is to blame for this tendency toward violence. * * * There is flying loose enough resentment, enough bitterness, enough wasted rebellion, sporadic, blind, passionate, emotional, to blast capitalism into a dust cloud. Let us hope that in the immediate next few years, the delegates of the I. W. W. will succeed in gathering all these loose rebels into one strong army of revolutionary industrial unionism, turning this blind beating of fists at Herrin and West Virginia into a powerful shoulder to shoulder heave of the submerged masses that will wreck the edifice of capitalism. General strike.

"We have enough power, the question is to harness it. We have enough hate, the problem is to direct it. We have enough courage, the next thing is to think a little. There are enough revolutionists, what we need is organization. * * *

"San Pedro still hankers after a free speech fight. Well, give it to her. * * * There are a lot of pickets in Los Angeles, and more should be on the way. The G. E. B. calls for every foot-loose Wob to sail down to Pedro and wade in. The struggle was won there once, and papers were being sold openly on the streets. Then the Southern California Edison Company found that the picket line was choking off their supply of scabs, and orders have gone out to the San Pedro police to make trouble with the I. W. W. Give them lots of trouble. Flood the town with I. W. W.'s."

Again, as late as March, 1923, the same newspaper printed the following editorial, entitled, "I. W. W. and the Law":

"The laws are made by the capitalists, not by the workers. The capitalists try to make everybody think that the people make the laws. This is a lie. The people would not make laws like those that hold workmen in jail for stating their honest opinions and planning for social improvements. The lawmakers are those robbers that would lose the opportunity to exploit labor if they did not have special laws to protect themselves. These capitalists need the jails, courts, police, the army and navy to keep the workers from taking for themselves what the workers have produced.

"They need to have the people respect the

laws and love their country, because even the police could not hold the workers in slavery if there was not this reverence and respect for the institutions of our master's government.

"So the capitalist class, that is the employers (in the Pacific Northwest, it means more than anything else the Lumber Trust), try to make laws that keep people in slavery and at the same time fool the people into believing that the people, the workers, make the laws. If it were not so, no one would respect the laws that protect private property, created by the public and no one would honor and protect these great robbers, the capitalists.

"The capitalists pretend a mighty reverence for the Constitution of the United States. Capitalists made it a long time ago, and as time goes on, they have had to break it in order to continue the robbery, for they dared not change it very much. To change it would make the people lose respect for it.

"The people, the workers, the producers, especially like the section of the constitution which says, 'The right of free speech shall not be abridged.' It also guarantees the rights of free assemblage and the rights of a free press.

"In order to keep such organizations and individuals as the Industrial Workers of the World from exposing the capitalist's game, from convincing the workers that they are being robbed, it is necessary for the capitalists to break the constitution, to deny the right of free speech, free press and right of assemblage. It is necessary to pass other unconstitutional laws, called criminal syndicalism laws and have the capitalistic courts declare them constitutional, and throw men into prison for long periods of time, because they dared to act according to the constitution which this capitalist class made itself, but which now, in some degree, is against the interests of the great robbers.

"In order to get convictions, it is necessary for these robbers to lie about the I. W. W. and to declare that they advocated the destruction of property, the killing of soldiers and all sorts of unsocial crimes. This paper represents the I. W. W. Let us tell you what the I. W. W. stands for.

"In the first place, even if the I. W. W. did destroy property, it would not be an immoral act, for the property belongs to the workers, they made it, and it is only stolen from them; they can do what they please with it.

"But it is just because this property does belong to the workers, because the workers expect to use the machinery and tools of production to continue their work after the capitalist class shall be forced to put on overalls too, it is just for this reason that the I. W. W. does not and never did advocate the destruction of property. At one time members of the organization did talk of 'sabotage.' By this they meant, 'striking on the job,' doing a short day's work for a short day's pay. Courts have hired special liars and professional witnesses to say that this word means 'destroying property,' so the I. W. W. has been forced to avoid using it. Nowadays we say, 'striking on the job' and nobody can understand that.

"Neither does the I. W. W. advocate an armed insurrection. Here again there would be no moral reason why we should not. If a thief takes your pay check, you have a right to shoot at him to get it back. If the thief

also bribes the judge and jury and the legislature, to declare his act legal, he is not the less a thief, because he is a perjurer and a corrupter of public officials likewise.

"But it is not good tactics for a labor union to engage in armed insurrection, and it is not necessary. When we get the workers so well organized that they will say, 'The industries are ours', and refuse to work for bosses at all, there will be no need for revolution. If the CAPITALIST CLASS then attacks US with deadly weapons, that will be another matter.

"The I. W. W. method of taking back the products of the workers for the workers, is to organize industrially and win all we can while organizing. When we are strong enough, we will declare a great general strike and put the boss out of his job. Then the workers will run the industries themselves, hiring managers, as the capitalist does, if that is necessary. The workers will take all the profit for themselves.

"It just happens that we can do all this without breaking any laws. All we need is the right of free speech, guaranteed by the constitution. Therefore we do not break any laws.

"But if organized bandits like the capitalist class succeed in getting unconstitutional ordinances passed, depriving us of our right to free speech, free press and freedom of assemblage and organizing and striking, we must continue to do those things just the same."

The Industrial Solidarity published at Chicago, Illinois, and the official organ of the Industrial Workers of the World, on February 3, 1923, printed an open letter to all workers, entitled "On to San Pedro. A Call to Action," with the request that all labor papers copy, from which we take the following excerpt:

"Present one solid front to the enemy.

"If you are not craven and foot-loose, even though you might have to quit a job, this call is to you, whether you are an I. W. W., a S. L. P., a member of the Socialist party, a communist or an intelligent Craft Unionist.

"On to San Pedro, if you possibly can.

"On with your money, if you cannot come.

"We do not want your sympathy, if that is all.

"We need you.

"Come on, you lumber-workers. Let the camp shut down.

"Why should you care about the profits of the boss or the job he is loaning you, when the class struggle needs you.

"Leave your scrapers, your teams, your excavators you 310 men; 'on to San Pedro' is the slogan for you.

"Come on, you Socialists, and Communistic fellow-workers.

"Come on, you brave union men, whatever be the name."

The foregoing is an urgent call for large numbers of the Industrial Workers of the World to gather at a place of labor congestion and fermentation to affect by their presence or otherwise the result of a labor struggle. Whether the call for men to assemble at a place of trouble was for a lawful or unlawful purpose considered with reference to the

hostility of the organization towards the economic and political system of this government was a question properly submitted to the jury. The call was heeded and men assembled in large numbers at San Pedro. Many arrests followed.

A book issued by the authority of the organization and containing I. W. W. songs, calculated to arouse its members to vigorous activity, forms a part of its general publicity plan. This book is entitled "Songs to Fan the Flames of Discontent," and has the express approval of the organization. The purpose of the songs seems to be well expressed by the title. The songs contained therein scoff at any pretense of loyalty on the part of citizens to their country and respect generally for the law. No institution escapes bitter denunciation. Belligerency and resistance to law are boldly encouraged. The red flag is exalted and the flag of the nation is depreciated. The Christian religion is blasphemed and its devotees are subjected to invective, satire, and ridicule. They are classed as cravens lacking the courage essential to make worthy members of the I. W. W. The songs carry with them a spirit of hatred for all the institutions that are a part of our national life. They are not written with a view of correcting or reforming laws, but with a desire to destroy the fabric of our national system.

[12] The purposes sought to be accomplished were proper matters for the consideration of the jury in determining the quality of the acts, which, it is claimed, bore a criminal color. The songbooks above referred to were found on one or two of the defendants. They contain the songs approved and published by the organization.

It was also competent for the jury to consider the fact that the organization anticipated collisions with the law as evidenced by the creation of a defense fund for which provision is liberally made. The constitution itself makes provision that the general secretary-treasurer (the executive head of the organization) does not forfeit his office by reason of "being in jail." Of course, the justification of the defense for this provision would be placed upon the ground that its members had been unjustly prosecuted and convicted. These, however, were all questions for the jury's consideration.

If the intent of bringing a multitude of men to San Pedro was to create a state of terrorism by designedly casting idle men in large numbers upon the public during a tumultuous or riotous situation, and with the agreement and understanding that general or local laws should be violated by them as a means of filling the jails to overflowing and creating a condition beyond the power of the law officers to cope with, and thereby obstructing the administrative arm of the law, as coercive methods (a means advocated in the literature of

the organization) such acts would be in violation of the means and methods prohibited by the act. So, too, if a system of threats, intimidation, and molestation was agreed upon as a means of accomplishing the purpose of the organization, as defined in *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 P. 324, then both the means and purpose of the organization would be unlawful, and the rule laid down in *Pierce v. Stablemen's Union*, supra, *Parkinson v. Building Trades Council*, 154 Cal. 581, 98 P. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165, and other decisions of this state which justify the right of employees or laborers to strike and conduct a boycott (provided the means employed are not illegal) would not be applicable to their situation.

The strikes initiated by the Industrial Workers of the World differ on basic principles from the strikes resorted to by the ordinary craft union. No concession in wage disputes is sufficient to satisfy the former. The abolition of the wage system, as declared by the preamble, is a definite plan of the organization, and the strike is resorted to at opportune times as one of the means of bringing about the industrial, economic, and political changes which they advocate. One strike is to follow another until the employer is forced to retire. It is a part of a revolutionary plan looking to the accomplishment of the ultimate object.

[13] While it is not absolutely essential to a decision of the instant case that we should determine whether the statute makes it a necessary prerequisite for the prosecution upon the trial to prove, in addition to showing the act of joining the organization—becoming a member—that the defendants had actual knowledge of its character at the time they became members, yet in view of the fact that the point is made and discussed at considerable length, and, there being no decision of this court bearing directly on the question, it is proper to give it consideration. The constitutionality of the statute is a question foreclosed by the decisions of this state and many other states. The Legislature has absolute power to provide that knowledge of the criminal character of the act or acts prohibited shall be a necessary element of the offense defined, or it may dispense with such knowledge altogether.

Unquestionably the Legislature had the power to provide that any person who joins an organization organized for unlawful purposes, whether such person is or is not aware of the unlawful purpose, is guilty of an offense.

Section 7, subd. 1, of the Penal Code of this state, provides:

"The word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It

does not require any intent to violate the law, or to injure another, or to acquire any advantage."

Subdivision 5, of the same section, defines knowingly, as follows:

"The word 'knowingly' imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission. * * *"

[14] To make a person guilty of an offense it is not necessary in every instance that such person should have a specific intent to violate law; it is sufficient that he intentionally commits the forbidden act.

The commission of various acts are made punishable under our criminal procedure, even though the doer be ignorant of the fact that the doing of the act constitutes an offense. A mistake of fact, or a want of intent, is not in every case a sufficient defense for the violation of a criminal statute. Statutes enacted for the protection of public morals, public health, and the public peace and safety are apt illustrations of the rule just announced. *People v. Ratz*, 115 Cal. 132, 46 P. 915; *People v. Griffin*, 117 Cal. 583, 49 P. 711, 59 Am. St. Rep. 216; *People v. Sheffield*, 9 Cal. App. 130, 98 P. 67; *State v. Hennessy*, 114 Wash. 351, 195 P. 211, and cases cited. The latter case quotes the following extract from 8 R. C. L. p. 62, as a correct statement of law:

"The maxim, *actus non facit reum, nisi mens sit rea*, does not always apply to crimes created by statute, and therefore, if a criminal intent is not an essential element of a statutory crime, it is not necessary to prove any intent in order to justify a conviction. Whether a criminal intent or guilty knowledge is a necessary element of a statutory offense is a matter of construction to be determined from the language of the statute, in view of its manifest purpose and design. There are many instances in recent times where the Legislature in the exercise of the police power has prohibited, under penalty, the performance of a specific act. The doing of the inhibited act constitutes the crime, and the moral turpitude or purity of the motive by which it was prompted and knowledge or ignorance of its criminal character are immaterial circumstances on the question of guilt. The only fact to be determined in these cases is whether the defendant did the act. In the interest of the public the burden is placed upon the actor of ascertaining at his peril whether his deed is within the prohibition of any criminal statute."

See, also, 7 Cal. Jur. 852; *In re Ahart*, 172 Cal. 762, 159 P. 160; *People v. O'Brien*, 96 Cal. 171, 31 P. 45; 16 C. J. 76.

There is much force in the observation made by Mr. Presiding Justice Finch in the case of *People v. Flanagan*, *supra*, to the effect that the average man does not ordinarily become affiliated with political or industrial organizations which may affect national wel-

fare without informing himself as to the cardinal principles of such organization. Political and economic experiences justify the observation. The general principles and primary purposes of all organization, whether political, industrial, benevolent, fraternal, or social, are quite generally known to the public. We agree with what was said in the *Flanagan* case that:

"The intent of the defendants must be determined from their voluntary connection with the conspiracy, viewed in the light of the circumstances which they knew or ought to have known. It must be held that the evidence is sufficient to justify the inference that the defendants had knowledge of the purposes of the organization."

Section 4, the emergency provision of the Criminal Syndicalism Act, is of itself a persuasive argument in favor of a literal interpretation. It provides:

"Inasmuch as this act concerns and is necessary to the immediate preservation of the public peace and safety, for the reason that at the present time large numbers of persons are going from place to place in this state advocating, teaching and practicing criminal syndicalism, this act shall take effect upon approval by the Governor."

The section sounds a note of apprehension from which it may be argued that the Legislature was of the opinion that immediate and somewhat drastic steps were necessary to check a menace that was threatening public peace and safety.

[15] A consideration of the entire subject leads us to the conclusion that proof of the act of joining an organization shown to be such as the statute denounces is a sufficient showing of knowledge of the purposes of the organization. An accused may meet this showing by proof that he was ignorant of its criminal purposes, or that he was induced by false or fraudulent representations to become a member of said organization, and was ignorant of its purposes. Of course, if he remained a member and became active in teaching and advocating its doctrines, as was done in the instant case, such conduct would itself be evidence of knowledge of its evil purposes.

[16] Objection is made to the statute on the ground that it is based on a false and arbitrary classification. This objection is fully answered in the case of *State v. Hennessy*, *supra*, in considering the syndicalism law of the state of Washington, in which the same objection was made. It was there pertinently said:

"The Legislature has power to pass all needful police regulations, and, so long as such regulations bear with equal weight upon all in like situation or of the same class, they are upheld by the courts. *State v. Fraternal Knights & Ladies*, 35 Wash. 338, 77 Pac. 500; *State v. Nichols*, 28 Wash. 628, 69 Pac. 372; *State v. Nicolls*, 61 Wash. 142, 112 Pac. 269, Ann. Cas. 1912B, 1088. The act is general in its

terms and provides that 'whoever' shall do the things there prohibited shall be guilty of a felony. Under this language any one, no matter what his business association or professional calling might be, who did the things prohibited by the act, would be subject to its provisions."

See, also, *People v. Wagner et al.* (Cal. App.) 225 P. 464; *State v. Dingham*, 37 Idaho, 253, 219 P. 760.

[17] F. W. Kelly, a former special agent of the department of justice, was a witness for the prosecution, and was permitted to testify against the objection of the defendants as to the dynamiting of the Governor's mansion, which occurred on December 19, 1917. In this connection he testified that he visited the Governor's mansion a few days thereafter and it bore the appearance of having been injured by an explosion. He arrested more than a hundred members of the I. W. W. organization. He testified that a box of dynamite was discovered in the possession of three members of the organization. On cross-examination it developed that his testimony as to dynamite having been found in the possession of said members was hearsay on his part. A motion to strike out all reference made by this witness as to dynamite having been found in the possession of the members above referred to was made and granted. A sufficient admonition was given by the court to the jury to wholly disregard that portion of his testimony. A motion, somewhat informal, was made to strike out all of the witness's testimony which in anywise referred to the Governor's mansion. This motion was denied. The motion was quite sweeping, but waiving all technical objections that might be made as to the form of the motion, and conceding that error was committed in refusing to grant it, we cannot say that the verdict of the jury would have been different had the motion been granted. The record is somewhat replete with alleged acts of violence, including the use of dynamite. The evidence objected to was merely cumulative, and could not have produced prejudicial error in the light of the other evidence which was properly admitted.

[18] In our consideration of the case we have treated the defendants as a group without making an exception as to any one of them. This was done for the sake of convenience. The defendant, J. C. Robinson, a member of the organization, was arrested several days after the indictment was found, and no evidence was produced to show that he was within the state on the day the offense is alleged to have been committed, or that he had any connection with the conspiracy in this state prior to the day of his arrest. The judgment and order as to him must be and is reversed. As to the other defendants, the judgments and orders appealed from are affirmed.

We concur: MYERS, C. J.; RICHARDS, J.; WASTE, J.; SHENK, J.; LENNON, J.

LAWLOR, J. I concur. But assuming without concluding that by the word "knowingly," as it appears in subdivision 4, § 2, of the act, "any person who * * * knowingly becomes a member of" the organization is meant guilty knowledge of its purposes at the time membership is acquired, and that it is a necessary ingredient in that offense, I concur in the affirmation of the judgment and the order so far as that part of the decision is concerned solely upon the ground that it cannot be maintained that the evidence before the jury including the proof of membership was not sufficient as matter of law to support the implied finding of such guilty knowledge.

195 Cal. 522

STATE v. TAGAMI et al. (L. A. 7881.)

(Supreme Court of California. Feb. 27, 1925.)

1. Treaties ⇐7—Treaties between friendly powers to be given liberal interpretation.

Treaties between friendly powers are to be given liberal interpretation so that, where a treaty admits of two constructions, one restrictive of rights that may be claimed under it, the other and favorable interpretation is to be preferred.

2. Treaties ⇐8—Treaty of commerce and navigation with Japan to be construed liberally.

Treaty with Japan Feb. 21, 1911 (37 Stat. U. S. 1504), being treaty of commerce and navigation for the purpose of strengthening relations of amity and good understanding, is such a treaty as requires liberality of construction.

3. Treaties ⇐8—"Trade" and "commerce" within scope of treaty defined.

The words "trade" and "commerce," when used in juxtaposition as in Treaty with Japan Feb. 21, 1911 (37 Stat. U. S. 1504), impart to each other enlarged signification, so as to include practically every business occupation carried on for subsistence or profit, and into which the elements of bargain and sale, barter, exchange, or traffic, enter; "commerce" and "commercial" usually being given the larger signification as embracing those dealings in general which arise and are conducted in the course of business and social intercourse between individuals and peoples.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Commerce; Trade.]

4. Treaties ⇐8—Lease to conduct sanitarium held for purposes of trade and commerce within treaty.

Lease of seashore land to conduct sanitarium, by Japanese alien, held for purposes of trade and commerce within Treaty with Japan Feb. 21, 1911 (37 Stat. U. S. 1504),

so as not to make land subject to escheat, under St. 1913, p. 206.

In Bank.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by the State of California against Tojuero Tagami and another. Judgment for defendants, and the State appeals. Affirmed.

U. S. Webb, Atty. Gen., Frank English, Deputy Atty. Gen., Asa Keyes, Dist. Atty., and Tracy C. Becker, Deputy Dist. Atty., both of Los Angeles, for the State.

Albert H. Elliot, of San Francisco, Clyde W. Smith, of San Pedro, and J. Marion Wright, of Los Angeles, for respondents.

RICHARDS, J. This appeal is prosecuted by the state of California, as plaintiff, from a judgment in favor of the defendants after an order sustaining their demurrer to the complaint; the plaintiff declining to amend. The action is one instituted by the state at the instance of the Attorney General, seeking to have an escheat declared and enforced as to a certain leasehold interest in certain lands and premises described in its said complaint. The basic facts upon which the action is predicated, as averred in the complaint, are these: On and prior to the 1st day of September, 1918, the defendant Ramon D. Sepulveda was the owner in fee and in possession of a parcel of land at a place along the coast of southern California known as "Fish Camp," lying adjacent to the line of ordinary high tide, being 200 feet long by 98 feet wide, and consisting in area of something less than half an acre of land. On said last-mentioned date Sepulveda executed a lease in writing of said tract of land to his codefendant, Tagami, for the term of three years, with certain options for additional periods not exceeding nine years, and for the express purpose of having said land occupied and improved by said lessee for use as a health resort and sanitarium. The complaint proceeds to allege that under and in pursuance of said lease Tagami entered into possession of said lands and premises, and has since used and is now using and occupying the same for the purpose of a health resort and sanitarium and for no other use or purpose; that said Tagami was and is an alien, a native and subject of the Empire of Japan, and, as such, ineligible to citizenship under the laws of the United States; that by virtue of the foregoing facts the leasehold interest of Tagami is being held by him in violation of the laws of California and particularly of the statute of 1913 relating to the disability of certain aliens, and to escheats, and of the acts amendatory thereof; and that in consequence thereof said leasehold interest has escheated to the state of California. Wherefore the plaintiff prays for a decree establishing such escheat of said leasehold inter-

est in said land, determining the value thereof and decreeing that the same be sold in conformity with the provisions of section 1271 of the Code of Civil Procedure, and for general relief. The trial court sustained the demurrer of the defendants to the complaint upon the ground that the same did not state a cause of action, and thereafter entered its judgment in the defendants' favor, from which judgment this appeal has been taken.

It is the appellant's contention that an escheat of said leasehold interest exists by virtue of the facts averred in its complaint as above set forth. It is obvious that such escheat, if the same has occurred, has not arisen or been created through any violation of those provisions of the so-called "alien land laws" of California, which forbid the acquiring, leasing, or use of lands in the state of California for agricultural purposes, and which declare escheats and other penalties for the acquisition, possession, or use by ineligible aliens of such lands. The complaint herein expressly avers that the lands held by Tagami under and by virtue of said lease are being held, possessed, and used by him solely for the uses and purposes of a health resort and sanitarium, and it follows that if an escheat has thereby been created it must have come into being by virtue of other inhibitions in the statutes of California than those affecting agricultural lands. The appellant contends that such escheat has come into being by virtue of the provisions of the statute of 1913, which is entitled:

"An act relating to the rights of aliens," etc., "with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, and repealing all acts or parts of acts inconsistent or in conflict herewith." Stats. 1913, p. 206.

Sections 1 and 2 of said act provide as follows:

"Section 1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

"Sec. 2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise, and may in addition thereto lease lands in this state for agricultural purposes for a term not exceeding three years."

Section 6 of the act provides:

"Sec. 6. Any leasehold or other interest in real property less than the fee, hereafter ac-

quired in violation of the provisions of this act by any alien mentioned in section two of this act, or by any company, association or corporation mentioned in section three of this act, shall escheat to the state of California. The Attorney-General shall institute proceedings to have such escheat adjudged and enforced as provided in section five of this act. In such proceedings the court shall determine and adjudge the value of such leasehold, or other interest in such real property, and enter judgment for the state for the amount thereof together with costs. Thereupon the court shall order a sale of the real property covered by such leasehold, or other interest, in the manner provided by section 1271 of the Code of Civil Procedure. Out of the proceeds arising from such sale, the amount of the judgment rendered for the state shall be paid into the state treasury and the balance shall be deposited with and distributed by the court in accordance with the interest of the parties therein."

It will be seen from a reading of the foregoing provisions of said statute that by the terms of section 2 aliens ineligible to citizenship under the laws of the United States may nevertheless acquire, possess, enjoy, and transfer real property or any interest therein in this state in the manner and to the extent and for the purposes prescribed in whatever treaty exists between the government of the United States and the nation or country of which such alien is a citizen or subject, with the added proviso as it stood in said statute at the date of its adoption that such ineligible alien might in addition thereto lease lands for agricultural purposes for a term not exceeding three years. By its later legislation, and particularly by the initiative measure adopted by the people of California at the general election held in November, 1920 (Stats. 1921, p. lxxxiii), and amended by the act of the Legislature in 1923 (Stats. 1923, p. 1020), the permission above granted to ineligible aliens to hold leases of agricultural lands for a period not exceeding three years was withdrawn, but otherwise the provisions of sections 2 and 6 of the statute of 1913 remain unchanged so far as the issues involved in the instant case are concerned. It follows that, if any escheat of the leasehold interest acquired and held by the defendant Tagami in the lands in question has arisen, it could only have occurred by virtue of a violation on his part of the provisions, permissions, and limitations of whatever treaty was in existence at the time of his entering into said lease or at any time thereafter and during his occupation of said premises thereunder and for the uses and purposes specified therein. This much the appellant practically concedes by basing its argument of this appeal upon the proposition that the particular leasehold involved in this proceeding was not such a lease of land as was or is embraced within the provisions and permissions of the treaty between the government of the United

States and the Empire of Japan entered into in the year 1911 (37 Stat. p. 1504), and which has ever since been and still is in full force and effect. It is the contention of the appellant that under the provisions of article I of said treaty the citizens and subjects of each of the high contracting parties thereto are granted liberty and permission to enter the territory of the other for certain limited purposes as set forth therein; that among these is the grant of liberty and permission to lease lands for "residential and commercial purposes" only; and that the leasehold under consideration in the instant proceeding is not one which may be brought within either of the foregoing purposes for which leases by aliens in the respective countries of either of the contracting powers may be entered into. The precise provisions of the first paragraph of said article I of the treaty read as follows:

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

[1] In determining the interpretation to be given to this provision of the treaty, the language and scope of the entire document is, of course, to be considered, and at the outset of such consideration those certain principles which have been with a fair degree of uniformity applied, at least by our own government, to the interpretation of treaties between ourselves and other friendly powers are of first importance. Among these is the doctrine that treaties entered into between friendly powers are, as a general rule, to be given a liberal interpretation. This principle was given apt expression by Mr. Justice Field in the case of *De Geofroy v. Riggs*, 133 U. S. 258, 10 S. Ct. 295, 33 L. Ed. 642, wherein that learned Justice says:

"It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction, words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that, where a treaty admits of two constructions, one restrictive of rights that may be claimed under it, and the other favorable to them, the latter is to be preferred."

[2] Looking to the treaty here under consideration, taken as a whole, it will be ob-

served that its opening paragraphs expressly declare that it is to be a treaty between friendly powers, entered into with the mutual desire and purpose of strengthening "the relations of amity and good understanding which happily exists between the two nations," and having for its object "the fixation in a manner clear and positive of the rules which are hereafter to govern the commercial intercourse between their respective countries." The treaty is termed: "A treaty of commerce and navigation" for the foregoing purposes. Its first article provides that:

"The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects."

In certain other clauses of said treaty the citizens or subjects of the respective contracting powers are to enjoy as to particular rights and privileges the equality accorded to native citizens or subjects and to occupy the status of those of "the most favored nation." It would seem to be obvious that to such a treaty the foregoing principle as to liberality in its interpretation with a view to achieving its expressed purposes as above outlined should be adopted and applied. The opening sentence of the first article of the treaty as above quoted provides that—

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail."

In order that the foregoing liberties and privileges may be exercised, the citizens or subjects of the respective parties to the treaty are by the succeeding clause in said section accorded the right "to own or lease and occupy houses, manufactories, warehouses and shops"; and are also permitted "to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade." The question in this case turns upon the meaning to be given to the term "commercial purposes" as used in the foregoing clause of article I of said treaty. Looking to its immediate context in said article, this phrase would seem to be intimately linked up with the term "trade," as twice employed in said article in defining the liberties and activities of those persons, the citizens or subjects of each of the contracting parties, for whose benefit the treaty was made.

[3] The words "trade" and "commerce" are frequently found in conjunction or juxtaposition in treaties between nations and in those constitutions and laws which define and regulate the scope and purposes of such

international engagements. They are also often employed by lexicographers in defining each other. When so employed, and particularly when so used in the conjunctive, they are held to impart to each other an enlarged signification which would include practically every business occupation carried on for the purpose of procuring subsistence or profit and into which, or any material part of which, the elements of bargain and sale, barter, exchange, or traffic enter. Each of these terms has sometimes been subjected to two limitations which would distinguish them from unskilled labor and even from agricultural employments on the one hand and from professional employments and the exercise of the fine arts on the other. See Standard Dictionary "Trade." Of these two phrases the term "commerce" and "commercial" are usually given the larger signification as embracing those dealings in general which arise and are conducted in the course of business and social intercourse between individuals and peoples. See Standard Dictionary "Commerce." This enlarged signification was early in our national history imparted to the term "commerce" by Chief Justice Marshall, in the leading case of *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, when, in defining the term as employed in our federal Constitution, he said:

"Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

This enlarged meaning of the term "commerce" has been adopted and carried down through a long line of later decisions of both federal and state tribunals, and has been applied to many and varied occupations. In the case of *Welton v. Missouri*, 91 U. S. 280, 23 L. Ed. 347, the Supreme Court said:

"Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states."

In the case of *Preston v. Finley* (C. C.) 72 F. 850, it was held that, within the comprehensive definition of the term "commerce" given by the Supreme Court in the foregoing cases, a newspaper was the subject of commercial intercourse and sale between state and state like any other article in which the right of traffic exists. In the case of *In re Radke Co.* (D. C.) 193 F. 735, it was decided that the term "commercial corporation" as used in the National Bankruptcy Act included a corporation which, owning its own property, was engaged in leasing it and collect-

ing rents therefor. "It was transacting business," says the court. In the quite recent case of *Asakura v. City of Seattle*, 265 U. S. 332, 44 S. Ct. 515, 68 L. Ed. 1041, it was decided that a Japanese alien, engaged in the business of a pawnbroker, was engaged in "trade," within the language of article I of the treaty here under review. In so deciding Mr. Justice Butler said:

"Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it, and the other favorable to them, the latter is to be preferred. *Hauenstein v. Lynham*, 100 U. S. 483, 487, 25 L. Ed. 628; *Geofroy v. Riggs*, supra, 271 (10 Sup. Ct. 295); *Tucker v. Alexandroff*, 183 U. S. 424, 437, 22 Sup. Ct. 195, 46 L. Ed. 264. The ordinance defines 'pawnbroker' to 'mean and include every person whose business or occupation it is to take and receive by way of pledge, pawn, or exchange, goods, wares, or merchandise, or any kind of personal property whatever, for the repayment or security of any money loaned thereon, or to loan money on deposit or personal property,' and defines 'pawnshop' to 'mean and include every place at which the business of pawnbroker is carried on.' The language of the treaty is comprehensive. The phrase 'to carry on trade' is broad. That it is not to be given a restricted meaning is plain. The clauses, 'to * * * own or lease * * * shops, * * * to lease land * * * for * * * commercial purposes, and generally to do anything incident to or necessary for trade,' and 'shall receive * * * the most constant protection and security of their * * * property, * * *' all go to show the intention of the parties that the citizens or subjects of either shall have liberty in the territory of the other to engage in all kinds and classes of business that are or reasonably may be embraced within the meaning of the word 'trade' as used in the treaty."

[4] In the light of the foregoing views as to the enlarged and liberal interpretation to be given to the words "trade," "commerce," and "commercial," as employed in the terms of the treaty under consideration, we approach the immediate question as to whether the expressed purpose for which the lease in question here was entered into and the leasehold interest in the lands and premises described therein acquired by the respondent Tagami was such a "commercial" purpose as to come fairly within the intentment of the treaty makers in the use of said terms. The expressed purpose for which said respondent took said lease and admittedly proceeded to operate thereunder was that of conducting a "health resort and sanitarium." It is a matter of common knowledge that health resorts and sanitariums have been and are being established and operated in various parts of the state of California, wherever climatic and other conditions are or are supposed to be favorable, and that these establishments are usually, if not universally, conducted for

profit. It is also a matter of common knowledge that the conduct of such institutions involve business transactions, including the equipment and supplying of the institution with the varied and often extensive accessories to its successful operation and the continuing purchase of merchandise and other articles of daily consumption essential to its upkeep. That the establishment and proper conduct of such institutions as aids to public health should be encouraged is beyond question; and that persons of alien extraction, even though ineligible to citizenship under our laws, should be permitted to establish and maintain them in the interest of health, cleanliness, and comfort, even of their own alien race, should be equally beyond controversy. No nice distinction can or should be drawn between a business venture of this character and the many others in which aliens of this particular race, as a matter of common knowledge are and for many past years have been engaged in the state of California, such as the keeping of hotels, lodging houses, tea houses, and eating places of various sorts, the conduct of drug stores, bath houses, barber shops, book stores, theaters, and other places of amusement or recreation. Most if not all of these activities are in more or less modified form either necessary or incidental to the conduct of health resorts. To distinguish between a health resort and sanitarium conducted for profit and any or all of these forms of business or commercial activity would be to create a rule of exclusion which would be practically without limit and to shut aliens of this race out of most if not all of the many and varied occupations in which they have heretofore preferred or been permitted to engage, and would not only have this effect, but would by necessary reaction and sequence foreclose the citizens of our own country from engaging in like pursuits within the Empire of Japan.

The appellant herein, in support of the interpretation it would have us place upon the foregoing clause of this treaty, makes the further contention that, in interpreting the treaty in the form in which it has been phrased since its execution in 1911, we should consider those matters of public and official history which preceded and attended the adoption of the treaty in its present form as disclosing an intention on the part of the framers of the treaty to impart to it a restricted meaning which would exclude the sort of occupation or business for which the leasehold here in question was to be utilized. Our attention is directed to the fact that the Circuit Court of the United States, in the case of *Terrace v. Thompson*, 263 U. S. 197, 44 S. Ct. 15, 68 L. Ed. 255, recites that, in the draft of the treaty presented by the imperial government of Japan, the article therein corresponding to article I of the present

treaty contained a clause permitting the citizens or subjects of each of the contracting powers "to lease land for residential, commercial, industrial, manufacturing and other lawful purposes," and that in the ensuing correspondence between the then Secretary of State and the representative of the imperial government objection was made to the use of the phrases "industrial and other lawful purposes," and that as a consequence these phrases were eliminated from the final and adopted draft of said treaty, and it was executed and approved in its present form. The appellant herein deduces from this recital by said court of the foregoing undoubted facts attending the formation and final adoption of the treaty the conclusion that the more restricted meaning for which it is contending should be given to the words which were permitted to remain therein. But we do not find such a conclusion deducible either from the correspondence between the representatives of the respective powers proposing to enter into treaty relations, nor from the language of said circuit court in reciting and interpreting the same, since it clearly appears from such correspondence, as pointed out in said case, that the sole object in view on the part of the representative of our government in suggesting the omission of the objectionable phrases was that of eliminating from the draft of said treaty a phrasing which might be held to go beyond the desire of our nation to prevent the leasing to said aliens of agricultural lands, and that this was due to the then existing condition of the California statute inhibiting the leasing of lands for agricultural purposes for a term in excess of three years. It would not be going beyond the boundaries of well-known public history to recall the fact that there was at that very time a growing agitation in California looking toward the adoption of the statute which was in fact enacted in 1913 and to its later enlargement by the terms of which the leasing of lands to alien Japanese for agricultural purposes was altogether inhibited. If it had been the intention of the framers of said treaty to create a more drastic inhibition against the leasing of lands by aliens of this race than that which is referred to in their correspondence and embraced within the terms of said treaty, it would have been a simple matter to have done so. If, as the appellant insists, the proper interpretation of the express terms of said treaty would render it susceptible of the restrictive meaning which it would have us assign to it, there would have been no impediment in the way of a more drastic statute than that which has been enacted in our alien land law. That such was not the intention of either the treaty makers or the framers of our alien land legislation seems to us clear.

The judgment is affirmed.

We concur: MYERS, C. J.; SEAWELL, J.; WASTE, J.; SHENK, J.; LENNON, J.

70 Cal. App. 652

SHANNON v. CALMUS et al. (Civ. 2865.)

(District Court of Appeal, Third District, California. Jan. 20, 1925.)

1. Partnership ⇨55—Evidence held to justify finding defendants partners.

In action for services, use of automobile, and moneys paid out for defendants' benefit, evidence held to justify finding that defendants were partners.

2. Partnership ⇨213(1)—Allegation of partnership unnecessary for recovery on partnership theory.

In action against partners as joint debtors, allegation of partnership is unnecessary to support recovery on theory of partnership.

3. Appeal and error ⇨928(4)—Instruction as to requisites to justify verdict for plaintiff presumed given at request of defendant.

Instruction that, to justify verdict for plaintiff, partnership must be proved by preponderance of evidence, will be presumed on defendant's appeal to have been given at request of defendant, where record does not show at whose request instruction was given.

4. Trial ⇨251(4)—Instruction as to necessity of proof of partnership, which was not pleaded, held proper.

In action against two defendants on alleged indebtedness, instruction, that partnership must be proved by preponderance of evidence, defining term, and stating liabilities of partners, held proper, although pleadings raised no issue as to partnership obligation, where recovery was sought on that theory.

5. Witnesses ⇨379(2)—Rebuttal relative to admission of partner, not in presence of other, held proper for purpose of impeachment.

In action against defendants claimed to be partners, where one defendant was cross-examined as to an admission not made in presence of other, and court, on request for instruction that such defendant was not bound, said that it could be offered at proper time and would be given, there was no error in admitting rebuttal testimony that admission had been made for purpose of impeachment.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by R. H. Shannon against George M. Calmus and another. Judgment for plaintiff, and defendant Elsie P. Betts appeals. Affirmed.

W. S. Taylor and E. W. Forgy, both of Los Angeles, for appellant.

Guy Knupp, of Porterville, for respondent.

FINCH, P. J. The defendant Elsie P. Betts has appealed from the judgment herein given against the defendants jointly.

The complaint states five separate causes of action: The first, for moneys paid out and expended for the use and benefit of defendants; the second, for services performed by plaintiff; the third, for the reasonable value of the use of plaintiff's automobile in the performance of such services; the fourth and fifth for services performed by other persons, the claims for which were duly assigned to plaintiff—all at the special instance and request of defendants. The complaint does not allege that the defendants were partners or state the relation between them which would make them jointly liable. The plaintiff introduced evidence at the trial tending to show that the defendants were in fact partners. The defendants, who filed separate answers denying the allegations of the complaint, testified that Mrs. Betts was not a partner of Calmus or interested in the enterprise in which he was engaged, but that she was merely his secretary, employed by him at a salary of \$75 a month.

[1] Calmus was engaged in the promotion of an enterprise to prospect for oil, and for that purpose, through the efforts of plaintiff and others, leases were secured on more than 20,000 acres of land. Mrs. Betts was the owner of lands within the area to be prospected. There is evidence that she put large sums of money into the enterprise. One witness testified that both defendants stated:

"That they were interested in the proposition equally, she was furnishing the money, all the cash except some I got hold of, and some other money she wanted to borrow, and asked me if I would go see about borrowing some for her. * * * They asked me if I would go down to Los Angeles and ask somebody to loan them \$25,000 on her ranch to carry these operations on. * * * I went to various places to try to borrow money. * * * I introduced Mr. Walker to the two of them. * * * He made arrangements with Mrs. Betts to come out to her house and look the property over, which he did, with several other men. * * * As I understand it, he loaned her \$10,000 or \$15,000 on the ranch; I don't know which the amount was, \$10,000 or \$15,000."

The plaintiff testified:

"Mr. Calmus told me that Mrs. Betts—in Mrs. Betts' presence—that Mrs. Betts had an interest with him in this proposition. * * * And in the event of his death or if anything should happen to him, that Mrs. Betts was able to go right on with the plans, and he had so arranged things that there wouldn't be any interruption at all. * * * Mrs. Betts was very active in helping him secure leases, and driving her car, and entertaining the guests that would come up from the South at her residence, and the loaning of her tools and other equipment she had on her ranch, in the actual operations."

Another witness, who had furnished a considerable sum of money to be used in the enterprise, testified:

"George M. Calmus frequently stated in the presence of Elsie P. Betts that she, Elsie P. Betts, was a partner in the oil leases * * * and had been with him in the work from the beginning."

Funds used in the enterprise were deposited in her name and paid out on her personal checks. There was other evidence tending to show that Mrs. Betts was interested with Calmus in the enterprise, but enough has been stated to justify a finding that the defendants were partners.

[2] The principal ground urged for a reversal is that because the complaint failed to allege that the defendants were partners, the plaintiff was not entitled to a recovery against appellant on the theory that she and Calmus were partners. In overruling a similar objection in *Pike v. Zadig*, 171 Cal. 273, 277, 152 P. 923, 925, the court said:

"It is urged that * * * the pleading contains no allegation of any such partnership. 'In an action against partners upon a partnership obligation, it is not necessary to allege a partnership between the defendants, but they may be declared against as any joint debtors.' (15 Ency. Pl. & Pr. 920, and cases cited.) Indeed, a denial of the partnership, where it is alleged, does not raise a material issue. (*Hunter v. Martin*, 57 Cal. 365.)"

[3, 4] Exception is taken to several instructions given by the court, stating in effect that to justify a verdict against Mrs. Betts it must be shown by a preponderance of the evidence that she and Calmus were partners, defining the term "partnership," and stating the liabilities of partners. It is contended that the pleadings do not raise any issue as to a partnership obligation. The record does not show at whose request the instructions were given, and the presumption, therefore, is that they were given at appellant's request. *Gray v. Eschen*, 125 Cal. 1, 5, 57 P. 664; *Sutter Butte C. Co. v. American R. & A. Co.*, 182 Cal. 549, 189 P. 277. Disregarding this defect in the record, however, it is clear from what has been said that the instructions were properly given.

[5] Complaint is made of the admission in evidence of a certain declaration made by Calmus when Mrs. Betts was not present. He testified that she had no interest in the oil enterprise, but that he borrowed \$5,000 from her which he deposited "to the credit of Mrs. Betts to check off, * * * she being my secretary and carrying on my work," and that she had borrowed this \$5,000 from her father. Counsel for plaintiff, evidently for purposes of impeachment, examined Calmus as follows:

"Q. Do you remember having a conversation with Mr. Shannon at the time when he and you were on the road to Visalia or Tulare, in an automobile, relative to some money that Mr. Post was giving his daughter, to put into this enterprise? * * * A. No, sir.

"Q. Didn't you tell Mr. Shannon on this oc-

casion Mr. Post had given his daughter, Mrs. Betts, \$5,000 to put into this enterprise?

"Mr. De Laney (Counsel for defendants): As to Mrs. Betts, if such a conversation as that took place, * * * I will ask that the court instruct the jury that she is not bound by any statements they make.

"The Court: Proper instructions can be brought in at the proper time; I will give the jury those instructions. Of course, if she were not present she is not bound by the conversation. * * * A. No, sir."

In rebuttal the plaintiff was permitted to testify, over defendants' objection, that Calmus said, at the time and place referred to in his cross-examination, that Mr. Post was giving Mrs. Betts \$5,000 to invest "in the oil proposition." Manifestly there was no error in the ruling.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

70 Cal. App. 643

Ex parte CLARK. (Cr. 1201.)

(District Court of Appeal, Second District, Division 1, California. Jan. 19, 1925.)

1. Criminal law ☞1001—Court without authority to suspend sentence without admitting defendant to probation.

Court is without authority to suspend execution of a sentence without admitting defendant to probation.

2. Criminal law ☞1001—Suspension of sentence, except as incident to probation, unauthorized.

Pen. Code, § 1203, conferring on court authority to place defendant on probation, does not authorize suspension of execution of sentence, except as an incident to granting of probation.

3. Criminal law ☞1001—Order suspending sentence held void, where application for probation denied.

Order suspending execution of sentence in burglary prosecution held void, in view of Pen. Code, § 1203, and hence judgment was not satisfied by expiration of period of suspension, where order stated that application for probation was denied and remanded defendant to custody of sheriff for work on roads.

Application for writ of habeas corpus by C. V. Clark directed against the Sheriff of Los Angeles County to secure his release from custody on a commitment issued on revocation of suspension of sentence. Prisoner remanded.

W. W. Judd, of Los Angeles, for petitioner. Asa Keyes, Dist. Atty., and A. D. Orme, Deputy Dist. Atty., both of Los Angeles, for respondent.

CONREY, P. J. In his petition for the issuance of this writ the applicant alleged

that he was restrained of his liberty by the sheriff of Los Angeles county, and that his detention was illegal by reason of certain facts. These facts were that immediately after applicant had been convicted in the superior court of Los Angeles county of the crime of burglary in the second degree, and sentence had been pronounced, the court suspended the execution of the sentence for the period of six months, under certain stated circumstances, which appellant contends amounted to an admission to probation for said period of six months; that thereafter said superior court caused applicant to be arrested and held on a commitment under said judgment for the purpose of causing him to be imprisoned in the state prison, as provided by said judgment. Appellant contends that, because the order of suspension of judgment was not revoked within the said period of six months, the court lost its authority to proceed further in execution of the judgment.

The return shows that on February 8, 1924, after Clark had duly entered his plea of guilty of the crime of burglary in the second degree, he was duly sentenced to be punished by imprisonment in the state prison at San Quentin for the term prescribed by law. At the same time, as shown by a minute order of the court, the court directed a stay of execution of the judgment against the defendant and his codefendant as follows:

"The application for probation is denied; and, no legal cause appearing why judgment should not be pronounced, the court pronounces judgment and sentence as entered in the minutes. * * * (San Quentin.) Execution of sentence is stayed for a period of six months, and both defendants are remanded to the custody of the sheriff of Los Angeles county, during which time they shall be permitted to work on the public highways of Los Angeles county to be returned into court at the end of the six months' period."

The said judgment is the same judgment which came before this court for review in the case of *People v. Clark et al.* (Cal. App.) 231 P. 590. In that case the defendant had been convicted of the crime of escape while in the custody of the sheriff at the county road camp. We reversed that judgment upon the ground that the court had no authority to order imprisonment of the defendant in the county jail or road camp. That being so, it was held that the defendant was not guilty of the crime of escape when he left that place of confinement.

In *People v. Clark*, supra, it was assumed by counsel and by the court that the judgment was free from any legal defect other than that it attempted to impose an unauthorized imprisonment by way of substitution for the substantial part of the judgment which directed that defendant be imprisoned in the state prison. We did not there con-

sider, and we were not asked to consider, any question challenging the authority of the court to suspend the execution of judgment in the manner there attempted; that is to say, without admitting the defendant to probation.

As we said in our former decision above noted:

"Undoubtedly the court had in mind, in pronouncing this judgment, subdivision (a) of section 1203 of the Penal Code, providing for the suspending of sentence."

According to the record which was before us at that time, the judgment itself, at the end thereof, stated that execution of sentence was suspended, "defendant to be remanded to the custody of the sheriff to work at the county road camp." Following the construction of section 1203 as found in *People v. Mendosa*, 178 Cal. 509, 511, 173 P. 998, we held that "the trial court upon a suspension of a sentence of imprisonment is without authority to further restrain or confine the defendant."

[1] Although this court, perhaps inadvertently, in *People v. Clark*, supra, assumed that the court below had authority to suspend execution of sentence without admitting the defendant to probation, we consider that subject open for consideration now. And we are of the opinion that such authority does not exist. In the *Mendosa* Case the Supreme Court said:

"If the court desires to suspend the execution of the sentence, the only way in which it can legally do so is by proceeding under section 1203 of the Penal Code, and that section expressly provides that in the event of such suspension 'the court shall place such person on probation and under the charge and supervision of the probation officer of said court, during such suspension.' The section clearly contemplates that the defendant, while on probation and conforming to the terms thereof, shall be at large and not in confinement."

[2, 3] Section 1203 of the Penal Code first confers upon the court authority, in the cases to which it applies, "to place the defendant upon probation as hereinafter provided." The subdivision relating to suspension of imposing of sentence, or of execution thereof, is a part of the process of admitting to probation as authorized by the general provisions of the section. It does not purport and should not be construed to authorize suspension of execution of the sentence except as an incident to the granting of probation, for by implication it declares the opposite intention. Therefore, in order to reach the conclusion that the suspension was within the authority of the court, it must be determined first that the order was, in effect, an order admitting to probation. But in the present case this cannot be so determined for the two sufficient reasons: First, that

the order itself states that the application for probation is denied; and, second, because it attempts to retain the defendant in actual custody. We hold, therefore, that the order suspending execution of judgment in the principal case was void, and that the judgment itself has not been satisfied by the expiration of a term of probation. This being so, there appears to be no reason why the defendant may not be taken into custody and compelled to submit to imprisonment in the state prison as required by the terms of the judgment.

The return herein further shows that at the time when the court made its order suspending execution of the judgment this was done virtually at the request of the defendant, who promised that, if the court would make said order, he would remain at the road camp as provided therein. There was no appeal taken from the judgment. In *People v. Walker*, 6 Cal. Unrep. 472, 61 P. 800 (not published in the official reports), the Supreme Court had before it an appeal from an order vacating a stay of execution and committing the defendant to imprisonment in execution of the judgment. The court affirmed that order, saying:

"It would be strange if, under such circumstances, the court had no power to enforce the sentence. If the contention of defendant is correct, the court, after having, at defendant's request, stayed proceedings until the full expiration of his time to appeal or make a motion for a new trial, would be powerless to carry the judgment into effect. The law does not contemplate any such absurdity."

The prisoner is remanded to custody.

We concur: HOUSER, J.; CURTIS, J.

70 Cal. App. 519

PEOPLE v. KELLY. (Cr. 1136; Cr. 2768.)

(District Court of Appeal, Second District, Division 1, California. Jan. 8, 1925. Hearing Denied by Supreme Court March 9, 1925.)

1. Municipal corporations ☞707—Evidence held to warrant finding of public highway.

In prosecution for violation of Motor Vehicle Act, § 112, evidence held sufficient to warrant finding that street intersection at which accident occurred was public highway.

2. Homicide ☞74—Killing by driving automobile while intoxicated, held manslaughter.

Evidence that accused, while driving his automobile under influence of liquor, collided with pedestrian, resulting in injuries causing her death, was sufficient to support verdict of manslaughter regardless of speed at which he was traveling.

3. Criminal law ☞406(4)—Corpus delicti may be proved by accused's testimony in court.

Though corpus delicti cannot be proved by extrajudicial admissions of accused alone, it

may be proved by his testimony in open court tending to prove corpus delicti, where he voluntarily becomes witness.

4. Homicide $\hookrightarrow$ 234(1)—**Accused's testimony held to prove death by driving automobile at unlawful speed.**

Accused's testimony in open court held sufficient to prove that he was driving his automobile at unlawful speed when he collided with pedestrian at street intersection, making pedestrian's death resulting therefrom manslaughter.

5. Homicide $\hookrightarrow$ 340(2)—**Accused convicted of manslaughter may not complain of instruction on murder.**

Accused found guilty of manslaughter could not complain that instruction, correctly stating law on manslaughter, erroneously stated law applicable to murder.

6. Homicide $\hookrightarrow$ 309(1)—**Instruction on manslaughter by unlawful act held proper.**

Instruction that person committing act in manner forbidden by statute, thereby causing death, may be convicted of manslaughter, held not erroneous, in view of Pen. Code, § 192, defining involuntary manslaughter.

7. Criminal law $\hookrightarrow$ 822(1)—**Instructions considered as whole.**

Instructions must be considered as whole, and, if law is fairly stated, judgment will not be reversed merely because one or more of them standing alone are subject to criticism.

On Petition for Hearing in Supreme Court.

8. Homicide $\hookrightarrow$ 74—**Violation of statute by automobile driver must be cause of killing.**

Violation of Motor Vehicle Act, § 113, or section 121, by automobile driver who collided and killed pedestrian, would not warrant conviction for murder or manslaughter, unless it caused accident.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

J. J. Kelly was convicted of manslaughter, and of violating Motor Vehicle Act, § 112, and he appeals. Affirmed.

Ford, Bodkin, Watt & Herlihy, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen. (Hamish B. Eddie, of Los Angeles, of counsel), for the People.

CURTIS, J. The defendant was charged with the crime of murder and, in a second count of the indictment, with the violation of section 112 of the Motor Vehicle Act (St. 1923, p. 517) in driving his automobile upon the public highway while under the influence of liquor. He was found guilty of manslaughter and also of violating the Motor Vehicle Act as charged in the second count of the indictment.

[1] The only point raised by the appellant against the judgment rendered under the second count of the indictment is that there was

no evidence tending to show that West Sixteenth street at its intersection with South Ardmore street in the city of Los Angeles was a public highway. The evidence shows that Sixteenth street at its intersection with Ardmore street is used by the public as one of the regular avenues of travel in that vicinity of the city; that it is curbed and lighted with street lights; that it has cement sidewalks; that it has fronting upon it dwelling houses, a garage, and other buildings. These two streets, at their intersection with each other, are referred to by witnesses as well-known and well-defined highways. We think this evidence is sufficient to justify the implied finding of the jury that Sixteenth street at its intersection with Ardmore street is a public highway.

[2-4] As to the verdict against the defendant finding him guilty of manslaughter, appellant contends that the evidence is insufficient to support such a verdict. In support of this contention appellant claims that there was no proof introduced by the prosecution, aside from his own extrajudicial admissions, as to the rate of speed appellant was traveling at the time of and just prior to the collision. Conceding for the present that the only evidence as to the speed appellant was traveling was that furnished by his own extrajudicial admissions, yet there was evidence tending to prove that appellant, at and just prior to the collision, was driving his car while under the influence of liquor, and that, while so driving his car, he collided with Mrs. Sarah Joy, and from such collision she sustained injuries which caused her death. This evidence was sufficient to support the verdict of manslaughter independent of any evidence as to the speed at which appellant was driving his car at the time he struck the deceased. Referring again, however, to appellant's contention that there was no evidence produced by the prosecution as to the speed at which appellant was driving at the time of the collision, aside from his extrajudicial admissions, and that therefore the corpus delicti had not been proven, we find that appellant is possibly correct in this contention, but, after the prosecution had closed its case, the defendant took the stand in his own behalf, and testified that he was going "18 or 20 miles, about 20 miles at the outside." This statement made by the defendant in open court, and, while testifying as a witness in the case, was sufficient to prove the fact testified to by him, and, if this fact was necessary to make up the required proof of the corpus delicti, it was competent and material for that purpose. While the corpus delicti cannot be proven by the extrajudicial admissions of the defendant alone, yet we know of no authority holding that it cannot be proven by the testimony of the defendant himself when he voluntarily becomes

a witness in the case and testifies to facts which tend to prove the corpus delicti. There was evidence in the case showing that the maximum rate of speed permitted at the intersection of Sixteenth and Ardmore streets was 15 miles per hour. The defendant testified that he was exceeding this rate of speed in crossing this intersection. This evidence tended to prove that the defendant, at the time he struck the deceased, was committing an unlawful act not amounting to a felony, and, if in committing such unlawful act, he caused the death of another he was guilty of manslaughter.

[5-7] Certain instructions are excepted to by the appellant. In one of these the court, after setting out in full section 121 and portions of section 113 of the Motor Vehicle Act applicable to the facts in this case, and informing the jury that the violation of either of these provisions of the law was a misdemeanor, stated to the jury as follows:

"If in the operation of a motor vehicle the driver violates either of these provisions, and while so driving contrary to the law strikes another, and as a result of the injuries the victim dies, the driver is guilty of either murder or manslaughter, dependent on the surrounding circumstances."

In considering this instruction we can do so upon this appeal only in so far as it applies to the charge of manslaughter. As the verdict of the jury finding the defendant guilty of manslaughter was an acquittal of him upon the charge of murder, he cannot complain of the instruction if it correctly stated the law as to the crime of manslaughter, even if it did erroneously state the law applicable to the charge of murder. Appellant contends, however, that in the giving of this instruction the court told the jury that, if a person driving a car unlawfully strikes and kills another, he is guilty of manslaughter, regardless of whether or not there was any causal connection between the illegal act of driving and the striking of the deceased. Involuntary manslaughter is the unlawful killing of a human being without malice, in the commission of an unlawful act not amounting to felony. Pen. Code, § 192. The instruction complained of is no broader than the section of the Code defining involuntary manslaughter. The court in effect told the jury that, if the driver, while unlawfully operating his automobile, strikes and kills another, he would be guilty of involuntary manslaughter. The only possible difference between this instruction and the code section defining manslaughter is between the phrase "while unlawfully operating his automobile" and the phrase "in the commission of an unlawful act." From a legal standpoint this difference is so slight that we do not believe that the jury could have been misled thereby. Especially is this so when we find that

in instruction No. 38, as well as in others, the court told the jury that, if one perform an act in a manner expressly forbidden by statute, and thereby cause the death of another, he might be convicted of manslaughter. Here the jury were in effect instructed by the court that the injury sustained by the deceased must be caused by the unlawful act of the defendant before he could be found guilty of manslaughter. The instruction to which the defendant objects must be considered in connection with instruction 38 and all other instructions given by the court bearing upon the same legal proposition in order to determine whether the court has correctly instructed the jury. *People v. Glover*, 141 Cal. 233, 242, 74 P. 745. If the law is fairly stated in the instructions as a whole, the judgment will not be reversed merely because one or more of the instructions standing alone are subject to criticism. *People v. Lee Chuck*, 78 Cal. 317, 339, 20 P. 719; *People v. Anderson*, 105 Cal. 32, 38 P. 513.

Practically the same objection is made to a portion of instruction No. 42, but in our opinion this objection is without merit, for the same reasons we have given regarding the objection to the first instruction considered above. In our opinion the instructions given by the court as a whole fairly state the law applicable to the facts in this case, and the defendant was in no way prejudiced by the giving of such instructions.

The judgment and order denying motion for a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. Appellant's petition to have the above-entitled cause heard and determined by this court, after judgment in the District Court of Appeal, is denied.

[8] In denying the petition, we withhold our approval from that portion of the opinion of the District Court of Appeal relating to the instructions to the jury to the effect that a person, who is violating any portion of section 113 or section 121 of the Motor Vehicle Act, and, while thus driving his car unlawfully, strikes and kills another person, may be found guilty of murder or manslaughter, dependent on the surrounding circumstances, regardless of any causal connection between the alleged act of thus driving the car and the injury to the deceased person. Such an instruction would be clearly erroneous, in the absence of other instructions rendering essential such causal connection. The record in this case discloses that other instructions were given to the extent that the jury was not misled as to the law requiring a causal connection to be shown.

70 Cal. App. 624

(234 P.)

KOFOID v. BECKNER et al. (Civ. 2856.)

(District Court of Appeal, Third District, California. Jan. 16, 1925.)

1. Trial $\hookrightarrow$ 253(7)—Instruction directing verdict must embody all essential elements showing legal liability and warranting conclusions contained in instruction.

An instruction directing a verdict for one party in event jury finds certain facts to be true must embrace all elements necessary to show legal liability and warrant conclusion contained in instruction.

2. Negligence $\hookrightarrow$ 117—Contributory negligence must be pleaded.

Contributory negligence is matter of defense, and must be specifically pleaded by defendant.

3. Highways $\hookrightarrow$ 173(2) — Pedestrians have right to use of highway and chargeable only with ordinary care as prudent persons would ordinarily exercise.

Pedestrians have right to the use of highways and are chargeable only with such ordinary care for their own safety as prudent persons would ordinarily exercise, and are not bound to assume that drivers of cars will act otherwise than in a careful manner.

4. Highways $\hookrightarrow$ 177—Duty of automobile driver when paved highway is obstructed to drive along right-hand half of pavement at speed not endangering others.

While the law does not require an automobile driver to drive on the right side of paved portion of highway at all times, when opposite portion is obstructed, he must drive along his right-hand half of pavement at such rate of speed as not to endanger others.

5. Appeal and error $\hookrightarrow$ 1033(5)—Trial $\hookrightarrow$ 253(7)—Court held to have properly omitted question of contributory negligence in instruction in nature of directed verdict for plaintiff, and later inconsistent instructions on contributory negligence were not prejudicial to defendants.

Where defendants' pleading did not properly tender issue of plaintiff's contributory negligence, and evidence did not show that plaintiff was contributorily negligent, court did not err in omitting question of contributory negligence in an instruction in nature of directed verdict for plaintiff, and fact that court afterwards gave inconsistent instructions relating to contributory negligence was not prejudicial to defendants.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by H. C. Kofoid against O. L. Beckner and another, copartners doing business under the name of Beckner Bros. Judgment for plaintiff, and defendants appeal. Affirmed.

C. W. Croop, of Merced, and Jos. T. O'Connor, of San Francisco, for appellants.

Johnston & Jones, of Fresno, and Hugh K. Landram, of Merced, for respondent.

PLUMMER, J. Plaintiff had judgment against the defendants in the court below in an action prosecuted by him for and on account of personal injuries sustained in being run down by an automobile belonging to the defendants, and driven by one of the defendants at the time of the injury. From this judgment the defendants appeal. The incident resulting in the injury of the plaintiff occurred on the state highway a short distance south of Athlone, in the county of Merced, at about 7:30 o'clock p. m., February 19, 1922. Prior to the accident rain had fallen and the paved portion of the highway was more or less slippery. At the time of the occurrence no rain was falling, but the evening was misty, and vision through windshields of automobiles appears to have been somewhat obscured. The highway at the place where the injury was received is a straight-away for a number of miles to the south. Just prior to the circumstances giving rise to this action it appears two automobiles, one a Dodge car and the other a Hupmobile, had gotten off the highway and were stuck in the mud. These cars were headed toward the south. A Cadillac car had stopped, or rather had returned to the place of the accident, to assist in extricating the Hupmobile and Dodge cars from the mud and back onto the paved portion of the highway. The plaintiff and three other persons came along at this juncture, asked if they could be of any assistance, were told that they could, and thereupon drove their car southward on the highway a distance of 75 or 100 yards, and parked it alongside the paved portion of the highway. All four of the automobiles just mentioned were headed southward, and the headlights of all the cars were lighted. It appears that the Hupmobile was in the ditch on one side of the road and the Dodge car was off the highway on the opposite side of the road. The plaintiff and his companions assisted in getting the Hupmobile car back on the highway, and this car was driven southward to a position a short distance in the rear of the Dodge car, in which the plaintiff and his companions had been riding, and there parked alongside the highway and its headlights left burning. Thereupon the plaintiff and his companions walked back to where the Cadillac car had been standing on the west side of the highway for the purpose of assisting in pulling the Dodge car, before mentioned, back onto the highway. As the plaintiff and his companions were walking back to the Cadillac car, they occupied the westerly portion of the pavement, and were passed by two cars going northward. These cars slowed down somewhat. One of them slowed down so that it passed by but little faster than one would ordinarily walk. After these cars had passed by and the plaintiff and his companions had reached a point, variously estimated at from 8 to 12 feet south of

the Cadillac car, the defendants' car approached, traveling at a speed variously estimated at from 25 to 30 miles an hour. The defendant, who was driving the car, testified that he was running at about 25 miles an hour. No sound or warning of the approach of the defendants' car appears to have been given. The defendants' car had not slowed down before it reached a point some 30 or 40 feet from where the injury upon the plaintiff was inflicted. The defendants' car had passed the Dodge car in which the plaintiff and his party had ridden, and also the Hupmobile, which we have mentioned, parked alongside of the roadway, but the defendants appear not to have noticed whether they were actually standing still or moving slowly. The lights of the other cars, which we have mentioned, were also observed by the defendants, but it does not appear that they sensed any trouble on the highway, as the momentum of their car was not lessened until after they reached the point before stated. At about this instant of time the plaintiff became aware of the approach of the defendants' car by observing the lights, and glancing sideways saw that the car was approaching toward him, and moved a short distance westward on the highway, but was not able to escape the approaching car, and was run down and injured. Whether the plaintiff was standing or actually moving at the instant of time before he observed the approach of the defendants' car is not exactly clear, but the weight of the testimony would indicate that he had stopped walking and then moved again in an effort to get off the highway, when he observed that the defendants' car was headed toward him. At the time the plaintiff was run down he was a few feet west of the center line of the highway. It appears also from the testimony that, if the defendants' car had remained on the right-hand side of the highway, where it would ordinarily be entitled to move on its course northward, there was sufficient clear space to pass without injuring any one. Two cars had just passed by, as we have before stated, but these cars, apparently observing conditions, slackened speed. When the defendants' car reached the point, which we have noted, some 30 or 40 feet from the plaintiff, it would appear that the driver threw on the brakes, or, at least, did something, which caused his car to skid and head directly toward the plaintiff and his companions. In these movements of the car the plaintiff and one other person were knocked down and injured.

The appellants in this case concede the negligence of the defendants, and it could not very well do otherwise in view of the testimony of one of the defendants, who was driving the car, that, after observing the lights, as we have before stated, he did not slow down, but kept running along on a wet pavement at the rate of 25 miles an hour. The following question and answer show the dis-

regard of conditions manifested by the driver of the defendants' car:

"Q. So, then, just trusting to blind luck and without knowing whether they were moving or not, you just kept going along at 25 miles an hour, even after you found out the Dodge car was standing still? A. Yes."

Admitting the negligence on the part of the defendants and the negligence of the driver of the car, which fixes such responsibility, the appellants contend that the injuries received by the plaintiff were due to his own contributory negligence, and that the court, in one of its instructions, erroneously took from the jury the question of contributory negligence on the part of the plaintiff. In a number of instructions the court did state to the jury that if the injuries received by the plaintiff were due to his own negligence, and also that, if the plaintiff was equally negligent with the defendants, and also, if the plaintiff was not acting with due regard to his own welfare and exercising ordinary care, etc., then, and in that case, the plaintiff could not recover; also that a pedestrian must make reasonable use of his senses of sight and hearing, must give heed to ordinary indications of danger, and must not walk blindly into danger, unless he expects to stand the consequences, and that he should look and listen and observe if vehicles are approaching. The instruction complained of is as follows:

"The defendants were bound to use ordinary care in operating their automobile along the public highway, to avoid collision with other persons or vehicles, and, if you find from the evidence that they failed to use such ordinary care, and that the accident was the proximate result of the failure of the defendants to use such ordinary care, your verdict must be for the plaintiff."

[1, 2] The rule is well settled in this state that an instruction directing a verdict for a party in the event the jury finds certain facts to be true must embrace all the elements necessary to show legal liability and to warrant the directions or conclusion contained in the instruction in relation to the verdict. Measured by this rule, if contributory negligence on the part of the plaintiff was pleaded in the defendants' answer, and supported by any substantial testimony, or, if the testimony, of the plaintiff showed contributory negligence, then, and in that case, the instruction before referred to was clearly erroneous. But, if the question of contributory negligence was not properly before the jury, then, and in that case, the instruction is correct, and the fact that the court elsewhere and afterwards, in its instructions, did give to the jury the law relating to contributory negligence, and instructed them that if they believed the plaintiff to be negligent, or equally negligent, or that his negligence contributed to the injury, the plaintiff could not

recover, though inconsistent with the instruction which we have just set out, were against the plaintiff, and therefore not prejudicial to the rights of the defendants. Contributory negligence is a matter of defense and, as a pleading, must be specially set forth by the defendant. In the answer filed by the defendants, it appears that, coupled with a paragraph denying negligence on the part of the defendants, there are these words, "and, by way of further and separate defense, allege that the injury and collision in said complaint described, if any there was, was solely and proximately caused by the fault and negligence of the plaintiff, himself, and without any fault on the part of said defendant, or either of them." The rule in pleading new matter is clearly stated by Pomeroy in his work on Code Remedies, § 690, p. 756, to wit:

"It is elementary that a defense of new matter should be pleaded, and, as new matter must of necessity be a distinct defense from a denial, it follows that it cannot properly be associated or mingled up with denials, general or special, in one paragraph or plea. For the same reason, such defense of new matter must necessarily be complete and single, as much so as each cause of action, and should be separately stated in a plea by itself."

Crabbe v. Mammoth Channel Gold Min. Co., 168 Cal. 500, 505, 143 P. 714; Hughes v. Warman Steel, etc., Co., 174 Cal. 556, 562, 163 P. 885, and a number of other cases might be cited, but these establish the rule in relation to pleading contributory negligence.

In answer to this rule that the pleadings do not properly tender the issue of contributory negligence on the part of the plaintiff, the appellants reply that the rule has no application when contributory negligence is shown by the plaintiff's evidence. Cahill v. E. B. & A. L. Stone & Co., 153 Cal. 571, 96 P. 84, 19 L. R. A. (N. S.) 1094; Kenny v. Kennedy, 9 Cal. App. 350, 99 P. 384. This rule also seems to be well established. Basing their contention upon this rule, the appellants insist that the plaintiff's own testimony shows contributory negligence, and therefore that the instruction, which we have quoted, constitutes prejudicial error. With this contention we do not agree. The testimony upon which the appellants base their contention of contributory negligence is as follows:

"Mr. Jones: Q. How far down the pavement was the Beckner [defendants'] car, within the best of your judgment, when you noticed it coming? A. Perhaps 30 feet.

"Q. Could you give any judgment as to its speed? A. It was coming very rapidly towards me. * * *

"Q. I will ask you, then, to just state how it appeared to you, when you were standing there, when the Beckner car came, from the time that you first saw it until it struck you. A. Well, when I first saw it, it was coming right in the center of the highway and, considering myself safe, then I started for the running board of the Cadillac, and the Beckner car veered a lit-

tle towards the west, that is, turned a little bit towards the west side of the highway; it seemed to take right after me; I made up my mind I had better get off the highway, and I was getting off the highway, when it caught me with the front end of the car. * * *

"Q. And what was your position with reference to the center of the paved portion of the highway? A. I was west of the center.

"Q. Could you state how far west of the center, Mr. Kofoid? A. No, sir; I cannot say; past a few feet, maybe only a foot or two.

"Q. You cannot say you were more than one foot or two to the west of the center of the paved portion of the highway? A. My best judgment is, perhaps I was more than that though, perhaps 3 or 4 feet west of the center. * * *

"Q. That car [viz, the last car that passed by before defendants' car] was very close to you then before you saw it? A. Yes, sir; well, I would say it was, it may have been 40 or 50 feet probably.

"Q. You were walking then in a northerly direction towards the Cadillac? A. Yes, sir.

"Q. Did you turn around or did you just glance out from the side? A. No, sir; the rays of light as they came on me; I noticed it coming.

"Q. Then, you did not turn around at all. A. No, sir; I don't believe I did.

"Q. You did not at all look in a southerly direction down the highway at that time to see if there were any other cars approaching from a distance? A. I might have; but I do not remember.

"Q. You do not remember of having done so? A. No, sir; I do not remember.

"Q. Then, after this Ford car had passed, you continued to your position which you finally took, namely, 6 or 8 feet in front of the Cadillac car? A. Yes; I had reached about that point when I was struck; I had not come to any stop that I know of; I don't know; we were just going back there to do this work; I don't think we had come to any standing position.

"Q. You think you were still in a position of walking towards the Cadillac? A. I think we were; yes. * * *

"Q. Now, about how far was the Beckner car, that is the defendants' car from you at the time you first saw it? A. I don't know the distance; what I would give you, would be an approximation, I should say something like 30 or 40 feet. * * *

"Q. Do you know what attracted your attention to the car? A. No, sir; I do not, unless it was the light.

"Q. You don't remember of having heard anybody say 'a car is coming' or anything of that kind? A. No, sir; I did not hear any one say that.

"Q. Then your impression is, now, that the first thing that attracted your attention to the Beckner car was the approaching light? A. I think so.

"Q. And what was the first thing you did, Mr. Kofoid? A. My first thing was to make a move towards the Cadillac car; you see I could not get out of the way that way; I started to get off the pavement on the west side in the mud, but he got me before I got off.

"Q. Did you turn around as the Beckner car approached? A. I turned, yes; I turned sideways to watch it.

"Q. You turned sideways? A. Yes, sir.

"Q. And started to move in which direction? A. I first started or tried to move, but did not move very far; I started towards the Cadillac car. I saw him coming right towards me and I started to run off the pavement, but he was so close and he got me before I could get out of the way of the car."

[3-5] The cases relied upon by appellants in relation to contributory negligence being shown by the testimony of the plaintiff so as to make it an issue in the case irrespective of the pleading, in stating the rule, are particular to mention the fact that there must be some substantial testimony, upon which the jury can base a finding of contributory negligence. In other words, whether presented by the pleadings, or by the testimony introduced by the plaintiff, there must be some substantial testimony showing contributory negligence before the court would be justified in holding that the instruction complained of by the appellants was either inapplicable to the instant case or constituted prejudicial error. If these elements are both wanting, the instruction is correct under the circumstances of this case. The testimony of the plaintiff, which we have set forth, is not changed or altered in any respect, or modified by the testimony of other witnesses other than, as we have stated, that the weight of the testimony would lead to the conclusion that the plaintiff had stopped walking an instant or so before he was struck down, but the testimony all shows the facts just as we have stated, and that the plaintiff was in a position where, if the defendants' car had been guided along the highway where it should have been driven, no injury would have resulted to the plaintiff. At the time of the injury, the testimony of the plaintiff and of all of his witnesses show that he was on the westerly half of the paved portion of the highway; that the course the defendants' car should have followed was along the easterly portion of the highway; and that cars had immediately passed along that portion of the highway without injury to any one. The testimony leads irresistibly to the conclusion that the defendants' car was being driven at an excessive rate of speed under the circumstances, upon a slippery highway, that the presence of the lights of four automobiles standing still was not heeded, the speed of the on-coming car was not slackened until within immediate proximity of where the plaintiff and his companions were, and then, either by an improper application of the brakes or "a loss of his head," as one of the witnesses testified the driver stated, the defendants' car was deflected in its course over and upon the westerly half of the highway, and the plaintiff and one of his companions run down. Notwithstanding the fact that the number of reckless drivers have rendered the paved portion of our highways a

danger zone, pedestrians have a right to the use thereof, and are chargeable only with such ordinary and reasonable care for their own safety as a prudent person would ordinarily exercise, and they are not bound to assume that drivers of cars will act otherwise than in a careful and prudent manner, and while the law does not require an automobile driver to, at all times, drive on what to him is the right side of the paved portion of the highway, when the opposite portion of the paved highway is obstructed, it does become his duty to propel his car along his right-hand half of the pavement, and at such a rate of speed as not to endanger the life or property of others. There seems to us no question that the conditions which we have recited in this case and the testimony which we have set forth show that the injury to the plaintiff was occasioned solely and exclusively by the improper and reckless driving on the part of the driver of the car occupied and being driven by the defendants, and therefore that the instruction complained of by the appellants was correct, and that the inconsistent instructions, in relation to contributory negligence, afterwards given by the court, were in nowise prejudicial to the rights of the defendants.

The order and judgment of the trial court are hereby affirmed.

We concur: FINCH, P. J.; HART, J.

70 Cal. App. 650

STATE COMPENSATION INSURANCE FUND v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (Civ. 5048.)

(District Court of Appeal, First District, Division 2, California. Jan. 20, 1925. Rehearing Denied Feb. 17, 1925. Hearing Denied by Supreme Court March 19, 1925.)

Insurance — 435—Employer's policy held not to cover vice president.

Where clause in employer's policy specifically exempted liability for injury to person having title of vice president, injury to vice president of typographical union, although acting at time as member of active committee, held not covered so as to justify award against insurance carrier.

Certiorari on petition of the State Compensation Insurance Fund against the Industrial Accident Commission of the State of California and others, to review an order of the Industrial Accident Commission, awarding compensation for injuries. Award annulled.

Frank J. Creede and John J. Taheny, both of San Francisco, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondent Industrial Accident Commission.

Heidelberg & Murasky, of San Francisco, for respondent San Francisco Typographical Union No. 21.

LANGDON, P. J. This matter comes before us upon a writ to review the award of the Industrial Accident Commission, requiring petitioner to pay compensation to respondent Thomas S. Black.

No dispute arises over the right of Black to receive compensation for injuries suffered by him; the controversy is narrowed down to a question of whether the respondent San Francisco Typographical Union No. 21, the employer, should be held liable, or whether it was insured against such liability by the petitioner, as insurance carrier.

There is no conflict in the evidence about the facts. Thomas S. Black was the vice president of the San Francisco Typographical Union. As such officer he had few active duties to perform. The policy of insurance upon which the award of the Industrial Accident Commission is predicated contains a statement of "Risks not Covered," including among such risks the following:

"If the insured be a corporation, any work or duties performed by any person having the title of (see indorsement attached) or a combination of any such titles with or without other titles."

The "indorsement attached," which elucidates the foregoing, is as follows:

"Anything in this policy to the contrary notwithstanding, it is understood and agreed that lines 20 and 21 (the lines above quoted) of the policy are changed to read: 'If the insured be an association, any work or duties performed by any person having the title of vice president or a combination of any such titles with or without other titles.'"

The construction of these clauses of the policy is the only matter before us. Thomas S. Black, the vice president, was appointed to serve upon a committee to gather information regarding the cost of living. While so serving, he was injured when attempting to board a street car. Was his injury one of the excepted risks? We think the plain language of the policy excludes it. *Any work or duties performed by any person having the title of vice president, even though at the time he may hold such title in combination with another title* (such as member of an active committee) is expressly and plainly excluded.

It is not for the courts to change the contract of the parties. This contract is unambiguous and leaves no room for judicial construction. The insured purchased only the protection afforded by the terms of this policy. It might have paid a larger premium and "covered" its vice president, as well as its president and secretary, who were expressly "covered." When insured has chosen

to make and pay for a contract expressly "covering" injury to two of its officers, and excluding a third, regardless of what work he may be engaged in doing, there is no rule of law by which this court may save it from the legal consequences of the same.

The award of the Industrial Accident Commission is annulled.

We concur: STURTEVANT, J.; NOURSE, J.

70 Cal. App. 677

GARDINER v. FREDERICKSON, Police Judge. (Civ. 4648.)

(District Court of Appeal, Second District, Division 2, California. Jan. 22, 1925.)

1. Mandamus  29—Does not lie to compel police judge to order delivery to petitioner of property taken on illegal search.

Mandamus is not maintainable to compel police judge to direct return of property alleged to have been taken from petitioner's residence by certain officers on unlawful search, where the judge has no control over the seized property, especially as possession of such officers cannot be divested in a proceeding to which they are not parties, but petitioner's remedy is by means of direct proceeding against such officers.

2. Mandamus  154(2)—Allegation that certain officers "held" certain property mere conclusion of law.

In mandamus to compel police judge to direct return of property alleged to have been unlawfully taken from petitioner's residence by certain officers, an allegation that property is "held" by prosecutor and chief of police, is a mere conclusion of law, and, where there is no allegation that officers were acting under direction of prosecutor, or chief, or that property was delivered to them, petition fails to show that they have possession.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Application for writ of mandate by N. J. Gardiner against William F. Frederickson, Police Judge. Judgment for respondent, and petitioner appeals. Affirmed.

Fisk & Randall, of Los Angeles, for appellant.

J. M. Friedlander, City Prosecutor, and A. T. Folsom, Deputy City Prosecutor, both of Los Angeles, for respondent.

WORKS, J. This is an application for a writ of mandate, made to the superior court. A demurrer to the petition was sustained and judgment went accordingly. Petitioner appeals.

The petition alleges that on a certain day there was filed in the police court of the city of Los Angeles, of which respondent is one of the judges, a criminal complaint against petitioner, and that on the same day petitioner

pleaded not guilty thereto; that at all times mentioned in the petition, and now, a certain person was chief of police of the city of Los Angeles, two certain persons were police officers thereof and a certain person was city prosecutor thereof; that two days before the filing of the criminal complaint the two police officers entered petitioner's place of residence without a search warrant and took therefrom certain specified articles of personal property; that "the said property is now being unlawfully and improperly held by the said city prosecutor, chief of police, and police officers in violation of the rights of this petitioner under the Constitution of the state of California; that the said city prosecutor, chief of police, and police officers purpose, and each of them purposes, to use the said property, or some or all thereof upon the trial" of the criminal cause, "and that by reason thereof, and of the facts above set forth, the petitioner's rights as aforesaid, under the Constitution of the state of California, have been and will be violated, unless the court order the return of said property as prayed"; and "that if the said chief of police, police officers, and city prosecutor are permitted to retain possession of the above-described property until the time of the trial of the aforesaid cause, the said officers or some or all of them, may, and your petitioner verily believes that they will, offer the said property so unlawfully seized as aforesaid, or some part thereof, as evidence upon the trial of the said cause, and the said judge may, and petitioner verily believes that he will, admit the same in evidence, and thereby the constitutional rights of your petitioner are now, and will be hereafter, violated, and your petitioner will be without remedy." There are other allegations of the petition, but the foregoing are all that are material to the present inquiry. The pleading closes with a prayer that a writ of mandate issue "commanding" respondent police judge, the sole respondent in the proceeding, "to make and enter an order directed to" the chief of police, the city prosecutor, and the two police officers, "commanding them, and each of them, to release, surrender, and deliver to the defendant all of the aforesaid personal property so unlawfully seized and held by them, or any of them. * * *

[1] It is manifest that the petition is insufficient. No facts are alleged showing that respondent has any control over the seized property, nor, in fact, is it sought to compel him to deliver it up. Appellant would have him order the officers named in the petition to make delivery of it. If, as the petition alleges, the property is held by the officers, the possession by them cannot be divested in a proceeding to which they are not parties. Appellant's remedy, if any he has under the allegations of the petition, could be sought

only by means of a direct action or proceeding, by claim and delivery or otherwise, against the officers.

[2] It is to be observed, in passing, that the allegation that the property is "held" by the prosecutor and the chief of police is a mere conclusion of law. There is no allegation that, in making the seizure, the police officers were acting under the direction or orders of either the prosecutor or the chief, or that, after making it, the property was delivered to them or to either of them. In making the seizure, for aught that is alleged in the petition, the officers may have been acting in a private capacity and under a claim of ownership of the articles seized.

Appellant would justify his pleading under *People v. Mayen*, 188 Cal. 237, 205 P. 435, 24 A. L. R. 1383, and *Weeks v. United States*, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, but there is nothing in either case which breathes the breath of life into it.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

70 Cal. App. 691

MacDONALD v. KUHN. (Civ. 2876.)

(District Court of Appeal, Third District, California. Jan. 22, 1925.)

1. Appeal and error ☞907(3)—Findings assumed to be supported by evidence where appeal on judgment roll alone.

Where appeal is before appellate court on judgment roll alone, it must be assumed that findings are supported by the evidence.

2. Partnership ☞262—Written agreement terminating partnership held not to terminate all matters in controversy between partners.

Written agreement terminating partnership as then carried on held not to terminate all matters in controversy between partners as to partnership transactions theretofore had, where it made no reference to amount of indebtedness, and did not purport to adjust same or apportion amounts which each should pay.

3. Partnership ☞327(5)—Amendment of complaint where defendant asked for "full accounting" held not erroneous, though increased amount thereby asked.

In action between copartners in which defendant filed a cross-complaint for a full accounting, amendment of complaint, under permission of court, to correspond with facts shown by such accounting, held not erroneous though increased amount was thereby asked; "full accounting" meaning an accounting of all transactions had by copartners.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by R. O. MacDonald against M. A. Kuhn, in which defendant filed a cross-com-

plaint. Judgment for plaintiff, and defendant appeals. Affirmed.

J. A. Chase, of Visalia, for appellant.

Russell & Heid, of Tulare, for respondent.

PLUMMER, J. Action for an accounting. Plaintiff had judgment, and defendant appeals.

[1] On or about the 19th day of June, 1919, the plaintiff and defendant formed a copartnership for the purpose of packing fruit and vegetables. This partnership was evidenced by a written agreement, and the parties continued in such partnership, under such agreement, until about the 20th of November, 1919, when the written agreement hereinbefore referred to was terminated by the execution of another written instrument. After this date, it appears that the parties continued to do business as partners under an oral agreement. After the final dissolution of the partnership, it appears that the plaintiff paid a certain promissory note which had been executed by the partnership, and in his complaint alleged the payment of the whole of said note out of his own funds, and instituted this action in the first instance to recover from the defendant one-half thereof. Thereupon the defendant and appellant herein by answer and cross-complaint demanded an accounting of the entire partnership; the prayer of the complaint of appellant being that plaintiff be required "to bring all of the books of the copartnership and a full, complete, and correct accounting be made of all the business of said copartnership," etc. An accounting was had, the matter was referred to a referee, testimony was taken, report and findings made by the referee, which report and findings were adopted by the trial court. By these findings the trial court ascertained and determined that there was due from the defendant to the plaintiff on account of said copartnership the sum of \$853.54, and judgment was entered in favor of the plaintiff and against the defendant accordingly. The matter is before this court upon the judgment roll alone, and it must therefore be assumed that the findings are supported by the evidence. After the testimony had all been taken, the plaintiff was permitted by the trial court to file an amended complaint asking an accounting, the same as had been prayed for by the defendant, and which accounting had been made, and setting forth in said complaint an additional sum as the amount due the plaintiff from the defendant to correspond with the proofs.

[2] The first contention made by the appellant is that the referee and the court erred in not finding that the written agreement dated November 20, 1919, executed by the parties hereto, finally fixed and terminated all matters in controversy between the plaintiff and the defendant as to partnership transac-

tions theretofore had. That this contention is without merit is apparent from a reading of the agreement itself. That agreement is as follows:

"Lindsay, Cal., Nov. 20, 1919.

"It is hereby agreed and understood that a certain operating agreement of June 19, 1919, or thereabouts signed by the undersigned be hereby terminated and at an end, and the rights of each of the undersigned under the said agreement hereby terminate. It is definitely understood and agreed that all mutual obligations incurred by the undersigned be paid off at the earliest possible date.

"[Signed] M. A. Kuhn.

"R. O. MacDonald."

This agreement makes no reference to the amount of the indebtedness, does not purport to settle and adjust the same, or apportion between the copartners the respective amount which each should pay in order to liquidate the partnership indebtedness.

The next contention of the appellant is likewise without any merit. It is set forth as follows:

"Although counsel for appellant made a motion to refer the case to the referee on all matters at issue, the court refused to do so and specifically ordered the matter to go 'to the referee for a full accounting.'"

This is the statement in appellant's brief. The record bearing the certificate of the clerk sets forth the proceeding in this language:

"Counsel for appellant then moved the court for an order referring the matters at issue back to the referee, D. E. Perkins, Esq., for a further and full account, * * * the court being fully advised doth order that the matter be referred to the referee for a full accounting, each party to produce all books, papers, checks, receipts, etc., necessary for the referee to make such account."

Further comment upon this objection seems unnecessary.

[3] It is further urged that the court erred in allowing the plaintiff to file an amended complaint. This objection seems to be based upon the fact that the amount appellant asks for judgment is in an increased sum. This court, in *Stohlman v. Martin*, 28 Cal. App. 338, 152 P. 319, has decided contrary to appellant's contention in this particular. See, also, *Born v. Castle*, 22 Cal. App. 282, 134 P. 347. The appellant, in his cross-complaint, asked for a full accounting. The plaintiff simply concurred therein and amended his pleadings, under the permission of the court, to correspond with the facts shown by such accounting. We do not need to cite authorities to the effect that when a full accounting is ordered, it means an accounting of all the transactions had by the copartners. No accounting, as we have said, was had of the partnership as it existed under the written agreement, and therefore the only accounting that could be had to settle all matters be-

tween the plaintiff and the defendant was one which included all transactions had between them covering the period of their partnership as it existed both under the written and oral agreements.

There being no bill of exceptions and no statement presented in this case, the appeal must be determined by what is disclosed in the judgment roll alone; and there being nothing of merit in appellant's contentions, and no reason having been suggested why the judgment of the trial court should not be affirmed, it is hereby ordered that the judgment of the trial court be and the same is hereby affirmed.

We concur: FINCH, P. J.; HART, J.

70 Cal. App. 647

BROADY v. JENNINGS. (Civ. 4146.)

(District Court of Appeal, Second District, Division 1, California. Jan. 19, 1925.)

1. Prohibition ☞10(1)—Lies where court assumes to act without jurisdiction.

Where a court is about to enter upon the discharge of some function of which it has no jurisdiction, prohibition is the proper remedy.

2. Animals ☞49—County ordinance prohibiting running at large held not unconstitutional.

County ordinance prohibiting owners from permitting their animals to run at large held not in conflict with Const. art. 11, § 11, providing that any county, etc., may make such regulations as are not in conflict with general laws, in view of the Estray Act, restoring common-law rule requiring owners of animals to keep them from their neighbors' lands.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Petition by J. C. Broady for writ of prohibition against Lacy D. Jennings. From order denying writ, petitioner appeals. Affirmed.

W. W. Praul, of San Diego, for appellant.

Chester C. Kempley, Dist. Atty., and A. J. Lee, Deputy Dist. Atty., both of San Diego, for respondent.

HOUSER, J. This is an appeal from an order of the superior court denying a writ of prohibition.

The substance of the facts underlying the matter appear to be that the board of supervisors of San Diego county duly passed an ordinance making it a misdemeanor "for the owner * * * of any domestic animal or animals to permit the same to run at large in or upon any land owned by * * * any person, * * * other than the owner of such animal or animals, unless the consent of the owner of such land and premises is first obtained," etc.

By a complaint filed in the justice court, one J. C. Broady (appellant herein) was charged with a violation of said ordinance. His demurrer to the complaint having been overruled, the justice caused the case to be set for trial. Thereupon said Broady applied to the superior court of San Diego county for a writ of prohibition directed to the said justice court and to Lacy D. Jennings, as justice of the peace (respondent herein), restraining and prohibiting said court and said justice from the trial of said action. The writ was denied, and thereupon this appeal was taken from such order.

[1] It is contended by respondent that prohibition will not lie for the reason that, assuming no jurisdiction in the justice court, defendant therein had the right of appeal to the superior court, and that such remedy was plain, speedy, and adequate. While the decisions of this state touching the question are not entirely harmonious, the weight of authority is that where a court is about to enter upon the discharge of some function of which the court has no jurisdiction, prohibition is the proper remedy. *Terrill v. Superior Court*, 6 Cal. Unrep. 398, 60 P. 38; *Green v. Superior Court*, 78 Cal. 556; *Arfsten v. Superior Court*, 20 Cal. App. 269, 128 P. 949; *People v. Palermo L. & W. Co.*, 4 Cal. App. 717, 89 P. 723; *Ophir Silver Min. Co. v. Superior Court*, 147 Cal. 467, 82 P. 70, 3 Ann. Cas. 340.

[2] Appellant contends that the ordinance adopted by the board of supervisors is unconstitutional, in that it is in conflict with section 11 of article 11 of the Constitution, which provides that—

"Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

It is urged that the ordinance in question is in conflict with the "general laws." By the common law the owners of cattle were required to keep them confined "to their own close." But by early statutes of this state (Stats. 1850, p. 131; 1851, p. 299) such general law was abrogated; and it is upon such statutes and others of a similar character that appellant relies. In 1915 (Stats. 1915, p. 636) a statute was enacted, known as the "Estray Act," which affects all the counties of the state with the exception of six counties of which San Diego is not one. By that act the common-law rule requiring the owner of animals to keep them from his neighbor's lands was restored as to all counties affected by the act. *Montezuma Improvement Co. v. Simmerly*, 181 Cal. 722, 189 P. 100; *Moran v. Freeman*, 48 Cal. App. 514, 192 P. 155; *Huffman v. Coulter*, 55 Cal. App. 173, 203 P. 125.

As is said in *Montezuma Improvement Co. v. Simmerly*, supra, the statute of 1915 "by

the very force of its terms" repealed all "fence laws" in all the counties of this state excepting in the six counties specified in the act. By subdivision 14 of section 4041 of the Political Code, boards of supervisors are given power to " * * * fix the limits within which animals shall not run at large."

It thus appears that the board of supervisors of San Diego county, in adopting the ordinance in question, was acting within its powers, and that the superior court was right in denying petitioner's application for the writ.

The order is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

70 Cal. App. 614

CAREAGA v. MOORE et al. (Civ. 4364.)

(District Court of Appeal, Second District, Division 1, California. Jan. 15, 1925.)

1. Fraudulent conveyances ⇨271(3)—Creditor held to have burden of establishing that debtor's conveyance was fraudulent.

Burden of establishing that debtor's conveyance was made with intent to injure, delay, and defraud his creditors, under Civ. Code, § 3439, rested on creditor seeking to set it aside by action under Code Civ. Proc. § 1589.

2. Fraudulent conveyances ⇨295(1)—Must be clearly proven.

Fraud must be clearly proven.

3. Appeal and error ⇨1009(1)—Effect and value of evidence tending to show fraud in conveyance held for trial court.

In action to set aside conveyances as fraudulent to creditors, effect and value of evidence tending to show fraud was for trial court.

4. Appeal and error ⇨1011(1)—Finding on conflicting evidence not disturbed unless court's discretion abused.

Where evidence is conflicting, decision of issue involved rests within discretion of trial judge which cannot be disturbed, unless it manifestly appears that such discretion has been abused.

5. Fraudulent conveyances ⇨299(12)—Evidence held to sustain finding that deed was not made with intent to defraud debtor's creditors.

Evidence held to sustain finding that debtor was not in straitened circumstances when executing deed to his wife, and that such deed was not made with intent to injure, delay, or defraud his creditors.

6. Appeal and error ⇨854(4)—Immaterial on what ground correct exclusion of testimony placed.

Where court decided correctly in excluding certain testimony, it was immaterial on what ground exclusion was placed.

7. Appeal and error ⇨1047(3)—Refusal to strike out nonresponsive testimony held harmless.

Refusal to strike out nonresponsive testimony was harmless, where it was a continuation of answer of witness to previous question in which answer witness had been interrupted by a later question, asked for apparent purpose of explaining part of answer already made.

8. Trial ⇨60(1)—No sufficient foundation held laid for attorney's testimony as to option given to purchase clients' property.

No sufficient foundation was laid for testimony of attorney as to an option, which he had given to purchase his clients' property, where option was given in his individual capacity and without any authority to bind either or all of his clients.

9. Appeal and error ⇨1056(6)—Any error in excluding attorney's testimony held harmless.

Any error in exclusion of attorney's testimony as to an option which he had given to purchase his clients' property was harmless where, if admitted, result would not have been changed.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by M. A. Careaga against Mary Theresa Moore, individually and as administratrix with the will annexed of the estate of Thomas W. Moore, deceased, and others. Judgment for defendants and plaintiff appeals. Affirmed.

Richards, Heaney & Price, of Santa Barbara (A. C. Postel, of Santa Barbara, of counsel), for appellant.

Harry W. T. Ross, of Santa Barbara, Frank L. Rabe, of Los Angeles, and Wm. G. Griffith, of Santa Barbara, for respondents.

HOUSER, J. The purpose of the action herein involved is to obtain a decree of court setting aside as fraudulent and void, first, a deed to certain real property comprising 268 acres of land, made by one Thomas W. Moore to his wife, Mary Theresa Moore, who is one of the defendants; secondly, a deed covering the same property, made by said Mary Theresa Moore to defendants Fox; thirdly, a mortgage likewise conveying the same property, executed by defendants Fox to Santa Barbara Trust & Savings Bank and assigned to the defendant Commercial Trust & Savings Bank; and, finally, to have said property declared a part of the assets of the estate of Thomas W. Moore, deceased, so that it may be used in payment of plaintiff's allowed claim of \$12,209.25 against said estate.

The property in question was formerly a part of a much larger tract of land belonging to Thomas Hope, now deceased, and who was the father of defendant Mary Theresa Moore and her brother James C. Hope. On

the death of Thomas Hope, defendant Mary Theresa Moore and James C. Hope each succeeded to an undivided one-twelfth interest in the estate of the father, Thomas Hope. On May 19, 1890, James C. Hope, who had succeeded to the title to the land here in question, conveyed it to Thomas W. Moore (husband of defendant Mary Theresa Moore) for a consideration of approximately \$20,000, which consideration was wholly paid by defendant Mary Theresa Moore.

On July 17, 1894, Thomas W. Moore conveyed the property to Mary Theresa Moore, and thereafter, to wit, on June 17, 1897, following Mr. Moore's discharge in bankruptcy proceedings on the preceding day, Mrs. Moore reconveyed the property to Mr. Moore. Approximately nine months later, that is to say, on March 24, 1898, Mr. Moore again conveyed the property to Mrs. Moore. It is the last-named instrument which plaintiff here seeks primarily to have set aside.

On March 22, 1911, Thomas W. Moore and Mary Theresa Moore gave a mortgage on the property to the Central Bank of Santa Barbara to secure a loan and future advances, which mortgage was later foreclosed. On October 13, 1917, which was within the time allowed by law for the redemption of the property from the foreclosure sale, the property was redeemed by Mary Theresa Moore with money obtained by her from the sale of the property to defendants Basil Fox and Thomas Fox, who procured the money necessary for the purpose by remortgaging the property to the Santa Barbara Savings & Loan Bank, which is the predecessor in interest of the Commercial Trust & Savings Bank, one of the defendants herein. The deed given by Mrs. Moore to defendants Fox, and the mortgage given by defendants Fox to the Santa Barbara Savings & Loan Bank are also the subject of plaintiff's attack.

Plaintiff's cause of action is based upon a claim allowed him in the probate proceedings in the matter of the estate of Thomas W. Moore deceased, which claim arose from an alleged indebtedness created by Thomas W. Moore in favor of plaintiff in 1914, or approximately 16 years after the deed in question was given by said Moore to his wife, Mary Theresa Moore, defendant herein. The deed was not recorded until shortly before the death of Mr. Moore and not until after his indebtedness to plaintiff was incurred. The evidence, however shows that in extending credit to Mr. Moore, plaintiff placed no reliance in Moore's apparent record ownership of the property. Plaintiff testified, among other things: "I didn't make an investigation to see who owned the ranch. I was not interested in it."

On the trial of the action, among other facts, the court found that "it is not true that said Thomas W. Moore was in straitened circumstances or heavily or at all indebted at the time he executed said deed of grant

to the defendant Mary Theresa Moore." The court further found that said defendant Mary Theresa Moore was without knowledge of any fraudulent intention of the said Thomas W. Moore in executing said deed and did not participate in any fraud, but accepted said deed in good faith, and that said deed was not made with the intention to injure or delay or defraud Moore's creditors. Furthermore, that the instrument of conveyance of said real property from Mary Theresa Moore to defendants Fox was not made or accepted by said defendants or by either of them with knowledge of the facts alleged in the complaint. Also, that it was not true that at the time of the execution of said last-mentioned conveyance said defendants Fox had actual or any knowledge of a certain action involving issues similar to those presented in the instant case, brought by George W. Southwick against Mary Theresa Moore, or of the fact that said conveyance from Moore to his wife was fraudulent, and that neither of said defendants knew of the pendency of said action brought by Southwick. In addition thereto, the court found that it was not true that at the time of the making or the delivery of the promissory note and mortgage from the defendants Fox to the Santa Barbara Savings & Loan Bank any officer of said bank had actual or any knowledge of the said action brought by said Southwick, or of the alleged fraudulent nature of the conveyance from Moore to his wife, or had actual or any knowledge that the conveyance from Mary Theresa Moore to the defendants Fox was made or accepted by said defendants with knowledge of the alleged fraudulent nature of said conveyance from said Thomas W. Moore. Judgment was rendered in favor of the defendants, and it is from such judgment that the appeal herein is taken.

Appellant urges that the evidence is insufficient to sustain the finding of the court to which reference has been had that:

"It is not true that said Thomas W. Moore was in straitened circumstances or heavily or at all indebted at the time he executed said deed of grant to the defendant Mary Theresa Moore."

The bringing of the action was authorized by the provisions of section 1589 of the Code of Civil Procedure, which is supplemented by the rule set forth in section 3439 of the Civil Code, and which declares in effect, among other things, that any transfer of property with intent to delay or defraud any creditor of his demand is void.

The complaint contains an allegation that "while said Thomas W. Moore was in straitened circumstances and heavily indebted said Thomas W. Moore, * * * without valuable consideration therefor and with intention to injure, delay and defraud his creditors and particularly this plaintiff, vol-

untarily conveyed to the defendant Mary Theresa Moore" the property in question.

For the purpose of sustaining such allegation of the complaint, certain evidence was introduced by plaintiff which tended to establish the fact that Thomas W. Moore was insolvent at the time he executed the deed of the property to defendant Mary Theresa Moore. The evidence to which attention has been directed is neither of the quantity nor quality which might be expected for the purpose of establishing so important a fact. One witness testified that subsequent to the transfer Mr. Moore had said that "he wanted to sell the ranch and hadn't been able to sell it, and wanted some money because he owed some money, and he wanted to pay his creditors." Other witnesses testified regarding certain alleged debts which were owing by Mr. Moore, but none of such witnesses was specific as to the time other than that it was in the years "1898 and 1899." There was, however, evidence that in 1896 the property in question had been sold to the state for delinquent payment of taxes and had not been redeemed until 1900; that about six months after the deed to Mrs. Moore was executed, Mr. Moore transferred certain leases to secure certain debts; that certain mortgages were executed by Mr. and Mrs. Moore on the property, some of them before and some of them after the date of the execution of the deed in question, and that during all such times Mr. Moore had no special business or occupation.

Considering such evidence, it is manifest that any person, however great his assets were, might be desirous of selling some property, or even all his property, if it were contained in one parcel and more salable or capable of inducing a higher price by reason of that fact, for the purpose of paying pressing debts, but which obligations in their entirety might be insignificant in amount as compared with the total value of his estate. It is likewise apparent that in these days when speculation is rife any man who is not extremely cautious or conservative may be led into making so-called "investments," with the result that to-day he may be in comfortable financial circumstances and within a week or a month hence may be utterly bankrupt. As is said in the similar case of *Windhaus v. Bootz*, 92 Cal. 617, 621, 28 P. 557, 558:

"In these pushing, busy times fluctuations in a man's financial condition are probably the general rule."

So that considering the fact that only nine months before the execution of the questioned deed Thomas W. Moore was discharged in bankruptcy proceedings, statements by witnesses made many years after the happening of the event, fixing the dates so loosely as "during the years 1898 and 1899" when Thomas W. Moore was "heavily indebted,"

are too speculative in their nature and leave too much room for conjecture. The fact that the taxes on the property were allowed to go delinquent in 1896 and not paid until 1900, while possibly indicating financial distress on the part of the owner of the property involved, is not conclusive; but, to the contrary, may be attributed to, and is readily explainable as, having occurred through mistake or oversight. With reference to the assignment of leases and the several mortgages given by the Moores on the property (some of which occurred before, and some after, the date of the deed in question), it need only be said that such transactions are at least of daily occurrence and are generally not thought necessarily to indicate financial difficulties to the extent of showing an intention to defraud creditors. The circumstance that Mr. Moore "had no special business or occupation," to say the least, is not a compelling reason for adjudging him guilty of fraud.

On the other hand, the evidence of Mr. Moore's lack of intention to hinder, delay, or defraud his creditors, if any, was also of a weak and unsatisfactory character. With relation thereto, Mrs. Moore testified in substance that, at the time the deed was made, she and her husband were living on the ranch; that she had invested money in blooded stock, and that Mr. Moore was looking after the business for her; that she did not hear him say whether he was indebted or not; that she knew he was solvent, explaining that she did not know that he owed any debts; and that he had income from the ranch in 1898. In part, she testified: "At that time I had money, but I don't know about Mr. Moore, because sometimes he would make sales and have money, and other times he would ask me for money." It also appeared in evidence that the property in question covered but 268 acres of land, but that in the month of March, 1898 (being the month and the year in which the deed in question was executed), Moore was assessed with 450 acres of the Hope ranch, besides furniture, wagons, harness, and horses—of what value, either as assessed or actual, not being disclosed—nor is there testimony as to the actual ownership of the property assessed.

[1] It thus appears that the total evidence regarding the pivotal point in the case was unreliable, not from a standpoint of lack of integrity in the several witnesses, but solely because of their failure to be specific or definite. The burden of establishing the fact rested upon plaintiff. The allegation contained in plaintiff's complaint, in substance that the conveyance was made by Moore "with the intention to injure, delay, and defraud his creditors," demanded that the evidence tending to establish that fact, or those facts, at least preponderate over the evidence or the presumption to the contrary. It is

said in the case of *Emmons v. Barton*, 109 Cal. 662, 671, 42 P. 303, 305:

"If such a conveyance be made with intent to defraud creditors, it is void as against the creditors; but the intent is a question of fact, and must be averred and proved. A voluntary conveyance is not prima facie fraudulent, and a fraudulent intent is not to be arrived at as a presumption of law. Civ. Code, § 3442; *Threlkel v. Scott*, 89 Cal. 351, 26 Pac. 879; *Windhaus v. Bootz*, 92 Cal. 617, 28 Pac. 557; *Bull v. Bray*, 89 Cal. 286, 26 Pac. 873."

[2-5] The allegation to which attention has been directed, if not involving criminal intent, is analogous thereto. The rule of the criminal law would forbid any presumption of guilt. To the contrary, at the outset the innocence of the act in question would be presumed and such presumption would continue until the guilty intent had been established beyond a reasonable doubt; and while the same degree of proof as to a criminal tendency would not prevail in a civil action grounded on fraud, the rule requiring that where fraud is alleged it must be clearly proven to the satisfaction of the court should obtain. In any event, in the instant case the effect and the value of the evidence was for determination by the judge of the trial court; and where the evidence is conflicting, the decision of the issue involved rests within the discretion and sound judgment of such judge and cannot be disturbed, except where it manifestly appears that such discretion has been abused. The question of the alleged fraudulent intent of Moore in making the conveyance not having been clearly shown by reason of his insolvency at or about the time the conveyance was made, or by reason of any other fact adduced in evidence, and there being some evidence, however slight, from which his solvency at such time might be inferred, it follows that the conclusion reached by the trial court that "it is not true that said Thomas W. Moore was in straitened circumstances or heavily or at all indebted at the time he executed said deed of grant to the defendant Mary Theresa Moore, * * * and that said deed was not made with the intention to injure or delay or defraud Moore's creditors," is supported by the evidence, and appellant's contention to the contrary cannot be sustained.

Certain other findings of the court are also attacked by appellant. They relate either to knowledge on the part of each of the several defendants of the alleged fraudulent intention of Thomas W. Moore in executing the deed to the property, or to knowledge or notice, actual or constructive of defendants Fox and Santa Barbara Trust & Savings Bank at the time or times when the deed and mortgage in which such defendants were interested were executed, of the pendency of a certain action involving issues similar in all respects to the issue raised in the instant

case. The record contains substantial evidence to justify the court in its several conclusions with reference to each of such findings, and, as hereinbefore indicated, the findings of the trial court are conclusive. In addition thereto, assuming that the evidence was sufficient to sustain the main finding, which is determinative of the case, that no fraud was practiced by Thomas W. Moore in making the deed to Mary Theresa Moore, the question of the sufficiency of the evidence to sustain the other findings would become immaterial.

Other points for reversal, such as the estoppel of Mary Theresa Moore, the legal effect of the knowledge and notice of all the defendants regarding the alleged fraudulent nature of the conveyance in question, as well as constructive notice to several of them with reference thereto, as obtained from the pendency of the action referred to in the findings and to which attention has been directed, are all likewise dependent upon appellant's claim of error in the main finding by the court to the effect that Moore had no fraudulent intent in making the conveyance of the property to defendant Mary Theresa Moore. The legality of such finding having been determined as against appellant's contention in that regard, each and all of the several legal questions predicated upon a state of fact thus found to not exist are unnecessary of determination by this court.

It is contended by appellant that certain errors of law were committed by the trial court in the reception or the rejection of evidence and which errors prejudicially affected the decision of the case in favor of the defendants.

[6] The first alleged error has to do with the refusal of the court to permit evidence relative to an interpretation requested of a witness of the terms of a real estate business partnership agreement which had existed between the witness and Moore by which "sales, rentals, leases, or other transactions" respecting the property owned by either party to the agreement were to be excluded from the partnership business. The witness was asked the question: "Do you know what property the party of the first part (Moore) referred to in that agreement?" An objection that the question was "an attempt to vary a written instrument by parol" was sustained. Counsel for appellant admits that "the question may possibly have been vulnerable to objection on other grounds." Assuming that appellant's suggestion is correct (of which we entertain no doubt), no error was committed by the trial court in sustaining the objection. *Spottiswood v. Weir*, 80 Cal. 448, 22 P. 289; *People v. Graham*, 21 Cal. 261; *Miller v. Van Tassel*, 24 Cal. 459. In *People v. Graham*, 21 Cal. 261, 266, it is said:

"If the court decides correctly in rejecting the testimony, it is not important whether the

best objection was made, or whether any objection was made."

[7] It is next urged that the court erred in denying plaintiff's motion to strike out certain testimony on the ground that it was not responsive to the question which had been asked. An examination of the record discloses the fact that the matter to which objection was made was a continuation of the answer of the witness to a previous question, in which answer the witness had been interrupted by a later question asked for the apparent purpose of explaining a part of the answer already made. In such circumstances appellant should not be heard to complain.

[8, 9] Appellant's final specification of error on the part of the court consists in the granting of a motion to strike out certain testimony. One of the attorneys representing the defendants had been called as a witness on behalf of the plaintiff and had been asked certain questions regarding an option which he had given to purchase the property in question. His evidence showed that he had given the option in his individual capacity and without any authority to bind either or all of the defendants. It appeared, however, that in some other minor matters he had represented the defendants or some of them in dealing with the property. From such considerations, aside from the question of the materiality of the transaction (which is neither explained by counsel for appellant, nor apparent to this court), no sufficient foundation was laid for the introduction of any evidence relating to the option. Besides, even though the evidence had been permitted to remain in the case, it would not have affected the one vital question as to whether or not the deed from Thomas W. Moore to Mary Theresa Moore was made for the purpose of injuring, delaying, or defrauding the creditors of Thomas W. Moore. As a consequence, no error was committed by the court.

The judgment should be affirmed. It is so ordered.

We concur: CONREY, P. J.; CURTIS, J.

70 Cal. App. 656

BIRCH v. MONROE, Glenn County Auditor.
(Civ. 2923.)

(District Court of Appeal, Third District, California. Jan. 20, 1925. Hearing Denied by Supreme Court March 19, 1925.)

I. Mandamus $\S$ 164(3)—Answer to school teacher's application for mandate to compel county auditor to allow his salary claim held not to present issue.

On school teacher's application for writ of mandate to compel county auditor to allow his salary claim, answer that defendant had no means of knowing whether there were outstanding claims against salary fund of school dis-

trict of previous year held not to present an issue, in view of Const. art. 9, $\S$ 6, Pol. Code, $\S\S$ 1696, 1700, and section 1543, subdvs. 3, 15, since defendant must have known whether there were any such outstanding claims notwithstanding Const. art. 11, $\S$ 18.

2. Evidence $\S$ 83(4)—County auditor presumed to have discharged official duty required by statute.

County auditor is presumed to have discharged official duty required of him by Pol. Code, $\S$ 1700, providing that no warrant shall be drawn in favor of any teacher unless officer whose duty it is to draw such warrant is satisfied the teacher has faithfully performed all duties prescribed in section 1696.

3. Evidence $\S$ 83(1)—Public officers presumed to be able to determine at any time amount of outstanding contractual obligations.

Public officers are presumed to be able to determine at any time amount of outstanding contractual obligations.

4. Schools and school districts $\S$ 18—County superintendent held not authorized to transfer any part of balance of maintenance fund to unapportioned county school fund.

County school superintendent was not authorized, in view of Pol. Code, $\S$ 1543, subd. 2, to transfer any part of balance of maintenance fund to unapportioned county school fund, where there was no excess of estimated receipts over disbursements to transfer.

Appeal from Superior Court, Glenn County; Claude F. Purkitt, Judge.

Application by J. E. Birch for writ of mandate against J. W. Monroe, Auditor of Glenn County. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

George R. Freeman, of Willows, for appellant.

Duard F. Geis, of Willows, for respondent.

FINCH, P. J. This appeal is from the judgment herein denying plaintiff's petition for a writ of mandate.

The plaintiff was a teacher in the Willows union school district during the fiscal year ending June 30, 1923. The board of trustees of the district issued to him an order for the payment of his last month's salary in the sum of \$191.66, payable out of the teachers' salary fund. The county superintendent duly examined and approved the demand, but the defendant county auditor refused to allow the same. Plaintiff alleged that there was in the funds of the district "a sufficient sum not otherwise appropriated and which sums are applicable to the payment of the claim of your petitioner." The answer affirmatively alleges:

"That a balance in excess of \$191.66 remains in the salary fund of the Willows union school district for the fiscal year 1921-22. That * * * said defendant has no means of knowing that all of the claims against said salary

fund for said fiscal year have been met and extinguished, or that claims against said fund evidenced by requisitions drawn by the board of trustees of said school district, examined and approved by said superintendent of schools, do not remain outstanding and unpaid."

The court found that at the time of the demand upon the auditor there was in the teachers' salary fund of the district "for the year ending June 30, 1922, the sum of \$1,424.84, and there was in said fund for the year ending June 30, 1923, the sum of \$7.21, both of which funds were made up of the school moneys provided for the payment of teachers' salaries."

[1, 2] It seems clear that the foregoing affirmative allegation of the answer did not present any issue. Affirmative allegations should be made positively or on information and belief. The allegation here in question does not even state that the auditor believed that there were outstanding claims against the salary fund of the preceding year. It must be presumed that the auditor knew whether there were any such outstanding claims. The salary fund is made up of the money provided by the state and 60 per cent. of that provided by the county. Article 9, § 6, of the Constitution provides:

"The entire amount of money provided by the state, and not less than sixty per cent. of the amount of money provided by county, or city and county, school taxes shall be applied exclusively to the payment of public school teachers' salaries."

Section 1696 of the Political Code provides:

"Every teacher in the public school must: * * * Second. Before taking charge of a school, and one week before closing a term of school, notify the county superintendent of such fact, naming the day of opening or closing. * * * Sixth. Make an annual report to the county superintendent at the time and in the manner and on the blanks prescribed by the superintendent of public instruction. Any teacher who shall end any school term before the close of the school year, shall make a report to the county superintendent immediately after the close of such term; and any teacher who may be teaching any school at the end of the school year shall, in his or her annual report, include all statistics for the entire school year, notwithstanding any previous report for a part of the year. The superintendent of schools shall in no case draw a requisition for the salary of any teacher for the last month of the school term, until the report required by this subdivision has been filed, and by him approved."

Section 1543, subdivision 15, makes it the duty of the superintendent of schools "to preserve carefully all reports of school officers and teachers." Section 1700 provides:

"No warrant must be drawn in favor of any teacher, unless the officer whose duty it is to draw such warrant is satisfied that the teacher has faithfully performed all the duties pre-

scribed in section sixteen hundred and ninety-six."

It is to be presumed that the auditor discharged the official duty required of him by section 1700, and if he did he knows whether the teachers employed during the fiscal year ending June 30, 1922, have been paid their salaries for that year. All trustees' orders for teachers' salaries—and they must pass through the auditor's hands—are required to state the monthly salaries of the teachers in whose favor they are drawn and the months for which such salaries are due. Section 1543, subd. 3. The auditor's own books must show what warrants have been drawn in favor of teachers and the amounts thereof. Since the teachers' salary fund can be used only for the payment of teachers' salaries and all the foregoing facts are presumptively within the knowledge of the auditor, his allegation that he has no means of knowing whether there are outstanding claims against that fund states no defense. It is true that the answer denies that there is a sufficient sum in the teachers' salary fund of the district not otherwise appropriated which is applicable to the payment of plaintiff's claim, but this is followed by the allegation that there is a balance in such salary fund of the fiscal year ending June 30, 1922, in excess of the amount of such claim, but that the "defendant has no means of knowing that all of the claims against said salary fund for said fiscal year have been met and extinguished." It is thus apparent from the answer, as well as from respondent's argument on appeal, that the only defense relied upon is that the defendant had no means of knowing whether there were outstanding claims against the fund of the previous year. The defense here relied upon is unlike that in the case of *Bilby v. McKenzie*, 112 Cal. 143, 44 P. 341, cited by respondent. In that case it was alleged in the answer and proved at the trial that there was an outstanding claim against the fund of the previous year, which was in litigation and which, if determined to be valid, would exhaust such fund.

Respondent's contention is based upon the provisions of article 11, § 18, of the Constitution, which provides:

"No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose."

[3] Respondent argues that, "as a corollary" to such inhibition, the balance in the fund of a preceding year cannot be used for any purpose other than the payment of liabilities incurred during that year until such liabilities have been extinguished; that the auditor has no means of knowing whether

there are any such outstanding liabilities until the same have become barred by the statute of limitations; and that therefore the balance in such fund, except as to liabilities incurred during the year in which the fund was raised, must be held in cold storage for four years, until all possible claims of that year against the same are barred by the provisions of section 337 of the Code of Civil Procedure. If this course were pursued, there would at all times remain in the treasury frozen balances of four fiscal years. Such a construction should not be given to the constitutional inhibition unless imperatively required. This constitutional provision has been held applicable only to contractual obligations. *City of Long Beach v. Lisenby*, 180 Cal. 52, 57, 179 P. 198. It is not to be presumed that public officers so inefficiently conduct the public business as to render it difficult or impracticable, on issues properly framed, to determine at any time the amount of outstanding contractual obligations. Particularly in a case such as this, where the fund in question is limited to one specified use and claims against the fund must be based upon contracts, the terms of which, as stated, are presumptively within the knowledge of the auditor, it would be a simple matter to establish whether or not there were any outstanding claims. There is no pretense that there are any such claims, but only that the auditor has no means of ascertaining whether there are any.

[4] Respondent contends that it was the duty of the superintendent of schools to transfer 80 per cent. of the balance in the funds of the previous year to the unapportioned county school fund. Section 1543, subd. 2, of the Political Code, provides:

"If at the beginning of any school year any school district shall have an unincumbered balance in its maintenance funds which combined with its total estimated income to be received

for maintenance purposes from all sources other than district taxes during the current year shall exceed a sum of money sufficient to maintain and conduct the schools of the district during the current year, then the county superintendent of schools shall in the month of August of that school year transfer a sum of money from the maintenance funds of that district to the unapportioned school funds of the county, or city and county, equal to eighty per cent. of the excess estimated as herein provided."

The evidence shows that on the 1st day of July, 1922, there was a balance on hand in the maintenance funds, including the teachers' salary fund, of the district of \$3,312.46. The estimated receipts from the state for the fiscal year ending June 30, 1923, amounted to \$11,910, and from the county, \$13,176, making a total of \$28,398.46. The estimated outstanding indebtedness at the same time was the sum of \$400. The estimated expenditures for the fiscal year ending June 30, 1923, amounted to \$34,100, including payment of the outstanding indebtedness of \$400. It was therefore necessary to levy a special tax amounting to \$5,701.54. The estimated receipts of the teachers' salary fund, computed upon the foregoing sums, amounted to a total of \$21,240.44, including the balance of \$1,424.84. The estimated salaries of teachers, then employed for the year ending June 30, 1923, amounted to \$23,500. In view of the foregoing, it is too clear to admit of controversy that the superintendent of schools was not authorized to transfer any part of the balance on hand on the 1st day of July, 1922, to the unapportioned county school fund. There was no excess of estimated receipts over disbursements to transfer.

The judgment is reversed, and the trial court is directed to enter judgment for plaintiff as prayed for by him.

We concur: HART, J.; PLUMMER, J.

70 Cal. App. 716

In re SCOTT. (Motion No. 4743.)

(District Court of Appeal, Second District, Division 2, California. Jan. 23, 1925.)

Attorney and client — 10—Practice in sister state held insufficient for admission to bar.

That attorney in sister state had practiced for 1 year and 10 months, and then removed to California, whence he claimed to have continued his practice by correspondence, *held* not sufficient showing of actual practice for 3 out of 7 years preceding application for admission to bar, required by Code Civ. Proc. § 279, to entitle him to admission.

Application by John Gardner Scott for admission to the bar as attorney and counselor at law, after adverse recommendation of State Board of Bar Examiners. Petition denied.

Arthur Lasher, of Los Angeles, and John Gardner Scott, of Prescott, Ariz., for petitioner.

WORKS, J. On April 21, 1924, petitioner filed his application for admission to the bar; the application being grounded upon a former admission and practice in the state of Arizona. The state board of bar examiners, after due investigation, recommended that petitioner be not admitted, and he asks that we now order his admission, notwithstanding the adverse recommendation.

The only question to be determined is whether petitioner's case as shown by affidavits filed in his behalf, is within the provisions of section 279 of the Code of Civil Procedure, which reads, in part:

"Any citizen * * * who has been admitted to practice law in the highest court of a sister state, * * * and who, after such admission, has been engaged in actual practice of law in such state * * * for a period of at least three years within the period of seven years immediately preceding the filing of his application, may be admitted to practice in all the courts of this state, * * * upon the production of his license, and satisfactory evidence that his license has not * * * been revoked and * * * that he has been so engaged in actual practice in such state, * * * as above provided. * * *

Without question, petitioner was admitted to practice by the highest court of Arizona on November 6, 1920, and, equally without question, his license to practice in that state has never been revoked. Has he been engaged in the "actual practice" of law there, however, for "at least 3 years within the period of 7 years immediately preceding the filing of his application," on April 21, 1924, here?

At the date of his admission in Arizona petitioner was a resident of that state. He continued to live there until September 17,

1922, covering a period of a little more than 1 year and 10 months, when he came to California. Everything shown by him or on his behalf concerning his practice in Arizona is as follows: It is averred in an affidavit made by petitioner and on file in this proceeding that immediately after his admission in Arizona "he engaged in the practice of law and opened offices for such purpose * * * at Prescott, * * * Arizona, and ever since has continued to be a member in good standing of the bar of Arizona and as subject to the orders of the courts of said state"; that "ever since his said admission * * * he has held himself out as a practicing attorney of said state, and in the course of his practice as such, he appeared as attorney of record for plaintiffs, or defendants, in numerous cases before the superior court in and for Yavapai county, and in other courts of said state, and conducted the prosecution, or defense, thereof"; that "from the day of his admission until on or about the 17th day of September, 1922, he remained in person, within the state of Arizona, but that, at the time last mentioned, he came to California for the purpose and with the intent to organize a certain fraternal association," and that "he did organize such association"; that "affiant is retained by said association as its attorney for the state of Arizona, and also as its chief counsel, to supervise and control its legal department, and any litigation it may become interested in, in any state, or place, whatsoever"; and that "such legal matters in Arizona as needed his attention, affiant has attended to by correspondence for the reason that, in his (affiant's) opinion, such course was more practical and economical than to have made numerous trips between California and Arizona which would have been necessary under the existing circumstances had affiant done otherwise." In a second affidavit made by petitioner in this proceeding it is averred that "the principal intent and purpose of his coming to California" on September 17, 1922, was "that it was necessary to have a personal interview with a client who had moved to California, in connection with a certain litigation then pending in the superior court of Yavapai county, Ariz., * * * before taking any further action therein"; that "at the time of coming to California affiant fully intended to, and in a short time, return to Arizona, has retained his law offices there and held himself ready so to do should the interests of his clients demand his personal presence"; that "before being admitted to practice in Arizona, affiant became interested in a corporation, * * * that after being admitted he did the legal work of said corporation and appeared as attorney of record in one or two cases therefor, but that said law work was the only such work in which he had an interest per-

sonal to himself; that affiant cannot recall all the work he did, during this time, in the course of his practice, but says that in the course he secured the acquittal of a young man charged with forgery upon trial; * * * that a client having been fined by the recorder's court upon a misdemeanor charge, he appealed and secured a verdict of not guilty before a jury in the superior court; that he foreclosed a mechanic's lien, probated an estate, foreclosed a mortgage, secured judgment against a bank in damages, secured a dismissal in a United States case"; and that, "after being admitted to practice law in Arizona, and those courts of the United States to which he is admitted [for he has a license to practice in the United States courts], he has at all times held himself out, as a practicing attorney of said courts, duly empowered and authorized to practice in said several courts." An Arizona trial judge writes a letter dated March 21, 1924, in which he says that petitioner "is a practicing attorney at the bar of this court, and has tried numerous cases before the writer as presiding judge." An affidavit of a practicing lawyer of Arizona contains the statement that petitioner "is an attorney at law, and has been a duly authorized attorney at law in the state of Arizona since November 6, 1920, and that he has been practicing in the town of Prescott, state of Arizona, since that date." An affidavit made by an individual at Prescott, Ariz., contains an averment that petitioner "has continuously had law offices in * * * Prescott, Ariz., from November 6, 1920, to [August 2, 1924], and that I have received law opinions from him in the last several months mailed to me here in Prescott, Ariz."

We can perceive in the record no showing that petitioner has engaged in the "actual practice" of law in Arizona, as that term is employed in our statute, since September, 1922, when he came to California, if we grant that his showing is sufficient as to such "actual practice" during the year and 10 months of his residence in Arizona after his admission there. His holding himself out as an Arizona lawyer and his maintenance of an office in that state since he has been in California amount, in our view, is no evidence that he "has been engaged" in practice in the sister state. There are general statements in one or two of the affidavits made by others than himself which might in some degree be helpful to him were it not for the showing made by the affidavits signed by himself. These latter affidavits apparently convey the idea that he has never been in Arizona since September, 1922. Certainly they do not show affirmatively that he has ever been there since that date. The showing as to his practice by mail, granting for the sake of argument that it can be con-

sidered as all, amounts in substance to nothing. On the whole, the showing as to an "actual practice" in Arizona since September, 1922, is negligible to the extent that it is practically imaginary.

Petition denied.

We concur: FINLAYSON, P. J.; CRAIG, J.

70 Cal. App. 567

PEOPLE v. DEGNEN. (Cr. 1068.)

(District Court of Appeal, Second District, Division 2, California. Jan. 13, 1925.)

1. Indictment and information $\S$ 150—In testing indictment on demurrer, face of indictment alone may be searched.

In testing indictment on demurrer, face of indictment alone may be searched.

2. Indictment and information $\S$ 128—Indictment making different statements of same offenses in separate counts must show on face that crimes were coincident or connected.

Indictment under provision of Pen. Code, $\S$ 954, allowing different statements of same offense to be alleged, must show on its face that crimes charged were coincident or connected in their perpetration.

3. Indictment and information $\S$ 128—Indictment charging in separate counts, rape and assault with intent to murder, held demurrable.

Indictment in one count charging assault with intent to kill, and in another charging rape, without alleging that they were separate versions of same transaction, held insufficient under Pen. Code, $\S$ 954, as against demurrer that more than one offense was charged.

4. Indictment and information $\S$ 130—Every rape includes assault.

Every rape not only originates in but itself includes assault.

5. Indictment and information $\S$ 130—Indictment charging assault with intent to murder and rape held not demurrable.

Under Pen. Code, $\S$ 954, permitting indictment to charge different offenses of same class of crimes, indictment in one count charging assault with intent to murder, and in another alleging that it charged different offense of same class, to wit, rape by force and violence, held not demurrable.

6. Criminal law $\S$ 161—Order in which clerk of court read two verdicts finding accused guilty under single indictment held not to raise issue of former jeopardy.

Where accused at same trial was convicted of two crimes charged in indictment arising from same events, or connected in their occurrence, order in which clerk of court read verdicts did not make rule of former jeopardy available.

7. Criminal law ⚭1205—**Accused, convicted of two offenses charged in single indictment, should be punished for greater offense.**

Accused, convicted of two offenses charged in single indictment under Pen. Code, § 954, should be punished for greater offense.

8. Rape ⚭40(3)—**Evidence of unchaste acts of prosecutrix with others than accused held admissible to show consent.**

In prosecution for rape by force, unchaste acts of prosecutrix with others than accused may be shown to disprove allegation that accused used force and that prosecutrix was unwilling.

9. Rape ⚭40(2)—**Evidence of prior unchaste acts of prosecutrix with accused held admissible as tending to show her consent.**

Evidence of prior unchaste acts of prosecutrix with accused is admissible as tending to show her consent to act charged.

10. Rape ⚭1—**Principal elements of "rape" are commission of act and lack of consent by prosecutrix.**

Principal elements of "rape" are commission of act and lack of consent by prosecutrix.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Rape.]

11. Rape ⚭36—**Burden on people to prove commission of act and lack of consent by prosecutrix.**

Burden is on people to prove commission of act and lack of consent by prosecutrix.

12. Criminal law ⚭338(1)—**Accused should be permitted to introduce evidence contradicting proof presented by prosecution.**

Accused should be permitted to introduce evidence contradicting proof presented by prosecution for purpose of establishing facts necessary for prosecution to prove.

13. Rape ⚭44—**Testimony of prosecutrix as to character of her previous associations with accused held admissible to show she had right to trust him.**

Testimony by prosecutrix showing extent of association with accused on former occasions when she was alone with him was properly admitted to show that she had a right to trust herself with him without fear.

14. Witnesses ⚭344(2)—**Accused held entitled to cross-examine prosecutrix to show she had previously submitted to his carnal embraces.**

On cross-examination of prosecutrix, in a prosecution for rape, accused may ask questions tending to prove that she had previously willingly submitted herself to his carnal embraces, or tending to affect her credibility, limited only by her testimony on direct examination, especially where she testified that accused's previous conduct had led her to believe that she could trust him.

15. Witnesses ⚭349 — **Limiting accused's cross-examination of prosecutrix to direct questions as to immoral relations between them on specified occasions, held error.**

In a prosecution for rape it was error to limit accused's cross-examination of prosecu-

trix to direct questions as to immoral relations on specified occasions, but he should have been permitted to prove her misconduct indirectly by proof of circumstances from which jury might infer her misconduct.

16. Criminal law ⚭1159(2) — **Jury's verdict cannot be disturbed by court of review, where there is substantial evidence to support it.**

Jury's verdict cannot be disturbed by court of review, where there is substantial evidence to support it.

17. Criminal law ⚭1186(4)—**In determining whether errors at trial require reversal, question is whether verdict might have been different but for errors.**

Under Const. art. 6, § 4½, whether errors at trial require reversal depends on whether verdict might have been different but for such errors, and not whether there is substantial evidence to support verdict.

18. Criminal law ⚭1168(4)—**Errors in rulings on admission of evidence and in limiting accused's cross-examination of prosecutrix in rape case held to require reversal.**

Errors in ruling on admission of evidence, and in limiting accused's cross-examination of prosecutrix in rape case, held material under Const. art. 6, § 4½, and required reversal.

Appeal from Superior Court, Los Angeles County; M. W. Conkling, Judge.

Michael Degnen was convicted of assault and of attempt to commit rape, and he appeals. Reversed.

Le Compte Davis, Wm. M. Bowen, and McDonald & Thompson, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

WORKS, J. Defendant was tried under an indictment in two counts. The first count, shortened by the omission of mere formal statements, reads that defendant "is accused * * * of a felony, to wit, assault with intent to murder, committed at and in the county of Los Angeles * * * as follows, to wit: That, on or about the 30th day of July, 1923, * * * the said defendant did willfully, unlawfully, and feloniously and with malice aforethought by means of a certain deadly weapon, to wit, a certain cord capable of strangling and killing, and with his hands, feet, and body, make an assault upon the person of" the complaining witness, "with the intent then and there, willfully, unlawfully, feloniously, and with malice aforethought, to kill and murder the said" complaining witness. The second count, similarly shortened, is to the effect that defendant, "for a further and separate cause of action, being a different offense of the same class of crimes and offenses as that set forth in count 1 hereof, * * * is accused * * * of a felony, to wit, rape, commit-

ted at and in" the same county " * * * as follows, to wit: That on or about" the same date " * * * the said defendant did then and there, willfully, unlawfully, and feloniously, and with force and violence have and accomplish an act of sexual intercourse with and upon the" complaining witness, "without the consent and against the will of the" complaining witness, "and she, the" complaining witness, " * * * then and there resisted the accomplishment of such act of sexual intercourse." Under the first count of the indictment defendant was convicted of an assault. Under the second count he was convicted of an attempt to commit rape. Defendant appeals from the judgment of conviction and from an order of the trial court denying his motion for a new trial.

Appellant contends that the trial court erred in overruling his demurrer to the indictment. One of the grounds of demurrer was that "more than one offense is attempted to be charged in the said indictment, except as provided in section 954 of the Penal Code, * * * in this, * * * that the said indictment charges, or attempts to charge, two different offenses which do not appear from the said indictment to be connected together in their commission, and which do not appear from the said indictment to be different statements of the same offense, and which appear from the said indictment not to be different offenses of the same class of crimes." Section 954, so far as it is material to the points presented under the demurrer, reads:

"The indictment or information may charge two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes or offenses, under separate counts. * * *"

[1-3] The integrity of the indictment is sought to be upheld under that portion of section 954 which allows the setting up in separate counts of "different statements of the same offense," but the effort is based upon the evidence in the cause, instead of upon the face of the pleading, to which alone we may look in determining its effect when tested by the demurrer. We search the indictment in vain for any language which indicates that the pleader attempted by it to state two versions of the same occurrence. Under the allegations of the pleading the events stated in the two counts may well have been far apart, both as to time and place. They may have occurred at opposite ends of the twenty-four hours constituting the day mentioned in each count, and, by force of that fact, they may have transpired at opposite corners of the county named in each count. Some time after section 954 was first put into a shape similar to its present form an information was before the court in which it was alleged in a second count that the defendant committed the offense therein denounced "as a part

of the same act, transaction or event alleged in the first count" (People v. Piner, 11 Cal. App. 542, 105 P. 780), the pleader who framed the information thus apparently evincing a correct understanding of the import of the section. In truth, under an earlier form of the enactment which allowed a statement of the same offense "in different forms under different counts," the Supreme Court had positively decided that "this must be done in such a way as to show clearly upon the face of the indictment or information that the matters and things set forth in the different counts are descriptive of one and the same offense." People v. Garcia, 58 Cal. 102. In another case, decided when section 954 stood somewhat as it does at present, an information was before the court in which it was alleged in a second count, as appears from parts of the record not referred to in the report, but which we have examined, that the offense in that count denounced was "a second, separate, and different statement of the same act, transaction, and event" mentioned in a first count. The court said: "Both counts in stating the offense with which defendant was charged related to and were predicated upon the same act and transaction, and, hence, the information was not subject to demurrer upon the ground" that it stated more than one offense (People v. Danford, 14 Cal. App. 442, 112 P. 474), leaving it logically to be inferred that the pleading would have been demurrable had it not contained the quoted allegation. It was said in a later case that in "charging under this section [954] it is of course necessary that care be taken to make it clearly appear that the offense set forth relates to but one act, transaction or event." People v. Miles, 19 Cal. App. 223, 125 P. 250. Finally, it was said by the Supreme Court:

"Where it is sought to charge in one indictment or information different offenses all relating to the same act, transaction, or event, as is now permitted by section 954 of the Penal Code, we are of the opinion that, under our practice where one of the grounds of demurrer provided by law is that more than one offense is charged except as provided in section 954 (Pen. Code, § 1004, subd. 3), the pleading should fairly show on its face that the offenses so charged do all relate to the same act, transaction, or event" (People v. Plath, 166 Cal. 227).

The transmutations in the form of section 954 have not been such as to render these cases now inapplicable in principle. We are satisfied that the indictment now before us cannot be upheld as showing in separate counts "different statements of the same offense."

We are equally convinced of the failure of the indictment when tested by that part of section 954 which allows a statement of "two or more different offenses connected together in their commission." The cases cited

in the last preceding paragraph are surely authority for the statement that an indictment based upon the clause just quoted must show upon its face that the various crimes charged in its several counts were coincident or connected in their perpetration. In the present instance the possibility of such a connection is left entirely to the imagination.

[4, 5] We turn, then, to the clause of the section which permits a statement in separate counts of "two or more different offenses of the same class of crimes or offenses." Notwithstanding the attempt of the Attorney General to sustain the indictment under another clause of the statute, it is evident that he who draughted the pleading intended it to stand under the language of the section which has just been quoted. He says in his pleading that the crime denounced in the second count is "a different offense of the same class of crimes and offenses as that set forth" in the first count. Can the indictment be upheld upon the score thus selected by the pleader? We think it can. True, it may appear at first glance that assault with intent to murder and rape cannot belong to the same class, whatever scheme of classification the Legislature may have had in mind when the present section 954 was enacted. A closer scrutiny, however, creates doubts as to the validity of this appearance. The crime first mentioned is an assault, and every rape not only originates in, but itself includes, an assault. Then, the Supreme Court, in *People v. Jailles*, 146 Cal. 301, 79 P. 965, when dealing with another phase of section 954, has justified a close inspection of the indictment before us in order, unrestricted by too close rules of interpretation, to ascertain the intent and purpose of its draughtsman as conveyed to appellant. In that case the pleader had joined a count upon rape by force and violence with one upon rape because of the nonage of the victim; both acts being alleged to have been committed upon the same day and upon the person of the same female. The court said:

"It must be conceded that it would be preferable for the pleader endeavoring to set forth one offense in different forms under different counts to expressly state in the information that the matters and things so set forth are descriptive of one and the same offense. Such a statement would obviate all question as to the intention of the pleader. We think, however, that, despite the absence of such a statement in the information before us, it is manifest that it was sought to charge but one offense—viz., one rape committed on Maria Tampo on May 10, 1903. The nature of the allegations in the two counts shows this very clearly. The only difference between the allegations of the two counts is that force, violence, and resistance are alleged in one without allegation as to age, while in the other is the allegation as to age without any allegation as to force, violence, and resistance. The allegations of each show the offense of rape, com-

mitted on the same person on the same day, and indicate that the district attorney was simply endeavoring to set forth the same transaction in different ways. * * *

This conclusion as to the effect of the information against Jailles, although it had to do primarily with the element of time, an element with which we are not here greatly concerned, inspires these views concerning the indictment now in question: It is alleged in the first count that the attempt to murder was essayed by means of a certain cord used for the purpose of causing death by strangulation. The second count opens with the allegation that the crime about to be charged therein was of the same class with the one charged in the first count; this significant language being followed by a charge of rape with force and violence. Taking the entire pleading together, why may it not be said that appellant was sufficiently notified by it that the two crimes, each involving an assault, as it did, were attempted to be committed by the same or similar means—a means specifically described in the first count but not described in the second—a means through which, in the one instance, appellant sought to deprive the complaining witness of her life, while in the other he actually deprived her of her virtue? We think it may. It appears to us, on the whole, that the indictment, when considered under the clause of section 954 now under consideration, was not obnoxious to the demurrer. As it alleged two offenses, both in the nature of assaults, as having been committed on the same day, in the same county, and upon the body of the same person, we think the section was satisfied. The only cases we have found which bear upon the portion of the section relating to offenses of the same class are *People v. Murnahan*, 32 Cal. App. 211, 162 P. 422; *People v. MacDonald*, 53 Cal. App. 488, 200 P. 491, and *People v. Mayen*, 188 Cal. 237, 205 P. 435, 24 A. L. R. 1383. They have not been of material assistance, however, in determining the present question.

[6] Appellant argues with great vigor that his conviction of the lesser charge of an assault under the first count was tantamount to an acquittal of the charge embraced in the second count, and, more especially, of the charge of which he was actually convicted under the second count. This point is made, of course, from the basis upon which respective counsel have argued the question arising upon the demurrer to the indictment. As that pleading cannot be upheld as containing different statements of the same offense, but only as an attempt to plead separately committed crimes of the same class, it is possible that we might justify ourselves in a disposition of the present point upon that consideration. We have concluded, however, to determine the point now under discussion from the standpoint of the evidence, not from that of the indictment, as the evidence indis-

putably shows that appellant was convicted of two crimes which either arose from the same transactions or events or which were connected in their commission. This state of the evidence is so plain that the remark cannot be forborne that the draughtsman of the indictment must not have made it a statement of separate crimes of the same class. We take up, then, the point made by appellant. The contention that his conviction of the lesser offense was an acquittal of the greater is predicated of several decisions. These are, mentioning only California cases, *People v. Ny Sam Chung*, 94 Cal. 304, 29 P. 642, 28 Am. St. Rep. 129; *People v. Defoor*, 100 Cal. 150, 34 P. 642; and *People v. McDaniels*, 137 Cal. 192, 69 P. 1006, 59 L. R. A. 578, 92 Am. St. Rep. 81. Authorities from other jurisdictions are also relied upon, but, as they are to the same import as the cases decided by our own courts, it will not be necessary further specifically to mention them. The cases upon which appellant places reliance are all to the effect that, when a defendant has been acquitted or convicted of a particular offense, and he is subsequently and in another trial attempted to be prosecuted for another offense against the same property right or against the same person, both offenses arising upon the same facts and one being or constituting a necessary element in the other, the second prosecution must fail for the reason that the defendant has been once in jeopardy. In a case of that character it is not incorrect to say that the jeopardy of the defendant at the first trial substantially amounts to an acquittal of the offense for which it is sought to try him at the second, but this is not such a case. Here defendant was tried at one and the same time and upon the same evidence under both of the charges against him, and the verdict as to each offense was returned at the same time. Appellant's point is apparently made to depend upon the fact that the verdict finding him guilty of an assault was read by the clerk, after the two were handed to him by the foreman of the jury, before the reading of the verdict finding him guilty of an attempt to commit rape, but this circumstance surely cannot make available the cases cited by him. One of the verdicts must necessarily have been read by the clerk before the other was read, just as the first word of each verdict must have been read before its last word. Doubtless the verdicts were read as they were for the reason that the one first read was responsive to the first count of the indictment, while the one last read responded to the second. This was the logical course for the clerk to take in the reading, but the reading in that order, or, in fact, a reading in what may be termed an inverse order, cannot change the indubitable fact that there was but one trial, with two verdicts rendered at the same time pursuant to the trial.

[7] The particular point presented by ap-

pellant is thus seen to be utterly devoid of merit. Whether one of the verdicts must fall on the ground that one of the offenses of which appellant was found guilty is included within the other, both having been found after one trial and at the same time, granting that one offense is included within the other, is a question not specifically presented. It is probable, however, that we should consider that the point is sufficiently made, within the broad lines of appellant's argument, that the verdict under the second count, finding appellant guilty on the more serious charge, should fall under the circumstances which actually exist in the cause. This specific point is also without merit. Although section 954 of the Penal Code allows the joinder in one indictment of two or more charges under different counts, where the defendant by his one act or through one transaction violates two or more sections of that Code, and permits as many verdicts as there are counts, it is possible that the accused is punishable upon but one of the charges, under the provisions of section 654 of that Code. By this it is not meant, however, that, where, as here, a defendant is convicted upon two charges made under section 954, he is to be punished only for the commission of the lesser offense of which he is found guilty. It was said in a quotation found in *People v. Defoor*, supra, a case, it will be remembered, in which a second separate prosecution against the defendant was attempted, "the prosecutor may carve as large an offense out of it [a single transaction] as he can, but it is said 'he must cut only once.'" If we grant without deciding that, because of section 954, no punishment may be imposed under one of the verdicts in the present case, and that a jury, like a prosecutor, can cut effectively but once when it carves out of the facts of a single transaction, it must be true that, like the prosecutor again, the jury may carve as large an offense as it can. It seems obvious that, if appellant must go unpunished under either of the verdicts, it must be under the one finding him guilty of the lesser offense, not the one convicting him of the greater. We do not decide, however, that either verdict must fall, for the reason that, as we shall now point out, we are of the opinion that both were erroneously arrived at.

The trial judge limited counsel for appellant in his cross-examination of the complaining witness, and appellant contends that the barrier thus supervened was so injurious to his substantial rights that a reversal must follow from the action of the judge in erecting it. It is also insisted that the judge was guilty of prejudicial conduct in certain remarks which he made in the presence of the jury, in connection with the rulings by means of which he limited the cross-examination of the prosecuting witness. The two points may well be considered together.

The prosecuting witness, a married woman

living apart from her husband, and whom we shall henceforth designate as E. C., had known appellant for a period of nearly four months preceding the happening of the events upon which the indictment was based. He had frequently visited her at her home, and had often driven her about in his car. He had an office or laboratory in a certain business building, and E. C. had gone with him to that place in the evenings, sometimes as often as three or four times each week, where, as she herself testified, she often spent several hours with him. On these occasions, she said, she witnessed the conduct by him of certain laboratory experiments in which she, a woman of considerable mental endowment, judging from the evidence, was much interested. The residence of E. C. was in that part of Los Angeles known as Hollywood, while appellant's laboratory was in the business portion of the city proper. In their joint excursions into the field of experimentation E. C. and appellant became desirous of subjecting a photographic camera to certain tests, and they determined, according to E. C., that these tests could best be made at San Diego. They accordingly arranged a trip thither. E. C. says it was planned that she should go to San Diego by railroad train, and that appellant should proceed to that city in his automobile, that they should meet there, and that they should also be met by a married couple who were to act as chaperons during the trip for the benefit of E. C. The latter says that the journey was taken as contemplated, but that when she met appellant in the lobby of a hotel at San Diego he informed her that through some misunderstanding the married couple would not be able to enact the roles assigned to them in the preparations made for the sojourn in the southern city. E. C. says that she was dissatisfied with this outcome, and insisted upon returning immediately to Los Angeles. Appellant then offered to drive her to that city. She accepted the offer, and the return journey was commenced in the manner indicated. However, according to E. C., appellant became ill before La Jolla was reached, so ill that they both agreed that the journey could not at once be completed, and they stopped at the Cabrillo Hotel at La Jolla to await the recovery of appellant. They remained at the hotel that night. At noon the next day appellant told E. C. that he had received a telephone message from the married couple to the effect that they would arrive in San Diego from Los Angeles on the evening train of that day. E. C. and appellant accordingly remained at La Jolla a second night, and drove to San Diego the next morning. Their friends were again not in evidence, and E. C. says she told appellant the situation looked strange, and insisted upon driving at once to Los Angeles. The journey was undertaken, and the two reached Los Angeles that evening. E. C. testified that her railroad trip to

San Diego was on a given Saturday, and that she and appellant reached Los Angeles on the return trip on the following Monday. It is to be understood that in narrating the events of the San Diego trip we have stated the version of E. C. throughout. Considering now for a moment the facts more immediately touching the charge against appellant, the alleged crimes having been committed in E. C.'s residence at Hollywood, E. C. testified that she and appellant had never indulged together in the sexual relation; that she resisted his attack upon her on the date named in the indictment; and that she succeeded in preventing the accomplishment by him of the final act which it was his purpose to perform.

A consideration of the two points presented by appellant involves the necessity of making copious quotation from the record. When the direct examination of E. C. was about to be concluded an argument took place, but no showing is made by the record as to what precipitated it. At the conclusion of the argument the trial judge said in the presence of the jury:

"I am familiar with the cases; they relate entirely to alleged immorality by the prosecuting witness occurring prior. * * * If it was a case where there was consent, the consent becomes material. Supposing the defense should be that the defendant did not do it and was not there at all, and, of course, inquiry into the moral character of the prosecutrix would be absolutely futile and immaterial from every standpoint; and the court is going to permit you to inquire point-blank as to any claimed immorality you may claim existed prior to that time between the defendant and this witness, or, for that matter, any other witness, but it will have to confine itself to a short inquiry because we are not trying the witness, we are trying the defendant as to what took place on a certain date. * * * You are not getting anywhere in this trial by going into evidence going into everything that every person did in their whole life and all those matters. As I understand the decisions they relate point-blank to the proposition that it would tend to prove a consent if there are previous immoralities of the prosecutrix, and that is all. If there are any alleged immoralities, the court will permit you until it appears to the court to be entirely immaterial to inquire whether there was such immorality, but I am not going to inquire into the proposition of where people went, whether they went by stage or rail or some other way, and where they stayed and what they said on the way and all those things. This case has to be cut shorter than that. It is entirely improper to get outside of the main case which concerns what happened on a certain evening in Hollywood."

After a few questions addressed to E. C. on further direct examination, the cross-examination then proceeded. It appeared that a friend of E. C.'s had asked permission to bring appellant to her home, and it was in this manner that the meeting of the two came about. It was the custom of E. C. to deliver lectures at her home fre-

quently in the evenings, and on one of these occasions, on April 6, 1923, appellant first appeared at her place of residence with the friend. On the next Sunday evening succeeding that date appellant called upon E. C. at her home and some days afterward—she testified she could not say whether it was as much as a week later or whether it was not—she made the first visit to his laboratory. With this preface we quote from the record:

"Q. By Mr. Davis [counsel for appellant]: I will ask you this— * * * you say you went to the laboratory to perform some work. State what was done, any work that took you three hours to do or any longer time.

"Mr. Burke: Objected to, not material to the issues in this case.

"The Court: Sustained.

"Q. * * * Isn't it a fact that you went there and stayed with Mr. Degnen until about a quarter after 1 o'clock, and that there was no experiment of any kind conducted by you or him at that time? A. That is not true.

"Q. Well, then, please tell us what the experiment was."

Upon objection being made to this question the following occurred:

"Mr. Davis: I think we have a right to go into that.

"The Court: No;—in regard to previous actions that relate to some cleancut immoral nature or— All others are entirely immaterial, and we are not going to investigate.

"Mr. Davis: Except to get at what she says was done at that time. This testimony was all introduced for the purpose of showing one thing—we realize that as between these two people—

"The Court: I do not care what you realize, unless they amount to immorality. You can ask anything of immorality, and I will permit that, but we are not going over her whole life. * * * It is utterly out of the question to attempt to go into everything that has happened between these people during an acquaintance of two or three years— * * * If you think and believe it is going to be material to prove that an act of adulterous intercourse took place on this occasion mentioned in the information, that it was with the consent of the prosecuting witness, you have a right to show previous acts of immorality, but if it did not turn out that way, the question of consent is not material, of course. As soon as that time arises, the court would cut off any further inquiry, but the court would not anticipate your defense, and will assume, if any situation is going to arise which would permit the introduction of testimony of that kind and therefore allow you to ask whether or not she has been guilty of any immoral act with the defendant, and possibly even beyond that, but the court is not going to go over in detail everything that has been said and done with this witness in her whole life, with the defendant or anybody else.

"Mr. Davis: I am not going to go over the lady's life—I want that portion of her life that she has given to the jury—I want this because everybody, and yourself and all of us, must realize that this man is charged with two of the most serious offenses known to the law,

* * * and I must rely upon circumstances to establish his defense, or upon the breaking down of her testimony by showing it was improbable in this instance. The very largest latitude is allowed, and * * * we will ask your honor, in view of the seriousness of this charge, in view of the jeopardy in which this defendant now stands * * * to give us an opportunity to lay before your honor authorities upon that subject, and in order that it might not come before the jury we would ask that they be sent out until this matter can be heard. Your honor must realize that this man's liberty is worth something, his reputation is worth something. * * * We will take only a short time. * * * It is going to arise and going to be more insistently urged on our part when it comes to this matter your honor is speaking of, with reference to the San Diego trip. It is of most vital importance, and around it hinges the circumstances upon which we hope to establish the innocence of this man. * * *

"The Court: It makes no difference if she might be guilty of some immorality, much less would it be material if she was given to some indiscretion, or if she did something some more prudent woman would not have done—but here is the case—we are trying the proposition of an alleged rape and assault with intent to commit murder that occurred on a certain day. There must be an end to all things, and we cannot go into everything in the world. I desire to be fair with the defendant and give him every opportunity, but you must remember there is a reason why the law does not permit a person to be cross-examined with respect to many things, and the reason is this: In the first place no one's memory is perfect, and no witness can be presumed to remember with precision everything that has happened in his or her life, so that it is utterly impossible. If you should cross-examine a witness over her entire life or over years of her life and not find some point where her memory would be bad, you would say she is not telling the truth and committing perjury; the law does not permit that inference, her recollection is supposed to be connected with respect to things material, and she is supposed to be able to correctly remember them and to testify to them, but you cannot go into a great mass of conversation covering years—it is unreasonable as to the witness and unreasonable as to the court and to the public, who have a right to expect there will be a reasonable dispatch of business; if it arises in the course of the case that the intercourse between the plaintiff and defendant upon the night in question was with her consent and not as a result of force, then the defendant is permitted to show by any competent testimony that the woman in the case is an immoral woman, solely for the reason of showing the probability it was with her consent. That is the only element in the case upon which any question can be raised as to previous conduct of the prosecuting witness. If it is not for that one thing, the testimony would be limited absolutely to what took place that night, and the corroboration, if any. It is for that reason, I say, we are absolutely precluded, both by common sense and by the law, from going into details, into every conversation which ever took place between these people months before, perhaps years before—

both for the reason that it was improbable, that being immaterial that it was implanted on her memory at the time, and therefore not proper to expect a person to remember, and would therefore not be valuable for the purpose of cross-examination to test her recollection or truthfulness. If anything arises, a serious question as to whether or not the intercourse had upon that occasion was by the consent of the prosecuting witness, then for the first time there will arise the query as to whether her past character was or was not such as to warrant the inference she consented to it, and with respect to that we cannot try every instance it is claimed there was some immoral act. We can only touch upon it lightly. The principal case, we must stay with that, and cling tightly to that as possible, only touching upon the other issues quickly and to the extent that it is important to find out whether true or false, if there was some immorality, and this question of conversation is bound to be futile, unless there was some immoral act. It is only to find if there was some adulterous intercourse prior to that time that will raise the consent upon the occasion in question.

"Mr. Davis: * * * I have recently looked up this matter, and your honor's theory that you cannot show other acts of adultery or other acts of sexual intercourse except where the party admits that he was guilty of the act he was charged with and says it was with the consent, we have the authorities in abundance that a man who is charged with sexual intercourse upon a minor under age, and he stands denying it every minute, we can show that the court says that the prosecution may show that at various other times prior to that time he had sexual intercourse with that girl. He may, because it is material to show, he may show that she did.

"The Court: I admit that you can show that.

"Mr. Davis: It is not with consent, because consent did not avail him anything. It does not have to be shown that he had sexual intercourse with her consent, but it goes down to the jury that she must establish it beyond a reasonable doubt before we are entitled to put in any evidence, or before we are called upon to put in any testimony, and the jury are entitled to have all the circumstances leading up to this alleged act before them, and to determine before they hear one word from him as to whether or not her story is the truth, and whether or not there was any such thing as that occurred. Now, that is what I am trying to get. * * *

"The Court: I agree with you entirely on that. The only question is, I am not going to permit every little episode in their lives to be threshed out separately. If there is any time you can bring to the attention of this witness where you claim she was guilty of some immoral act with the defendant, with somebody else—

"Mr. Davis: It must be apparent to your honor that she would not say that she was; it must be apparent * * * if I ask her and she said no, I am bound and I could not put on a witness to disprove it. Then where is your honor placing me at this moment?

"The Court: No. I don't say that is correct. I say it might subsequently arise it is immaterial, and that is where you are taking your chance.

"Mr. Davis: I am taking no chances. * * * I am not going to be driven into the direct question, 'Was any immoral act committed,' and she says, 'No.' * * *

"The Court: You are not bound by it, but it might be immaterial. I am not going to try every incident in their life. If there is any particular act of immorality you want to bring out I will permit you to bring it out.

"Mr. Davis: We cannot bring it out by asking her the single question if that is so.

"The Court: That means you can go inquiring along all her life to see if you can find something.

"Mr. Davis: I do not want to take her over any territory Mr. Burke [the deputy district attorney] did not take her over in placing her story before this jury. * * *

"The Court: What was the last question, Mr. Reporter? (Question read.)

"Mr. Davis: She detailed to the jury all that occurred in that laboratory at that time, and we want to show that nothing of that kind occurred, and I was cross-examining her to find out if anything she said did occur there, and to find out I asked her, and I ask you now what it was, to detail to this jury what those experiments were, what they consisted of.

"The Court: Objection sustained. I don't care what they were.

"Mr. Davis: I have forgotten, and I beg your honor's pardon, if I may transgress your rules, but I want to keep the record straight in this case, and I will ask this question: Q. Tell us the conversation then that occurred there that first night during the hours that you were there between you and Mr. Degnen?

"Mr. Burke: That is objected to as incompetent, irrelevant, and immaterial, not bearing upon any issue.

"The Court: If there is anything you remember you have not related to the jury you may state it. A. There is no—

"Mr. Davis: Your honor, on cross-examination are we compelled simply to let her restate what she said on direct examination? That is not the rule of cross-examination as I understand it.

"The Court: No, but it is there once and it is not necessary to say, 'Have you testified so and so, or this, that, and the other?' We will never get anywhere with that. You say you don't remember anything else? A. No, sir; there is nothing I have not already stated.

"The Court: That is enough for that.

"Q. By Mr. Davis: You stated, Mrs. Witness, you and Mr. Degnen were down there, and you took notes? A. Yes.

"Q. Now, where are your notes? A. I have some. Some of them are in Mr. Degnen's handwriting at home, and if necessary I can produce them. * * *

"Q. And didn't Mr. Degnen take some notes himself? A. If he did, I really don't know, because you must understand that it was not an exchange of knowledge at that time; Mr. Degnen acted in the position of my preceptor; he was teaching me.

"Q. Then I would like to know what he taught you that night.

"Mr. Burke: I object to that as incompetent, irrelevant, and immaterial.

"Q. By Mr. Davis: Tell us what he taught you at that time?

"The Court: Objection is sustained. * * *

"Q. Now, how long was it before you saw Mr. Degnen again? A. I don't remember. I have already stated that I gave up about an average of three or four evenings a week for the laboratory work. * * *

"Q. Now, can you tell us, and will you tell us anything that occurred between you and Mr. Degnen at any time after that first visit to his laboratory, at his laboratory when you and he were there?

"Mr. Burke: If your honor please, that covers a good deal of territory.

"The Court: There are about 15 or 20 pages of what occurred in the laboratory already of record.

"Mr. Davis: I know, your honor, but it has been held * * * on cross-examination you can ask a witness to go into exactly the same statements in order to see if she tells the same facts.

"The Court: Certainly, with respect to the material things. If you want her to repeat what occurred at the house, I will permit her to repeat them, but it is going a long ways to say we are going to fill this record up with such matters which amount to nothing, that are immaterial in the case, and which will be stricken out on motion.

"Mr. Davis: I take an exception as to the statement of the court that these were such matters that amounted to nothing, and assign the statement of the court as error, and I ask the court to instruct the jury to disregard it entirely.

"The Court: The court will instruct the jury both here and there with respect to anything that took place at her house or at his laboratory, unless they amounted to immorality, they are immaterial to the case.

"Mr. Davis: I take an exception to that statement of the court and assign it as error, and ask that the court instruct the jury to disregard it.

"The Court: All right. Go on with the case.

"Mr. Davis: You mean all right, you will instruct the jury to do so, or it is all right for me to take an exception?

"The Court: Proceed. Of course, there is an exception to that. There was certain evidence with respect to certain things that has a certain relevancy to the case. What I mean is, certain matters which do not lead up to this particular offense.

"Mr. Davis: But may I have a ruling on my motion?

"The Court: Your motion is denied.

"Mr. Davis: I don't like to have a motion and have your honor say, 'You have an exception to my statements to the jury,' because you can see where I stand and where the defendant stands. We ask your honor to make a clear-cut ruling in these matters, so that we may have the advantage of it.

"The Court: The motion is denied. * * *

"Mr. Davis: Then, as I understand it, they are instructed to disregard all that testimony as immaterial, or all the testimony with reference to anything except the day of the incident, is that it?

"The Court: No; no. There are certain things which led up to this proposition which are material, but nothing is material which does not tend to show some affection by the defendant towards the witness, or some desire to satisfy his lust upon her in some way, or some-

thing of that sort, to show a desire for intercourse upon his part; if anything does not lead up to that, it was immaterial in the first place.

"Mr. Davis: Well, again, I take an exception, to the statement of the court and assign it as error, and ask that the court strike it out from the consideration of the jury, that last statement particularly.

"The Court: Objection overruled. Motion denied. Proceed with your case."

The record then shows several pages of cross-examination, during which the witness testified that appellant had proposed marriage to her at his place of residence, whither she had gone with him. This proposal was said to have been made after the two had been together at appellant's laboratory at night on various occasions. The following then appears:

"Q. Will you tell us what your experiments were between the time when you first met him [at the laboratory] * * * and the time you say he proposed marriage to you?

"Mr. Burke: I object to that as incompetent, irrelevant and immaterial. * * *

"The Court: Objection is sustained."

Appellant resided in a home which was also occupied by a Mr. and Mrs. C. It is shown by the record how E. C. happened to be there on the occasion when appellant proposed marriage to her. E. C. testified that she was at the laboratory one evening working late; that when she got to her home she discovered that in changing her dress she had not put her key in her purse; that appellant suggested her going to a hotel, but that she said she would not, for the reason that the type of hotel that would take her at that hour without baggage was not the character of hotel she would spend the night in; that appellant then suggested her going to his home; and that she was acquainted with Mr. and Mrs. C., having been entertained by them. She accordingly accepted appellant's suggestion. She testified that Mrs. C. made up a divan in the living room for her, which opened off Mrs. C.'s room; that at her request Mr. and Mrs. C.'s door was open through the night; that next morning Mrs. C. drove her to her home; and that she never had her foot in appellant's room. The record then shows:

"Q. Now then, your home was at 1855 North Kingsley Drive in Hollywood, was it not? A. Yes, it is. * * *

"Q. Mr. Degnen's is away over here on Alvarado street, isn't it? A. Yes.

"Q. Where did your secretary that owned the key live at the time when you went to his house rather than get your key from the secretary? * * * A. My secretary was moving, at the time I believe, or something of that sort; she is living at the Christian Women's Home, I believe it is called, and I didn't know her telephone number. That is why. * * *

"Q. You knew where she lived, didn't you? A. No; I did not; I did not know.

"Q. Do you swear positively to this jury that

she moved at any time within a month of that time with that key? A. It was a new building. My secretary is here, she can answer that question.

"Q. I know, but you are the one that is being asked the questions.

"The Court: Do you recollect if she moved within a month of that time? A. I know my secretary—it was some circumstance of that sort.

"Q. By Mr. Davis: You can answer that by yes or no. * * * A. I know there was a legitimate reason that either my secretary—

"Mr. Davis: We ask that be stricken out, your honor, and the witness instructed to answer directly these questions.

"The Court: The witness will give her best recollection of the matter and if she doesn't remember she can say so. A. I do not exactly remember the circumstances.

"Q. By Mr. Davis: You don't remember the circumstances, but you can state to this jury positively why you did not go to the secretary and get your key rather than to go to his house and stay all night? A. It was rather late, besides that, when Mr. and Mrs. C., * * * who are reputable people, were to be there to chaperon, I think it would be casting a reflection upon them to suggest anything immoral there. A. I am not suggesting anything immoral.

"The Court: Why are you going into it if there did not anything immoral happen there? Let us go on to the next things.

"Mr. Davis: Your honor, I feel loath to have to take an exception every minute.

"The Court: You can take every exception you see fit, but, unless there was something immoral in her conduct, it is totally immaterial and a waste of time. * * * I don't know that her visit out at that house, if there was not anything immoral to it, had anything to do with this case, unless her previous conduct was immoral it becomes immaterial in this case.

"Mr. Davis: The jury has to determine that and not your honor or myself.

"The Court: No; but I have to determine myself first whether it tends to show immorality. It does not tend that way even.

"Mr. Davis: We take an exception to the court's remark and assign it as error on the part of the court, and we ask the court and move the court to instruct the jury to disregard it.

"The Court: Motion is denied."

It was the contention of appellant throughout the trial—and there was much evidence to support it, as we shall later point out—that E. C. and appellant returned from San Diego to Los Angeles on Tuesday instead of on Monday, and that they lodged at the Cabrillo Hotel on Monday night, as well as on Saturday and Sunday nights, on what we have above referred to as the San Diego trip. We shall anticipate our statement of the evidence mentioned in the last preceding sentence so far as to say that there is testimony in the record to the effect that on Tuesday appellant and E. C. called at a dog hospital, in appellant's car, to pick up a canine which E. C. had left there before

proceeding on the San Diego trip. During the cross-examination of E. C. the following occurred:

"Q. When did you go and get the dog at the hospital? A. That I don't remember.

"Q. Didn't you go directly on Tuesday after you got back from San Diego with Mr. Degnen, and get the money from him, and go right in and get the dog? A. I never did. I am not in the habit of accepting from Mr. Degnen or any other men. * * *

"Q. Did you get the dog that day? A. That I don't remember, that I got my dog. * * *

"Q. Do you know who went with you after the dog?

"Mr. Burke: I object to that. * * * The question has been asked and answered she does not remember, consequently she does not remember who went with her, of course.

"The Court: She has answered the question sufficiently for an immaterial circumstance like that. * * *

"Mr. Davis: We want to except to the statement of the court that it is an immaterial circumstance, and assign it as error, and ask the court to instruct the jury to disregard it.

"The Court: Overruled. Motion denied."

[8-12] In these extended quotations from the record the question is suggested whether one who is charged with rape by force and violence and who denies absolutely the charge, as did appellant here, may yet offer evidence showing acts of carnal intercourse between him and the complaining witness which occurred prior to the date fixed in the charge. A consideration of this particular point may well serve as a preface to a discussion of the two points made by appellant, that is, that the trial judge erred in limiting the cross-examination of E. C. and in making prejudicial comment in the presence of the jury in connection with his rulings affecting the right more fully to cross-examine. We find no authority emanating from the courts of this state upon the particular question above suggested, but it is the undoubted rule here, no matter what it may be elsewhere, that in a prosecution for rape by force and violence unchaste acts of the prosecutrix committed with other men than the defendant may be shown for the purpose of disproving the allegation that the act charged against the defendant was perpetrated through the exercise of force, and despite the unwillingness of the prosecutrix. *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506; *People v. Shea*, 125 Cal. 151, 57 P. 885. This rule exists in California, as a perusal of the opinions just cited will demonstrate, in opposition to the weight of authority in other jurisdictions, the rule supported by such authority being that particular acts of lewdness with other men may not be shown, but only the general reputation of the prosecuting witness for unchastity. As lewd acts with other men may be proven in our courts as a defense in prosecutions for rape, it is plain, upon much greater reason,

that such acts with the defendant may be proven. If evidence of specific acts of misconduct with men other than the defendant tend to prove that the prosecutrix consented to the act charged against him, the probability of that consent is surely more strongly predicable of a showing that she had formerly submitted herself to the embraces of the defendant himself. We are clearly of the opinion that the latter character of evidence is admissible in such cases. And we can conceive of no reason why such evidence is inadmissible in a case in which the defendant contends, as appellant here contended at the trial, that he committed no lascivious assault whatever upon the prosecutrix. The two principal elements of the crime of rape are, first, the commission of the act, and, second, the lack of consent of the victim to its commission. The burden is upon the people to prove both these elements, of course, and it is inconceivable that the defendant may not offer proof to rebut the evidence introduced by the prosecution in support of each of the two branches of the case. In civil actions it is the well-established rule, expressed, in fact, in the statute (Code Civ. Proc. § 441), that a defendant "may set forth by answer as many defenses * * * as he may have"; and it is well settled that the terms of the section permit the allegation of inconsistent defenses (*Calexico Lumber Co. v. Emerson*, 54 Cal. App. 239, 201 P. 612). These, of course, are rules of pleading, but a similar rule, as a matter of evidence and independent of statute, would seem necessarily to apply in criminal cases under the issue presented by a plea of not guilty. It were strange indeed if a defendant were not permitted to introduce evidence to counterveil proof presented by the prosecution for the purpose of establishing a fact necessary for the prosecution to prove.

[13-15] Taking this point, then, as settled, the next question arising is whether, on the cross-examination of the prosecuting witness in a rape case, the defendant may put questions calculated to prove that she had, previous to the time set in the charge, willingly submitted herself to his carnal embrace, or, if not proving the fact, tending to affect the credibility of her story that the alleged criminal act was resisted by her, and, in fact, the credibility of her entire testimony. And we have not here a case in which the prosecutrix merely recited the occurrences of the occasion mentioned in the indictment, including her statement that she resisted appellant's assault upon her honor, a situation which might make less clear the right to cross-examine for the purposes indicated, but she told a story of her association with appellant from the time she became acquainted with him, in April, 1923, to the day in July of the same year upon which it is charged that his crimes were committed.

Particularly, coming nearer to the points involved in the rulings and conduct of the trial judge, she told of her frequent visits to his laboratory at night, and, in a general way, at least, of the "experiments" which she says were conducted there. The prosecutor doubtless took her over all this ground for the purpose of convincing the jury of the heinousness of appellant's conduct on the occasion which is principally of interest here, and of demonstrating to that body that she had a right to be alone with him on the occasion when the alleged crime was committed, and to expect conduct from him of a character totally different from that with which he was charged. The evidence was entirely proper for the latter purpose, to say nothing of the purpose first stated. In a case in which the defendant was charged with a rape committed upon the person of his sister-in-law it was said, after the discussion of another point:

"Neither was it error to tell the jury that 'they had a right to consider the relation existing between the parties, as tending, in some degree, to show that the prosecutrix had a right to trust herself to the defendant without fear of molestation or harm from him.' If it was a circumstance of any importance in the case, we think the instruction of the court correct. Surely, the prosecutrix had a greater right to repose confidence in the husband of her sister than in a stranger." *People v. Mayes*, 66 Cal. 597, 6 P. 691, 56 Am. Rep. 126.

This language refers, it is true, to a relationship by affinity, but we can have no doubt that it has a ready application, in principle, to a relationship or to an association arising through friendship. We think, therefore, that the testimony of E. C. on direct examination, showing the character and extent of her association with appellant, was entirely proper and that it did not bring forth mere collateral matters. There could be, then, no objection to the cross-examination of E. C. which appellant's counsel sought to pursue, upon the theory that it was not within the lines laid by the direct examination.

The trial judge sustained an objection to the following question propounded to E. C. on her cross-examination: "I will ask you this. * * * You say you went to the laboratory to perform some work. State what was done, any work that took you three hours to do or any longer time." An objection to the following question was sustained: "Well, then, please tell us what that experiment was." The witness was also asked: "Tell us the conversation then that occurred there that first night during the hours that you were there, between you and Mr. Degnen." An objection was then interposed, and the judge in effect sustained it, for, after himself asking the witness whether she had on her direct examination stated all she could remember of the conversation and getting an affirmative answer, he said: "That is enough

for that." This question was put to the witness: "Tell us what he taught you at that time." An objection was interposed, and it was sustained. Although there appears to have been no express ruling upon it, the judge in effect sustained an objection to the following question: "Now * * * will you tell us anything that occurred between you and Mr. Degnen at any time after that first visit to his laboratory * * * when he and you were there?" An objection was sustained to the question: "Will you tell us what your experiments were between the time when you first met him [at the laboratory] * * * and the time you say he proposed marriage to you?" Finally, an objection was sustained to the following question: "Do you know who went with you after the dog?" We cannot but be convinced that the trial judge erred in sustaining the objections to each of these questions. None of them was itself of transcendent importance, it is true, but there were behind them questions of graver import. In the remarks of the judge which we have above quoted so liberally, made in connection with the rulings, appellant's counsel was told, in effect, that he could inquire as to immoral conduct between E. C. and appellant only by putting to the former direct questions as to whether the two had together committed sexual intercourse upon specified occasions, and that he then must take her answers to such questions. This position of the judge exhibited an altogether erroneous view as to the purposes of a cross-examination of E. C. and as to the right of appellant to subject her mind to a searching and vigorous inquest through his counsel. The matter of her alleged or supposed immoral conduct with appellant was not one of impeachment, under rules compelling appellant to put only direct questions to her and forcing him later to prove what he contended was the actual fact by witnesses in his own behalf. He had the right to prove her misconduct, if any there was, out of her own mouth, if he could, either directly or by circumstances from which the jury might justly infer that she had been guilty of misconduct, and for that purpose his counsel had the right to embark upon a searching cross-examination, limited only by the very broad lines of the direct examination. The truth must not be overlooked, also, that, aside from the question of E. C.'s alleged immoral conduct, appellant had the right vigorously to cross-examine her as to every material feature of her direct examination for the purpose of destroying, if he might, her credibility as a witness in general and as to every material part of her testimony. It was said in an early opinion rendered in a cause in which the defendant was charged with rape:

"There is no class of prosecutions attended with so much danger, or which afford so am-

ple an opportunity for the free play of malice and private vengeance. In such cases the accused is almost defenseless. * * *" *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506.

In such cases especially, therefore, the defendant should not be held to a sparing exercise of his right to cross-examine the prosecuting witness, but should be permitted to interrogate her narrowly and thoroughly. This right was denied appellant in the present instance, and it remains only to inquire to what extent his substantial rights were probably damaged by the erroneous rulings of the court.

The testimony of E. C. was contradicted in many particulars. She was asked, for instance, whether on a certain Sunday she did not go with appellant to Santa Fé Springs, at which place they took luncheon in a tent near the oil wells of the locality, upon the invitation of a named individual, and near which place an aeroplane fell to the ground, killing its driver and a young woman who was with him. She denied that such a trip was taken, and denied all knowledge of the circumstances stated for the purpose of refreshing her recollection as to the occurrences of the alleged visit to Santa Fé Springs. Not only was she contradicted in this denial by appellant, who, however, did not mention the aeroplane incident, and who said that he and E. C. did not remain for luncheon in the tent, but by a sales manager of one of the oil companies operating at Santa Fé Springs. It was he who invited the two to partake of luncheon in the tent, but he said they did not remain for that purpose. He mentioned the aeroplane incident as having occurred immediately after E. C. and appellant left the place. Another contradiction of E. C. arose from certain of her testimony concerning the male member of the married pair who, according to E. C., were to have acted as her chaperons on the San Diego trip. She testified that she had met this man a month before the San Diego trip, while he testified that they did not meet until at least 10 days after that event. E. C. was also contradicted in this regard by appellant. Another contradiction occurred with relation to an incident of the San Diego trip. Appellant testified that he ordered a breakfast sent to E. C.'s room on one morning at La Jolla, and that she ate the breakfast in the room, he being present. She testified that no breakfast was brought to her room at La Jolla. The proprietor of a restaurant at La Jolla corroborated the testimony of appellant upon this subject. Further, and so far as the number of witnesses is concerned, there was a wholesale and substantial contradiction of E. C.'s entire story of the San Diego trip, which story is stated above. Appellant testified that the excursion began on a Friday and not on a Saturday,

as testified by E. C., and that the return to Los Angeles was on the following Tuesday and not on Monday. Appellant said that the journey was not undertaken for the purpose of testing a camera, and that no camera was taken on the trip. He said that he and E. C. took the journey for pleasure only, and that no chaperons were talked of either before or during the sojourn in the vicinity of San Diego. He testified that E. C. did not go to San Diego on the train, but drove down with him in his car, after they, in company with another man, had left her dog at an animal hospital. A nurse at this hospital testified that on that day E. C. and two men brought the dog to the place in an automobile, one of the men being appellant, and that E. C. said she was on the way to San Diego, and that she was in a hurry to get started. An attendant at the hospital testified that he heard E. C. say that she was on the way to that place and was in a hurry. Appellant testified that neither he nor E. C. was at any time during the trip at the hotel in San Diego at which she said she met him. He said that the town of Tia Juana, across the Mexican border, was the main objective of the journey and not San Diego, and that they did not stop at the latter place on the way to Tia Juana, except to take dinner at a restaurant, but drove to National City, where they spent Friday night at a small hotel. He testified that he registered them at this hotel as "M. L. Degnen and wife," and that they occupied the same room during the night. The hotel register was produced at the trial, and it showed, under the date specified by appellant, the entry above noted. The manager of the hotel identified E. C. as having been at the place with appellant at the time mentioned, and corroborated appellant's entire story of the sojourn there. Appellant testified that he and E. C. left the hotel at National City at 11 or 12 o'clock on Saturday morning and drove to Tia Juana, where they remained until toward evening. He said they both drank intoxicating liquors at two different resorts, and that they thereafter went to a place in Tia Juana called the "Mint Saloon," where, after a drink or two at the bar, they retired to a booth and drank heavily until their departure in the evening. He testified that they drank frequently during the afternoon with the bartender of the saloon and with another man who was about the place. Both of these men were present at the trial, and they corroborated the story of appellant in every particular, except, as to exact date, identifying E. C. as the woman of the occasion. Although these witnesses did not fix the date as to day, they did specify the time as being within a day or so of that testified to by appellant. The latter testified that after this alleged adventure he and E. C. were heavily intoxicated, he being so much so

that, after driving his car across the national boundary on the return, he was forced to employ a chauffeur, who drove them to San Diego. This man did not appear at the trial, but appellant testified that he had made a search for him, and that he could not be located. Appellant testified that upon arriving in San Diego he and E. C. had dinner at a café there, and that thereafter they drove together to La Jolla. He denied that, as testified by her, he was ill on the way to that place, but said that he had a "hang over" from the drinking at Tia Juana. He testified that at the Cabrillo Hotel he, in the presence of E. C., registered her and himself as husband and wife. In her presence, he said, he asked for adjoining rooms with a bath between, but was told that such rooms were not then to be had, but that they could be had later, that E. C. was given a room with bath; that he was assigned to a room some distance away; and that later he was "moved" to a room which opened upon the bath theretofore assigned to E. C. This story of events at the Cabrillo Hotel, up to this point, was corroborated by the hotel register, which was produced at the trial, and by the testimony of the proprietress of the place. She also testified that she addressed E. C. as Mrs. Degnen when she saw her about the house, and that E. C. did not demur at being so addressed. The cash book of the hotel, also produced at the trial, showed that appellant paid for the two rooms and bath for Saturday, Sunday, and Monday nights, not merely for the nights of Saturday and Sunday. Appellant testified, further, that, after he was given his second room, the bath between his apartment and that of E. C. was kept open, and that on at least one night he occupied for a time with her the bed in her room, afterward retiring to his own room, where he passed the remainder of the night. He testified that E. C. and he occupied these quarters at the Cabrillo Hotel on Saturday, Sunday, and Monday nights, and that they together drove to Los Angeles on Tuesday, and that, as already related, they went to the animal hospital and reclaimed E. C.'s dog before proceeding to her home. The nurse at the hospital produced records of the place showing that the dog was reclaimed on Tuesday. An attendant at the hospital testified that the dog was taken out on that day; that he carried the animal to an automobile in which E. C. had driven up to the place; and that appellant was seated therein.

We have not stated all of the respects in which the testimony of E. C. was contradicted, but only some of the prominent instances of contradiction. In addition to these matters of direct contradiction, there was much evidence which was utterly inconsistent with important features of E. C.'s story. The night foreman of the office building in which

appellant had his laboratory testified that on one occasion he saw E. C. and appellant leave the building at 3 o'clock in the morning. An elevator operator in the building testified that he took them down in his car one evening when both were intoxicated. A janitor of the building testified that the two came into the place one night after the elevator ceased running, which customarily occurred at 9 o'clock, and that they were both so intoxicated that they had to help each other up stairs, both falling in doing so, and that it took about ten minutes for them to get to appellant's rooms, which were on the third floor. Mr. C., at whose house, as it will be remembered, appellant resided, testified that E. C. was frequently at that place of residence after night; that she and appellant were often intoxicated together there; and that on one of these occasions, when they were both drunk, appellant was so much so that he, Mr. C., drove the two home in appellant's car; that on the trip E. C. and appellant occupied the back seat of the vehicle; and that during the ride they hugged and kissed each other—had a "petting party." Mrs. C. corroborated her husband's testimony, with the exception that she said that she never saw anything "improper" between E. C. and appellant.

[16, 17] We do not mean to say that there was no corroboration of E. C.'s testimony, for there was, but that corroboration was largely circumstantial, and taken as a whole it was insignificant when contrasted with the contradictions of her recital. Certainly, if the members of the jury had elected not to believe her, but those whose testimony was opposed to hers, their view that she was an utterly discredited witness would have received ample support from the record. She was disputed at every turn, and not always by appellant alone. If we may judge from the showing made by the reporter's transcript, however, appellant's contradiction of the various phases of E. C.'s testimony was far from being unmarked and unimportant. True, the members of the jury saw the two, and we must not forget the rule of law based upon that circumstance, to the effect that the verdict of a jury is to be upheld even if rendered in opposition to what a court of review may deem to be the weight of the testimony, if there be substantial evidence to support it. We have here determined, however, that the trial court erred in its rulings limiting the cross-examination of the prosecuting witness, and we now engage in an endeavor to satisfy the provisions of section 4½ of article 6 of the Constitution, to the effect that we shall not reverse a judgment under any asserted error, "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." In

the present instance we have examined the entire cause, including the evidence. We have read the 1,200 pages which comprise the testimony. In an endeavor to satisfy the constitutional provision, we must look to the record. We have no other guide. In disposing of the present point, we are not interested in the question whether there is substantial evidence to support the verdict. We are to determine only, from the face of the record, whether the verdict might have been different had not the errors of the trial court occurred. Under such circumstances, we repeat that the face of the record shows appellant's contradictions of E. C.'s story to be worthy of serious consideration. His testimony was marked by a frankness and openness which are not characteristic of hers. She was "fresh," evasive, and "smart" in her recital of the events which culminated in the charge against him. From the cold face of the record we do not hesitate to say that, of the two, he was the more worthy of belief. Not only so, but his version of the relationship between her and him, in so far as the recitals differ, and regarding each recital in the light of the undisputed evidence in the case, is more in accord with the teachings of experience than is hers. In order to justify this assertion, a statement must be made of certain features of the evidence which have not yet been mentioned. We first state some matters which are established without contradiction. Appellant's fifty-third birthday occurred a few days after E. C. and he first met. Her thirty-fifth birthday came nearly two months later. He was a widower, having lost his wife by death a year and a half before his meeting with E. C. The latter was a married woman, living alone and expecting to procure a divorce from her husband. She was unusually attractive, both physically and mentally. Immediately after their first meeting the two began to see each other with great frequency. She herself said that she was at appellant's laboratory three or four times each week, and she saw him at other times at her home and on drives which they took together in his car. They frequently indulged together in intoxicants, although E. C. says that she drank sparingly and was never intoxicated. Their intimacy had so far progressed "shortly" after their meeting that E. C. accepted from appellant a valuable ring as a present. This ring incident seems to us an important feature in the case, and we quote at some length parts of E. C.'s testimony concerning it, which occurred on cross-examination, leaving it to be understood that important features of the recital, hereafter to be specified, were disputed by appellant and by the jeweler mentioned in her testimony; also, the extract will serve to illustrate in some degree the conduct of E. C. on the witness stand:

"Q. When was it that Mr. Degnen presented you with a ring? * * * A. He bought the ring, oh, some time shortly after I met him, and presented it to me for a birthday gift.

"Q. Your birthday was on the 30th of May? * * * A. Yes.

"Q. Is it not a fact that on April the 18th, Mr. Degnen—on April 17th, Mr. Degnen presented you with a ring costing \$165, and said, 'This is our engagement ring?' A. That is not true.

"Q. And did you not the very next day go with him to Lucian, the jeweler, and say you wanted a different kind of a ring, and picked out one that cost \$225? A. That is a point that I ask to explain the situation. * * * He did not give me the ring. He bought it in April, and it was not given to me until shortly before my birthday, a day or so before. Mr. Degnen had a ring—what he paid for it I do not know—I did not know that he had just bought it at that time. I went to his office one day and he showed it to me. * * * When he showed me a ring he had in his possession, which was in a gold setting, and he said to me, 'I want to give you a birthday gift,' and he said, 'Perhaps you would rather have a different setting, in platinum; it is a ring that I bought for a business investment.' * * *

"Q. * * * When did he first speak to you about the ring he bought? A. I do not know, some time in April—he had the ring in his possession and showed it to me. * * *

"Q. You met him on April 6th? A. Yes.

"Q. How long would you say it was, a week after that? A. Shortly after that, that Mr. Degnen told me that he had appreciated everything I had meant to him, and he knew it was my birthday— * * *

"Q. He did say to you, anyway, he had a ring for you, didn't he? A. Yes.

"Q. And you looked at it, didn't you? A. Yes.

"Q. And you tried it on, didn't you? A. No.

"Q. It did not suit you? A. It was at his suggestion that it be changed.

"Q. I am not asking whether it was his suggestion at this time or not, but I am asking you if that ring suited you—that is a question you can answer 'Yes' or 'No' absolutely. * * * It did not suit you? A. No.

"Q. You told him so, didn't you? A. No, it was his suggestion—he had asked me if I preferred a gold, platinum.

"Q. I am not asking about his suggestion. You can answer by categorical answers 'Yes' or 'No'—did you tell him it did not suit you? A. He asked me if it did, and I answered him truthfully 'No.'

"Q. Did you not go with him to the jeweler the next day in reference to that ring? A. The very same day. * * *

"Q. You picked out a ring? A. I selected it, yes.

"Q. Did not Mr. Degnen there in the presence of this man, the jeweler, * * * say, 'This is your engagement ring?' A. Absolutely not.

"Q. Are you positive that no such conversation as that occurred at all? A. I would not be capable of discussing such a thing—

"Q. I am not asking about your capability or noncapability, I am asking if there was anything said by you or Mr. Degnen at the time of the purchase of the ring? A. Certainly not.

"Q. What did you think of that matter of going with him within 8 or 10 days after meeting him and getting the ring—did you regard that as anything other than his making love to you? A. No, I did not regard it as love at all.

"Q. What did you regard it as, simply getting it from him? A. I think it is most insulting.

"Mr. Burke: I object to the form of the question, argumentative. A. I think it is most insulting.

"The Court: I do not think it makes any difference what her idea was about the matter.

"Mr. Davis: Isn't that something that must come into it as to the relations that existed between the parties at that time—is it a usual thing for a young lady to meet an old man, and she says she met him within 10 days before this and expressed a dissatisfaction with the one he bought, and went to the jeweler and selected another, isn't that something that can be brought out, is that the usual thing, would you tolerate one of the members of your family?

"The Court: A lot of old men make fools of themselves and give rings to young ladies. * * * It is not material. A. Ridiculous.

"The Court: You can prove he gave her the ring, and whether he made any protestations of love. * * *

"Mr. Burke: I object to it as argumentative.

"The Court: I think it is argumentative.

"Q. Now, * * * this episode of the ring that occurred within 10 days from the time you met him, had you during that brief interval gone into your life so as to give him your birthday and all that? A. No.

"Q. How did he know your birthday was about that time? A. I do not remember; I forget the circumstances.

"Q. You do not have the slightest idea? A. No. I cannot tell you definitely, but I know I always make a great deal of my birthday—as a matter of fact, I usually have a little dinner party.

"Q. This was more than 30 days before your birthday? A. I did not receive the ring.

"Q. When was your birthday? A. The 30th of May.

"Q. This was on the 18th of April, wasn't it? A. Mr. Degnen told me he had the ring, which he had in his pocket, and asked me if I would accept it as a token of appreciation for what he knew was going to be a friendship with a woman he was deeply interested in, because of our mental companionship.

"Q. He was deeply interested in you at that time, this old man, wasn't he? A. He claimed to be.

"Q. You knew it? A. I respected his mentality.

"Q. I am not asking whether you respected him—you knew he was deeply interested in you at that time, 10 days after you met him? A. Our companionship at that time was considered by me at that time on a mental basis, because he never could appeal to me physically.

"Q. If you will try to answer me categorically—he told you he was deeply interested in you at that time, didn't he? A. As a friend, yes.

"Q. Tell us exactly what he said when he purchased you this ring, where it was that he offered it to you, and all that occurred at that time. * * * A. In his laboratory—I had

gone down there, I think, some time in the morning—it was during the day, at any rate, and it was in his laboratory. He had this ring in a piece of tissue paper, and he took it out of his vest pocket and showed it to me, and he said to me at that particular time, he said, 'Little girl, I want you to have a token of appreciation and esteem from me.' I had spoken some time, I think to my friend, Mrs. Wilson, in his presence, of the approach of my birthday. * * *

"Mr. Burke: You wanted it all.

"Mr. Davis: A while ago she could not remember anything about her birthday. A. I said I could not remember exactly when or how I came to tell him it was my birthday, but I always make a great deal of my birthday—* * *

"Q. * * * What did you say in reply when he called you 'little girl'? * * * A. At that time, I said, 'That is not necessary, I accept your appreciation.' He said, 'No, but I want a material mark of that,—I really hate to tell you the substance—so ridiculous, you will only laugh. * * * He said that he wanted to place that ring on my finger as a seal of his deep appreciation and regard for the most intelligent woman he had encountered—therefore I thought it was quite ridiculous that one who knows a person just a short time should make such an exaggerated statement—he referred to me as a goddess, and a few other terms that were quite exaggerated. * * *

"Q. Nevertheless, you accepted it? A. Not at that time, no, but he asked me—I said to him, 'No, that is not necessary.' He said, 'Yes, I insist.' I did not know how long he had it or anything else—he had it in his possession—he said, 'Now,' he said, 'I will tell you about this ring: Some time ago I bought it as a business investment, but I do not want you to have this in gold, I want it in platinum setting,' and I said, 'That would be quite an expense to have it put in the platinum setting,' but I preferred the white gold, 'if you insist upon my having a token from you,' and he said, 'We will go to the jewelers and make the exchange.' I went to the jeweler's with him, and he said—it was his own suggestion, not mine—I did not like the setting, naturally, when he asked my opinion, but it was his suggestion, not mine, that he selected the larger stone and the ring in white gold, and there was nothing in the conversation at that time to indicate that it was an engagement ring."

Before we proceed to state the conflicting stories of E. C. and appellant as to their relations, using the foregoing showing made by the record including E. C.'s story as to the ring as a preface, we must exhibit the extent to which appellant and the jeweler disputed the recital of E. C. concerning the ornament. He testified that before its purchase he and E. C. had agreed to marry; that on the night of April 17 she told him she had been married twice, but had never had an engagement ring; that they then arranged to meet at his office for the purpose of going together to buy an engagement ring for her; that on the next morning in passing a jewelry store he saw in the window a ring which he thought had a fairly good

stone and which he purchased for \$150; that E. C. came to his office between 11 and 12 o'clock that morning to keep the engagement to go together to buy a ring; that he showed her the one he had bought, and she said she did not like it—that it was old-fashioned, and that she would have preferred if he had waited until she came down to select it; that he told her he had arranged for an exchange of the ring if it was unsuitable to her; that they then together went to the jeweler's to make the exchange; that he did not tell her he had bought the ring as an investment; that when they went to the jeweler's she selected a ring priced at \$65 more than the one he had first bought; that he paid that amount for it in addition to the amount he had paid for the first one; that she put it on her engagement finger. This entire story of appellant was corroborated by the jeweler. Appellant further testified that E. C. kept the ring and was highly pleased with it; that he did not tell her it was a birthday gift; that it was not a birthday gift; and that he could not remember whether he knew at that time when E. C.'s birthday would occur.

We now come to the respective stories of E. C. and appellant as to the nature of the relationship subsisting between them. She testified that their association was platonic; that it was always kept on a "mental" basis; that he tried often to become "personal," but that she always checked him; and that she had never accepted money from him until after the difficulty of July 30, out of which the present criminal charges against him arose, when he gave her money with which to pay physicians and nurses for attendance upon her, made necessary by injuries which she undoubtedly suffered on that occasion. Appellant testified that he had sexual intercourse with E. C. in her home a night or two after he gave her the ring and frequently thereafter; that on several occasions he passed the night with her at her residence; that he began, soon after they met, to furnish her money with which to keep up her establishment; and that the entire expense of the place was defrayed by him during their association together. He said he gave her various amounts under \$40 at various times, of which amounts he usually kept no account, but that he did keep a list of payments to her of larger amounts, making an entry of each amount on the day it was paid, or on the next day. This memorandum was offered in evidence, and showed the following payments; April 17, \$100; 27, \$50; 30, \$250; May 8, \$40; 14, \$50; 16, \$75; 28, \$250; June 4, \$40; 8, \$100; 14, \$70; 19, \$200; 28, \$50; July 7, \$25; 9, \$200; 22, \$70. Appellant and E. C. undoubtedly had two serious quarrels or disturbances during their association together. The first occurred about July 10. She testified that it arose out of his desire to enter

her house late at night, when she had forbidden him to see her. He said that it grew out of money matters. The second event was that of July 30 and was extremely serious. Beyond dispute, E. C. was severely injured during the physical encounter which then took place between them. She testified, with particularity, to facts tending to show that the event occurred as laid in the indictment. He said that they were both intoxicated at the time, and that the trouble would not have occurred but for that fact. He said that after July 22 he and E. C. had frequent conversations about money matters, during which he told her that he was giving her more than he could afford, and she said to him that he was a "piker" and was not "coming through" as he should. The subject was resumed with great bitterness, on account of their intoxicated condition, on the night of the 30th. He accused her, in effect, of holding him up, and she then attacked him in great anger, scratching and gouging his face. In the scuffle which ensued through his attempt to hold her and thus protect himself, as he said, the injuries which she suffered occurred, because of falls against objects in the house. The undisputed evidence is that on the next day they both showed on their persons ample evidence of the fact that they had been in a "fight." These evidences, of course, were consistent with the story told by each of them. The injuries to E. C. included a fractured clavicle.

[18] We have now reached the end of our protracted consideration of the question whether the limitation placed by the trial judge upon the cross-examination of E. C. has resulted in a miscarriage of justice. It seems to us that it must have done so. When considering the effect of section 4½ of article 6 of the Constitution we need only determine, in directing a reversal, that we cannot say "whether appellant would or would not have been convicted but for the errors of the court" (People v. Walker [Cal. App.] 231 P. 572), and we are unable to avoid reaching that conclusion in the present instance. Contradicted, as the testimony of the prosecuting witness was, not only by many other witnesses, but by the teachings of human experience as well, who can say what effect a proper cross-examination of E. C. might have had upon the jury? How great or how little additional weight was necessary to be thrown in the scale against her to impel the jury to conclude that the sordid story we have unfolded was but another instance of the victimizing of a fond and confiding man by a younger, but experienced, woman? We do not say that E. C. did victimize appellant. It is not within our province to say so. We do say, however, that the jury should have been given the opportunity, upon a survey

of all available evidence, and especially upon a searching cross-examination of the prosecuting witness, to determine whether she did victimize him, and whether, therefore, appellant should not have been allowed to depart the court, at the conclusion of his trial, without day.

We shall say but little concerning the claim that the trial judge committed error in his remarks made in connection with his rulings limiting the cross-examination of the prosecuting witness. We are of the opinion that some of his observations were erroneously made, and, not only so, but that they were materially prejudicial to appellant's rights.

One or two other claims of error are presented, but we find it unnecessary to consider them.

Judgment and order reversed.

We concur: FINLAYSON, P. J.; CRAIG, J.

195 Cal. 377

**LOS ANGELES CITY HIGH SCHOOL DIST.
OF LOS ANGELES COUNTY v. QUINN
et al. (L. A. 7964.)**

(Supreme Court of California. Feb. 6, 1925.)

1. Escrows ⚡—Binding contract based on valid consideration necessary.

To support an escrow there must be a binding contract based on valid consideration.

2. Escrows ⚡9—No valid delivery of deed by escrow holder where grantee does not comply with conditions contained in agreement.

Where deed is placed in hands of third person, as an escrow, with agreement between grantor and grantee that it shall not be delivered until grantee has complied with certain conditions, grantee does not acquire title, nor is he entitled to delivery until he has strictly complied with conditions, an escrow holder cannot make valid delivery of deed to grantee, in absence of such compliance.

3. Escrows ⚡5—Court must inquire into surrounding circumstances when escrow instructions ambiguous.

Where provisions in escrow instructions, read alone, were ambiguous, court must inquire into circumstances existing at time of negotiations between grantor and grantee which resulted in deposit of deed with escrow holder.

4. Escrows ⚡14(1)—Delivery of deed out of escrow held not to pass title where grantee did not comply with original agreement or grantor's escrow instructions.

Where, under contract of sale of land, grantee was to pay 1922-1923 taxes, but before delivery of deed in escrow grantor paid first installment of taxes, and in escrow instructions directed escrow holder to hold \$43.55 for "tax adjustments," and grantee did not comply therewith, but undertook to settle tax "outside of escrow," *held* that delivery of deed to grantee for acceptance required by Civ. Code, § 1158, was insufficient to pass title and, there being no other delivery, deed never took effect.

In Bank.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action to quiet title by the Los Angeles City High School District of Los Angeles County against Patrick Joseph Quinn and others. Judgment for plaintiff, and defendants appeal. Reversed.

Meserve & Meserve, of Los Angeles, for appellants.

Edward T. Bishop, J. N. O'Connor, Albert W. Leeds, and Ivan G. McDaniel, all of Los Angeles, for respondent.

WASTE, J. Defendants appeal from a judgment quieting the title of plaintiff to certain lands in the city of Los Angeles. The plaintiff relies upon deeds of the property, executed under escrow instructions, but not recorded. The defense in the trial court was that the defendants had not been divested of their title, for the reason, that they had

revoked the escrow instructions before actual delivery of the deeds.

Appellants are the four children of Catherine Quinn. Three are of legal age, and the fourth, a minor, is represented by and appears through Mrs. Quinn, his guardian. Part of the estate of the four children, each owning an undivided one-fourth interest therein was the land here in question. Catherine Quinn, who appears to have been acting on behalf of all of the appellants, gave the respondent, Los Angeles city high school district of Los Angeles county, an exclusive option to purchase the property for the sum of \$5,500 cash, taxes to be paid by the board of education of respondent, possession to be given October 17, 1922. No other terms or conditions of sale were specified in the option, which was in writing, signed by Catherine Quinn personally, as owner. She understood, so the option recites, that the sale of the property was to be handled in escrow by a company satisfactory to the board of education, and she agreed to furnish a good and sufficient grant deed, and a new, unlimited guarantee of title to the property, to be issued by a title company satisfactory to the respondent. The respondent, by formal resolution of the board of education, decided to purchase the property from Mrs. Quinn as an addition to the Polytechnic high school site, and on the terms and conditions set forth in the option. It also directed that an action in condemnation, theretofore authorized by it to acquire the property, be discontinued, providing the property be purchased in accordance with the option, and through ordinary channels. The secretary of the board of education thereupon notified Mrs. Quinn in writing that the board agreed to purchase the property at the price mentioned, provided a good and sufficient deed, and a new, unlimited guarantee of title were furnished, showing title to the property in the Los Angeles city high school district of Los Angeles county, free and clear of incumbrances, "except the taxes for the fiscal year 1922-23."

Catherine Quinn, as guardian of the minor appellant William Charles Quinn, thereupon filed in the superior court of Los Angeles county a return of sale of the interest of the minor in the property to the respondent, and prayed for confirmation, which was granted by an order of the court made and entered on the 7th day of December, 1922. On the same date, Mrs. Quinn deposited with the Title Guarantee & Trust Company a title company satisfactory to respondent, escrow instructions reading as follows:

"Escrow Instructions. Number 457343.

"Los Angeles, Cal., Dec. 7, 1922.

"Title Guarantee & Trust Company:

"I will hand you a deed executed by Catherine Quinn, guardian, also deed executed by Mary Elizabeth Quinn et al. to Los Angeles City High

School District of Los Angeles County, on the following described property: [Describing it.]

"Subject to: Second half taxes 1922-23.

"Conditions, restrictions, reservations, and rights of way of record, which you are authorized to deliver or use upon payment to you within 20 days from date hereof for my account, the sum of \$5,500.00. No insurance through escrow.

"Hold for me \$43.55 as tax adjustment.

"Pay your escrow charges; also your charges for guarantee certificate.

"(Liability \$5,500.00.)

"Affix and cancel proper revenue on each deed. Deeds to come.

"In the event that the conditions of this escrow have not been complied with at the expiration of the time provided for herein, you are instructed to complete the same at the earliest possible date thereafter, unless I have made written demand upon you for the return of all instruments deposited by me.

"Signature: Catherine Quinn.

"Address: 607 West 40th Place, City.

"Phones: Auto. 298034; Sunset —."

Following the deposit of these escrow instructions, Catherine Quinn, as guardian of William Charles Quinn, a minor, executed and placed with the escrow holder, Title Guarantee & Trust Company, a deed of such guardian conveying the quarter interest of the minor to the respondent. She also had prepared and caused to be signed by the three adult appellants a deed conveying their three-quarters interest in the property to the same grantee. This deed she likewise deposited with the escrow holder. After the deposit of these deeds with the escrow holder, the respondent delivered to the Title Guarantee & Trust Company the following communication:

"Los Angeles, Cal., December 12, 1922.

"Order No. 435264. Escrow No. 457343.

"Title Guarantee and Trust Company, Fifth Street and Broadway, Los Angeles, California. Mr. Zell Henley, Escrow Clerk—Gentlemen: Please be advised that the Board of Education has agreed to purchase from Catherine Quinn (describing the property), for the sum of \$5,500.00, provided that a good and sufficient deed and a new unlimited guaranty of title are furnished showing title to said property vested in 'Los Angeles City High School District of Los Angeles County,' free and clear of all incumbrances except the second half of taxes for the fiscal year 1922-23.

"The board is to pay only the fee for the recording of the deed; all other escrow charges to be paid by the seller.

"When the deed is ready for formal acceptance by the board, please forward it to the secretary's office, 730 Security Building, and after being accepted by the board, it will be sent to you for recording and final return to the secretary's office.

"We will have prepared a warrant to cover the above-mentioned purchase price and forward it to you for use in this escrow.

"Very truly yours,

"Wm. A. Sheldon, H. E. G.,

"Secretary Board of Education."

A few days later, and within the time required, the respondent handed to the Title Company its warrant in the sum of \$5,500, with directions to disburse the same "in accordance with our [its] previous instructions." The Title Company received the warrant, and deposited it in its own account in bank. The escrow instructions signed by Mrs. Quinn were not shown to the respondent, and the escrow instructions signed by the respondent were not shown to Mrs. Quinn.

Deeds or grants conveying real estate, or an interest therein, to a political corporation or governmental agency cannot be accepted for recordation without the consent of the grantee evidenced by its resolution of acceptance attached to such deed or grant. Civ. Code, § 1158. Consequently, on January 6, 1923, the Title Guarantee & Trust Company sent the two deeds to the board of education of the respondent for acceptance and return to the escrow holder. The communication accompanying these deeds contained the following:

"The seller's instructions in this escrow provide that you hold for them \$43.55 as tax adjustment and farther told us that this *as* on account of first half taxes having been paid by them, which according to your original agreement with them was to be assumed by you.

"If it is your intention to comply with this, you can send us funds in this amount with instructions to use said funds for the above purpose.

"Also in your letters to us include approval of liability under your guarantee of title not to exceed \$5,500.00, and that there is to be no insurance through escrow.

"As soon as the above matters have been provided for we will notify you regarding dismissal of action."

On January 8, the board of education, by resolution, accepted the deeds, and certificates to that effect, attested by its secretary, were attached to the documents. On the next day the deeds were returned to the Title Company, with a direction to have the instruments recorded and returned to the secretary's office. The letter contained this statement: "We will settle for tax with the seller outside of escrow."

On January 12, the appellants served on the Title Company an instrument in writing, canceling and annulling their escrow instructions, and vacating the authority of the Title Company to deliver the deeds, and demanded immediate return of the documents. The deeds were never recorded, and, at the trial below, it was stipulated that they were not in the possession of the escrow holder.

[1] The contentions of the appellants are that they were not divested of their title in the land by the transactions noted for the reasons, first, that there was no escrow between

the parties, because no valid contract of purchase and sale of the property was entered into by them, and Mrs. Quinn was not authorized in writing to do so for them; and, second, that the passing of the deeds out of escrow, for the sole purpose of having the certificates of acceptance indorsed thereon, did not amount to a delivery. That there must be a binding contract based on a valid consideration to support an escrow admits of no debate. *Thomas v. Birch*, 178 Cal. 483, 489, 173 P. 1102; *Holland v. McCarthy*, 173 Cal. 597, 602, 160 P. 1069; 10 Cal. Jur. 581. But it is not necessary for us to consider that phase of the case. Assuming that there was such a contract, we are satisfied that title did not pass to the respondent for want of a proper delivery of the deeds.

[2] Where a deed is placed in the hands of a third person, as an escrow, with an agreement between the grantor and grantee that it shall not be delivered to the grantee until he has complied with certain conditions, the grantee does not acquire any title to the land, nor is he entitled to a delivery of the deed until he has strictly complied with the conditions. *Dyson v. Bradshaw*, 23 Cal. 528, 536. If he does not comply with the conditions when required, or refuses to comply, the escrow holder cannot make a valid delivery of the deed to him. *McLaughlin v. Clausen*, 85 Cal. 322, 327, 24 P. 636. It is therefore necessary to determine what were the conditions precedent imposed on the respondent in this case to entitle it to delivery of the deeds. Respondent contends that there was but one, the payment by it to the escrow holder of the sum of \$5,500, for the account of appellants, within 20 days from the date of the escrow agreement, and that, having received manual transmission of the deeds, title to the property passed to it.

[3] Appellants contend that another condition was imposed by the escrow, which was not complied with by respondent, and non-performance of which rendered delivery of the deeds ineffective. They rely upon the direction, "hold for me \$43.55 as tax adjustment," contained in the escrow instructions given to the Title Company by Mrs. Quinn. Read alone, the direction is ambiguous and uncertain. There is nothing in the context to explain it. It therefore becomes the duty of the court to inquire into the circumstances and conditions which existed at the time of the negotiations between Mrs. Quinn, on behalf of the appellants, and the respondent for the sale and purchase of the property, which resulted in the deposit of the deeds with the Title Company as escrow holder. "This is necessary in order to bring the language in the 'escrow agreement' as near to the intention * * * of the parties at the time of its execution as the words which they saw fit to employ and rules of law will

permit. The rule is universal that it is the duty of the court, where the language used is not clear, positive, and certain, to consult the conditions, situation, and motives of the respective parties for the purpose of ascertaining their intention." *Clarke v. Eureka Co. Bank* (C. C.) 123 F. 922, 927.

[4] By the terms of the option, and the acceptance, which resulted in the deposit of the deeds, the respondent agreed to pay the sum of \$5,500 for the property, which was to be free of lien or incumbrance, except the taxes for the year 1922-23. From the record we may judge that appellants, not having been able to complete their escrow before the first Monday in December, paid the first installment of taxes for the year 1922-23, rather than suffer it to go delinquent. They were not compelled to make that payment under the terms of their contract of sale, for the transfer was to be made to respondent, subject to the whole of the tax for 1922-23. There is nothing in the record from which it may be inferred that that agreement was ever changed or modified. But, the first installment being paid by the appellants, the situation of the parties was changed from that in which it rested at the beginning of the negotiations. That both parties to the transaction were aware of the fact that the situation had changed is conclusively established by the evidence of what took place after the first installment of the tax was paid. The escrow instructions of both appellants and respondent recognize the fact. There is the direction of the Title Company in each set of instructions that the property is to be conveyed subject, only, to the second half of the taxes for 1922-23. We know of no reason why appellants, having made a payment, prior to the deposit of the deeds, which the respondent should have made, should not have demanded as a condition precedent to delivery of the deeds that respondent repay them for such advance. It is very evident that such was the motive of the appellants in inserting in the escrow instructions the direction to the escrow holder to hold the sum of \$43.55 "as tax adjustment." The choice of language in the direction was not happy. It has afforded respondent

an opportunity to argue that it was impossible to carry out the direction for the reason that the Title Company could not "hold" something it did not have, or which it did not collect, and that as the escrow holder was instructed to deliver the deeds on payment of the sum of \$5,500 it could demand no further payment from respondent.

The argument is too technical. It does not take into consideration the duty of the court to go behind the wording of the escrow agreement in order to ascertain and give effect to the intention of the parties. We have shown their situation in relation to the taxes before and at the time the deeds were deposited. The manifest intention of the appellants was to secure for themselves repayment of the sum advanced for taxes which respondent should have paid. The escrow holder fully understood what their intention was, and so informed respondent. The communication it sent to the board of education on January 6, 1923, is so plain on that point, and settles it so completely, that it does not admit of argument.

Instead of complying with the condition, which was reasonable, and with which it was fully cognizant, the respondent undertook to settle with appellants for the tax "outside of escrow." It does not appear that such course was ever agreed to by appellants, or that they have been repaid the amount. It follows, therefore, that the manual transmission of the deeds by the title company to the respondent for "acceptance and return to" it must be considered as having been made only for the purpose of putting the deeds in proper shape to be recorded. Transmission for any other purpose was, at that time, beyond the scope of the power and authority of the Title Company as the escrow holder. No other delivery appears to have been made or attempted. As a result, there was no delivery at all, no title passed, and the deeds never took effect. 10 Cal. Jur. p. 591, par. 15.

The judgment is reversed.

We concur: MYERS, C. J.; SHENK, J.; RICHARDS, J.; LAWLOR, J.; LENNON, J.; SEAWELL, J.

195 Cal. 533

CONTINENTAL CASUALTY CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (S. F. 11250.)

(Supreme Court of California. Feb. 27, 1925.)

1. Master and servant ⇨404—Industrial Accident Commission required to follow prescribed procedure and rules of evidence.

Industrial Accident Commission is required despite St. 1917, p. 871, § 60, subd. (a), to conduct proceedings pursuant to prescribed procedure and rules of evidence so that there will be as little occasion as possible for courts to resort to rule of decision announced in that section.

2. Master and servant ⇨404—Copy of transcript of testimony at coroner's inquest held admissible in compensation case though hearsay.

Copy of transcript of testimony given at coroner's inquest though hearsay held admissible under St. 1917, p. 871, § 60, subd. (a), in a hearing before Industrial Accident Commission, and properly included in return to writ of review.

3. Master and servant ⇨415—Knowledge that copy of certain testimony would be included in return to writ of review held imputable to insurer.

Knowledge that copy of testimony at coroner's inquest filed and considered by Industrial Accident Commission would be included in return to writ of review held imputable to insurer, where it knew of the commission's desire for copy of such testimony and assisted in procuring it.

4. Master and servant ⇨415—Insurer failing to object to informal and irregular admission of certain testimony, deemed to have waived objection.

Insurer, which made no objection to informal and irregular reception of certain testimony by Industrial Accident Commission, subsequent to hearing, though it knew thereof and subsequently moved for rehearing, must be deemed to have waived all objection to manner of taking such testimony and its admission into record.

5. Master and servant ⇨417(7)—Award on conflicting evidence of employment conclusive.

Award based on finding, on conflicting evidence, determining who deceased's employer was, will not be disturbed.

Myers, C. J., and Lennon, J., dissenting.

In Bank.

Proceeding under the Workmen's Compensation Act for compensation by Herman Ford, a minor, through his guardian ad litem and trustee, Josephine Ford, opposed by the Merchants' Improvement Company, alleged employer, and the Continental Casualty Company, insurance carrier. The Industrial Accident Commission awarded compensation, and the insurance carrier applies for certiorari to review the award. Affirmed.

Hettman & Hoge, of San Francisco, for petitioner.

W. H. Pillsbury, of San Francisco, for respondents.

LAWLOR, J. On October 11, 1922, Herman Ford, a minor, by his guardian ad litem and trustee, Josephine Ford, filed an application in the Industrial Accident Commission for the adjustment of a claim against the Merchants' Improvement Company and the Continental Casualty Company. The claim is based on the following alleged facts: On August 16, 1922, Wilbur Ford was killed, the result of an injury arising out of and in the course of his employment by the Merchants' Improvement Company, and that Herman Ford, a minor, is the dependent son of the deceased. Wilbur Ford, aged 51 years, was a porter engaged in repairing an elevator for the Merchants' Improvement Company in the California Fruit Exchange building in the city of Sacramento, when he was caught between the elevator and the wall of the shaft and fell to the bottom of the pit sustaining injuries in the abdominal region from which he died on August 16, 1922. Under his employment he received a wage of \$100 per month and worked six days a week. The answer of the defendants denied that Wilbur Ford was the employee of the Merchants' Improvement Company.

It was found by the commission that the injuries sustained by Wilbur Ford arose out of and in the course of his employment and proximately caused his death; that Herman Ford, his adopted minor son, is in the custody of his foster mother, Josephine Ford, and under the provisions of a decree of divorce the deceased was required to pay \$10 per month for the support of said minor; that Herman Ford is conclusively presumed to be totally dependent upon deceased and entitled to a death benefit of \$3,320 payable at the rate of \$14.25 per week, in addition to \$100 burial expense, and that the foregoing benefit was based upon a wage of \$100 per month. It was further found that the "evidence herein is insufficient to establish as a fact that the defendant, R. Smith, was, at the time of said injury, the employer of the deceased, Wilbur Ford." The award made was in accordance with these findings. Subsequently, the death benefit was increased to the sum of \$3,662, payable at the rate of \$15.67 per week upon the basis of a wage of \$110 per month.

The Continental Casualty Company, a corporation, the insurance carrier of the Merchants' Improvement Company, against whom the award was made, petitioned this court for a writ of review of the foregoing award and proceedings on the grounds: "(a) That said commission acted without and in excess of its powers in making its said decision, order, and award; (b) that the evi-

dence does not justify the findings of fact; (c) that there was no evidence legally sufficient to justify the findings and award of said commission."

In this behalf, the petitioner contends that the evidence in the case does not justify the finding that the Merchants' Improvement Company was the employer of the deceased, Wilbur Ford; that according to the testimony of Fred L. Martin, the secretary and manager of said building, one R. Smith, was paid the sum of \$325 per month under a contract with the Merchants' Improvement Company to do the janitor work on certain floors in said building; that R. Smith had no connection with the Merchants' Improvement Company other than by said contract, which had been in force for two or three years; that R. Smith employed various persons to assist him, of whom Wilbur Ford, the deceased, was one, whom Smith paid out of his salary; that Fred L. Martin did not know any of the employees of R. Smith; that he had nothing whatsoever to do with them; that the Merchants' Improvement Company exercised no control whatsoever over the manner or method in which R. Smith performed the work; that it did not hire or discharge the employees of R. Smith; that it did not pay the deceased any money and did not know that he was working in the building; that R. Smith was an independent contractor and the Merchants' Improvement Company did not control his full time since he was free to accept other contracts and do whatever work he saw fit to do and "that according to all of the testimony * * * Wilbur Ford was employed by, compensated by, subject to control of, and working under the instructions of the defendant R. Smith; that the defendant, R. Smith, was an independent contractor performing said work under a contract for a stipulated sum of money and was responsible to the Merchants' Improvement Company for results only; that said Merchants' Improvement Company was not the employer of said deceased, Wilbur Ford."

The testimony of Fred L. Martin, the secretary and manager of the building operated by the Merchants' Improvement Company at the original hearing before the commission on November 16, 1922, is that R. Smith was employed by the Merchants' Improvement Company under a contract to do the janitor work on the second, third, fourth, fifth, sixth, seventh, ninth, and tenth floors; that he was to hire his own men; that he was given a master key to all the floors and offices he contracted to clean; that he never directed him as to how the work was to be done; that George Erhardt, the engineer, was instructed to give him directions and inspected the building every day; that no control was exercised over the way in which R. Smith did the work; that he did not know who the employees of R. Smith were;

that he did not discharge any employee of R. Smith; that no money was ever paid by the Merchants' Improvement Company to any such employee; and that all the witness was concerned with was the result of the employment.

George Erhardt, the superintendent and engineer of the building, testified that he was instructed by the manager to see that all the janitor work in the offices was done; that on various occasions he spoke to R. Smith and "jacked him up" about the work; that he never spoke to the men "because they were working for Smith and Smith was the man I held responsible for the work"; that he was never around when R. Smith was doing the work; that the company furnished the appliances used in the janitorial work; that he would not "fire" R. Smith without consulting the manager; and that he never exercised any authority or any control directly or indirectly over Wilbur Ford, the deceased.

From the return to the writ of review it appears that the testimony above mentioned was heard before the commission on November 16, 1922, and filed on December 7, 1922. Seventeen months later a copy of the testimony of the witnesses at the coroner's inquest was "served and filed April 28, 1924," upon R. Smith, the Continental Casualty Company and Josephine Ford, as guardian ad litem. In the transcript of the coroner's inquest, R. Smith purports to have testified that "Mr. Ford was employed by the California Fruit people [Merchants' Improvement Company] and under my direction. * * * This man was working under my instruction as a janitor." Upon this supplemental testimony the commission on May 22, 1924, made the finding above mentioned that Wilbur Ford, the deceased, was in the employ of the Merchants' Improvement Company and sustained injuries resulting in death arising out of and in the course of his employment, and based the award on such finding.

On June 10, 1924, a petition for rehearing before the commission was interposed by the Continental Casualty Company upon the ground that the evidence shown by the record was not sufficient to establish the finding that the deceased was employed by the Merchants' Improvement Company. This petition was granted, and the following statement made by the commission:

"It further appearing to the satisfaction of this commission that no good reason exists for taking further testimony, the commission now reconsiders and redetermines the original cause without setting a time and place for such further hearing, and now makes its findings and award."

As appears above, the award was amended in the amount of the death benefit based on the testimony of R. Smith that prior to the accident he had increased the deceased's wage to \$110 per month. It is clear that the

commission based its findings and award upon a variation between the testimony of R. Smith given at the coroner's inquest held August 22, 1922, and that received at the hearing before the commission on November 16, 1922, touching the status of deceased and resolved this variation in favor of the latter's employment by the Merchants' Improvement Company. Upon this variation respondents contend that the former testimony impeached the latter. Petitioner asserts that the court cannot be expected "to take this contention seriously" because "respondents cannot at this stage of the proceedings drag into the case testimony given before a coroner's inquest or any other testimony that has not heretofore been produced in the case."

The first question is whether the testimony given at the coroner's inquest was competent and was properly before the commission. It is hearsay testimony and was not admissible under the original act. In *Eaglebretson v. Industrial Acc. Comm.*, 170 Cal. 793, 151 P. 421, it was held that the common law or statutory rule against the admission of hearsay evidence as proof of a fact under section 77 of this act (St. 1913, p. 279) is not a mere technical rule of evidence and that the commission has no power to make an award where the only evidence of a jurisdictional fact consists of hearsay testimony. The Legislature, however, has since expressly provided that:

"All hearings and investigations before the commission or any member thereof, or any referee appointed thereby, shall be governed by this act and by the rules of practice and procedure adopted by the commission, and in the conduct thereof neither the commission nor any member thereof, nor any referee appointed thereby, shall be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in such manner, through oral testimony and written and printed records, as is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this act. * * * Stats. 1917, p. 871, § 60(a).

See, also, *Perry v. Industrial Acc. Comm.*, 180 Cal. 497, 181 P. 788; *McFeely v. Industrial Acc. Comm.* (Cal. Sup.) 223 P. 413; *Western Indemnity Co. v. Industrial Acc. Comm.*, 174 Cal. 315, 163 P. 60; *Employers' Liability Assurance Corp. v. Industrial Acc. Comm.*, 179 Cal. 432, 177 P. 273; *Pacific Gas & Electric Co. v. Industrial Acc. Comm.*, 180 Cal. 497, 181 P. 788; *State Compensation Insurance Fund v. Ind. Acc. Comm.* (Cal. Sup.) 231 P. 996.

Petitioner's contention, however, is that the testimony was not "admitted," since "there is absolutely no stipulation or admission upon the part of petitioner that the testimony attributed to R. Smith was as a matter of fact R. Smith's testimony"; that it is not hearsay testimony for the reason that no

witness has testified that they heard R. Smith give any such testimony; and that although petitioner was aware of the fact that such testimony was desired by the commission and actually assisted the commission in obtaining a copy of it, it did not know and was not able to ascertain until one day before the oral argument in this court that it had been included in the return to the writ of review. The question whether this testimony was properly made a part of the return was first discussed during the oral argument herein and the point was thereafter taken up in the briefs filed. No objection was made to this testimony in the petition for a writ of review, and we have just called attention to petitioner's claim that it did not know it was included in the return until the day before the oral argument. The brief of respondents states that the Continental Casualty Company was notified of their desire to procure a copy of such testimony and quotes the response in the form of a letter which reads as follows:

"With reference to your letter of April 19th beg to advise that the writer was in Sacramento the latter part of last week. While there a call was made on the coroner in an effort to speed the forwarding to you of copy of inquest. At that time the coroner's records were checked up and it was noted that request had been made by the Industrial Accident Commission that they be furnished with such copy. It seems, however, that the reporter who writes up the notes of the proceedings is insisting on \$3 fee for transcription. The coroner, however, advises me that he would endeavor to get a copy forwarded to you soon and I trust that it will reach you in the near future."

The return recites the testimony of R. Smith before the coroner's inquest and contains the following purported filing mark already set forth: "Served and filed April 28, 1924." It is represented in respondents' brief that copies of such testimony were sent by mail to the three principal parties and that only the one addressed to Josephine Ford was returned unclaimed by the post office department. Petitioner does not state that the copy was not actually received by it, the burden of its claim being that the testimony had no place in the return and was therefore for the reasons already stated not even hearsay. It may be conceded that the manner in which the testimony in question was received was informal. A more satisfactory way and one more in keeping with orderly procedure would have been to have given notice of intention to reopen the case for the admission of certain supplemental testimony and on the day noticed to produce the coroner or other competent witness with the transcript of the proceedings of the inquest properly certified, and also prove that the R. Smith who gave the testimony at such proceeding concerning the status of the de-

ceased and the R. Smith who testified before the commission were identical.

It was realized by the Legislature, however, that in proceedings before the commission there will be occasional departures from rules of evidence and procedure, and hence section 60a of the act also provides:

"No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, rule or regulation made, approved or confirmed by the commission; nor shall any order, award, rule or regulation be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the said common law or statutory rules of evidence and procedure." Stats. 1917, p. 871.

[1] While the terms of this section are broad and comprehensive, covering as they do the admission into the record and use as proof of any fact in dispute of any evidence objectionable under the common law and statutory rules, yet it was not intended thereby that it would be any the less the duty of the commission to follow the prescribed procedure and rules of evidence. In other words, it still remains the duty of the commission to conduct the proceedings so that there will be as little occasion as possible for the courts to resort to the said rule of decision.

But apart from this rule of decision we cannot perceive how petitioner has any substantial ground of complaint. Petitioner was put upon notice by respondents indicating that the testimony at the coroner's inquest was desired. It is not stated that such testimony was not filed in the commission nor actually received by petitioner; if it was received by petitioner, any objection thereto, either to its substance or the form in which it was presented, should have been made to the commission so that if well founded it might be obviated. No such objection was made. In such a situation it was incumbent on petitioner, if it had not done so, to make inquiry as to the purpose for which the supplemental testimony was sought and to acquaint itself with the manner of its introduction. Moreover, petitioner does not claim that the same R. Smith did not testify before both tribunals; that the coroner's transcript was not in fact filed; that the testimony was not given by Smith; that it was not correct or that it was not a true copy. The contention is, as already stated, that it was not evidence at all on the question of fact whether the deceased was the employee of the Merchants' Improvement Company.

[2-4] Assuming that the admission and consideration of this evidence by the commission was irregular, we think the objection made by petitioner comes too late. It does not appear that any objection was made by petitioner at any time to the admission of the testimony as evidence in the case prior to the

oral argument, nor that petitioner in the petition for rehearing requested permission to cross-examine the said witness. Approximately 25 days elapsed between the time the testimony was filed and the making of the findings and award. Furthermore, a rehearing was granted thereafter and apparently no objection was made to such testimony. The commission found "that no good reason exists for taking further testimony" and entered the final award on July 2, 1924, approximately 60 days after the transcript of the testimony was filed. Petitioner did not object to such testimony on the ground it was not certified. The return does not show it was certified, but it purports to be a copy of the testimony "In the matter of the inquisition upon the body of Wilbur Ford" and it would be yielding form to substance to assume it was not evidence in the case filed with the commission at the time the findings were made.

We conclude that the copy of the transcript of the testimony which purports to have been given at the coroner's inquest is hearsay testimony but admissible; that it was filed as evidence in the proceedings before the commission April 28, 1924, and was properly included in the return to the writ of review; that the petitioner does not claim it did not have notice that such copy was filed, and knowledge that it would be included in the return to the writ of review will therefore be imputed; that while its admission was attended with informality and irregularity the petitioner made no objection thereto and it must therefore be deemed to have waived all objection to the manner of taking such testimony and its admission into the record.

[5] It follows that there being a conflict in the evidence as shown by the return to the writ of review, on the question of the employer of the deceased, and the commission having found that the Merchants' Improvement Company was the employer, insured by the Continental Casualty Company, the award based upon such finding must be affirmed, and it is so ordered.

We concur: SHENK, J.; SEAWELL, J.; WASTE, J.; RICHARDS, J.

MYERS, C. J. I dissent.

Waiving all questions relating to the admissibility and use as evidence of the purported copy of the testimony at the coroner's inquest, and assuming that the witness R. Smith actually made the statements at the inquest which he is here assumed to have made, I am of the opinion that it appears from the record herein that the respondent commission was without jurisdiction to render the award for the reason that the relationship of employer and employee was not shown to have existed between the Merchants' Improvement Company, owner of the

building, and the deceased employee. It is true that the Legislature by the amendments to the Workmen's Compensation Act has abrogated, for the purpose of hearings before the Industrial Accident Commission, all of the common law and statutory rules of evidence and procedure, and has provided no other rules of evidence to take the place thereof. It cannot have been intended, however, to vest the commission with authority to render an award without the production of some evidence of some sort reasonably tending to prove the existence of the jurisdictional facts, one of which in each such case is the relationship of employee and employer between the injured person and the one from whom compensation is sought. If such were the intention it would be ineffective under the limitations of our Constitution (Const. art. 20, § 21; *Carstens v. Pillsbury*, 172 Cal. 572, 158 P. 218; *Pacific G. & E. Co. v. Industrial Acc. Com.*, 180 Cal. 497, 181 P. 788; *Worswick Co. v. Industrial Acc. Com.*, 181 Cal. 550, 185 P. 953; *Flickenger v. Industrial Acc. Com.*, 181 Cal. 425, 184 P. 851, 19 A. L. R. 1150; *Fidelity & C. Co. v. Industrial Acc. Com.*, 191 Cal. 404, 216 P. 578. The authority and duty still rests in this court upon proper application and showing, to review an award of the respondent commission. Such review looks to the question of jurisdiction, and, notwithstanding the abrogation of the common law and statutory rules of evidence, it is still the duty of the court upon such review to annul an award where the record shows that there was no evidence of any sort having a reasonable tendency to establish the existence of an essential jurisdictional fact.

The statement of the witness Smith at the coroner's inquest that "Mr. Ford was employed by the California Fruit people and under my direction. * * * This man was working under my instruction as a janitor" was obviously made merely by way of identification of the deceased. It was no more than a conclusion of the witness, a mixed conclusion of law and fact, and there is nothing in the record to indicate that this witness had the slightest comprehension of the legal distinction between the rendition of service in the capacity of an employee and the rendition of similar service in the capacity of an independent contractor. I doubt that the quoted statement may even be justly regarded as tending substantially to impeach the testimony later given by this witness before the commission. The later testimony was as to facts rather than conclusions, and from the facts so testified to by him the conclusion would inevitably follow that he was an independent contractor and that the deceased was his employee. Conceding, however, that his testimony before the commission was impeached by the quoted statements

made by him at the coroner's inquest, there remains in the record the testimony of Martin and Erhardt, whose testimony was in nowise impeached and who testified to facts and circumstances from which, if true, no conclusion can be drawn other than that Smith was an independent contractor and the deceased his employee. This testimony being in nowise impeached and in nowise inherently improbable, the commission was bound to accept it as true unless it was substantially contradicted. 10 Cal. Juris., 1143; *Stewart v. Silva*, 192 Cal. 405, 411, 221 P. 191, and cases cited. I cannot regard the quoted testimony of Smith as a substantial contradiction thereof and I therefore think that the award herein should be annulled.

I concur: LENNON, J.

195 Cal. 544

MARTIN v. PACIFIC GAS & ELECTRIC CO. (Sac. 3696.)

(Supreme Court of California. March 3, 1925.)

1. Appeal and error ☞659(3)—Motion for diminution of record and insertion of matter in transcript on file in appellate court denied.

Motion for diminution of record and insertion in transcript on file in appellate court of instructions offered and refused in trial court, and clerk's record of order denying motion for new trial, and specification of grounds thereof, accompanied by copies of papers on file in trial court, and certified by clerk to be correct, will be denied, in view of Code Civ. Proc. § 953a et seq., and amendment to Code, providing for review of order denying new trial on appeal from judgment, where matter sought to be inserted was not included in reporter's transcript, settled by judge of trial court.

2. Appeal and error ☞612(2)—Clerk can authenticate for record on appeal only judgment roll and notice of appeal.

Only portions of record which clerk is competent to authenticate for record on appeal are judgment roll and notice of appeal.

3. Appeal and error ☞616(1)—Trial judge's action necessary to make papers part of reporter's transcript.

Only means by which copies of papers on file in trial court and certified by clerk to be correct purporting to be instructions refused, notice of motion, and order denying new trial, could properly be made a part of reporter's transcript, would be by action of trial judge, including them therein, and certifying to their correctness.

4. Appeal and error ☞659(3)—Application for relief from mistake for failure to include papers in reporter's transcript to be made to trial court.

If papers purporting to be instructions refused, notice of motion, and order denying new trial were omitted from reporter's transcript,

as settled by trial judge, through mistake, inadvertence, or excusable neglect, application for relief therefrom should be made in first instance to trial court.

In Bank.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Henry Alan Martin, a minor, by and through P. R. Merrill, as guardian of his estate, against the Pacific Gas & Electric Company. Judgment for plaintiff, and defendant appeals. On defendant's motion for diminution of record and to insert matter in transcript. Motion denied.

Carr & Kennedy, of Redding, and T. J. Straub, of San Francisco, for appellant.

Jesse W. Carter, of Redding, for respondent.

PER CURIAM. [1-4] This matter comes up on a suggestion by appellant of diminution of the record and motion to insert in the transcript now on file in this court the instructions offered by the party at the trial below and refused by the judge and also the clerk's record of the order denying motion for new trial and the specification of grounds of the motion. This motion is accompanied by copies of papers on file in the trial court and certified by the clerk to be correct, purporting to be instructions refused, notice of motion for new trial, and order denying motion for new trial, respectively. The record upon this appeal was prepared under the provisions of section 953a et seq. of the Code of Civil Procedure. The papers specified in the motion, in order to be available to appellant for use upon this appeal, should have been included in reporter's transcript, settled by the judge of the trial court. Section 953a provides for the inclusion in the reporter's transcript of "all rulings, instructions, acts or statements of the court, also all objections or exceptions of counsel, and all matters to which the same relate. * * *" The instructions are thus expressly provided for, and, since the amendment of the Code to provide for a review of an order denying a new trial upon appeal from the judgment, the order upon the motion therefor is in effect a ruling of the court, and the notice of intention to move for a new trial is in the nature of a supporting paper, and is a matter to which the ruling relates. The only portions of the record which the clerk is competent to authenticate for the purpose of a record on appeal are the judgment roll and the notice of appeal. Therefore, if the papers here involved should be inserted in the clerk's transcript, they could not be considered as a part of the record upon appeal. *Richmond v. Julian Consolidated Min. Co.*, 176 Cal. 600, 169 P. 356; *Barnabee v. Hunstock*, 42 Cal. App. 659, 183 P. 951. The only means by

which these papers may properly be made a part of the reporter's transcript is by the action of the trial judge including them therein and certifying to their correctness. *Bell v. Brigance* (Cal. Sup.) 229 P. 27. If these papers were omitted from the reporter's transcript, as settled by the trial judge, through mistake, inadvertence, or excusable neglect, application for relief therefrom should be made in the first instance to the trial court. In the absence of action thereon by the trial court, or the trial judge, the insertion of these papers in the transcript would add nothing to the authentic record upon appeal.

The motion is denied.

70 Cal. App. 695

DIAMOND MATCH CO. v. SANITARY FRUIT CO. (Civ. 2786.)

(District Court of Appeal, Third District, California. Jan. 22, 1925. Hearing Denied by Supreme Court March 19, 1925.)

1. Mechanics' liens ⇐3—Right to lien is guaranteed by Constitution, manner of enforcement being committed to Legislature.

Right of mechanics, materialmen, etc., to a lien on property is guaranteed by Const. art. 20, § 15, and Legislature is required to establish a reasonably framed system for enforcement of right, and is not vested with arbitrary power or discretion.

2. Mechanics' liens ⇐3—Legislature cannot impair right to lien or unduly hamper its exercise.

Legislature cannot impair or unduly hamper exercise of right to lien guaranteed by Const. art. 20, § 15.

3. Mechanics' liens ⇐3—Statute adopted to prevent denial of benefit of lien for immaterial mistakes.

Code Civ. Proc. § 1203, as added by St. 1907, p. 858, and re-enacted by St. 1911, p. 1319, § 12, and St. 1911, p. 1319, § 14, relating to mistakes in notice of mechanics' liens, were adopted to prevent a denial of benefit of lien duly filed for immaterial mistakes or errors in taking of steps prescribed or doing things required to perfect lien.

4. Mechanics' liens ⇐3—Legislature, in adopting means for enforcement of liens, required to protect rights of owners of property.

Legislature, in adopting means for enforcement of liens, given by Const. art. 20, § 15, must protect rights of owners of property which may be affected thereby.

5. Mechanics' liens ⇐159—Act of filing notice of lien constitutes "constructive notice."

Act of filing notice of lien as required by Code Civ. Proc. § 1187, constitutes "constructive notice" to owners and others.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Constructive Notice.]

6. Mechanics' liens $\Leftrightarrow$ 159—Filing of claim of lien in recorder's office intended to protect owner and those dealing with him.

Filing of claim of lien in recorder's office is intended to protect owner of property against double payment to contractor or payment for his services and materials in excess of what his contract calls for, and for protection of those who may deal with owner of property.

7. Mechanics' liens $\Leftrightarrow$ 137(1)—Statutory requirement, that claim of lien shall contain name of owner or reputed owner, must be complied with.

Requirement of Code Civ. Proc. § 1187, that claim of lien shall contain name of owner or reputed owner of property, must be complied with to perfect lien, where such owner is known to claimant.

8. Mechanics' liens $\Leftrightarrow$ 155—Statute requiring county recorders to keep an index of notices of mechanics' liens construed.

Under Pol. Code, § 4132, subd. 16, requiring county recorders to keep an index of notices of mechanics' liens, owner of property is not required to make any further inquiry as to liens than an examination of such index.

9. Mechanics' liens $\Leftrightarrow$ 137(2)—Notice of claim of lien, in which claimant inserted its own name as that of owner, held insufficient.

Under Code Civ. Proc. § 1187, providing that notice of lien shall contain name of owner or reputed owner of property, notice containing statement of all matters required, except that claimant inserted its own name as that of owner, was insufficient, and name of owner could not be read into notice, under Code Civ. Proc. § 1203, as added by St. 1907, p. 858 and re-enacted in St. 1911, p. 1319, § 12, and St. 1911, p. 1319, § 14.

10. Mechanics' liens $\Leftrightarrow$ 137(2)—Statement of name of owner in caption of notice insufficient.

As index of notices of mechanics' liens is required only to contain name of parties against whom lien is claimed, parties claiming lien, an indication of time of filing claim and book in recorder's office in which it may be found, statement of name of owner in caption does not cure error in name in body of notice.

11. Mechanics' liens $\Leftrightarrow$ 137(2)—Caption of claim of materialman's lien and attached account held insufficient to show that defendant was owner of property.

Caption of claim of materialman's lien and notation at head of itemized statement of account attached thereto, purporting to designate building for construction of which materials were furnished, held insufficient to show that defendant was owner of property.

12. Mechanics' liens $\Leftrightarrow$ 157(1)—Equity without power to protect lien claimant, if default or neglect material to perfection of lien.

Equity is without power to protect a lien claimant against consequences of material defects in notice of lien, unless defect is within scope of Code Civ. Proc. § 1203, as added by St. 1907, p. 858, and re-enacted by St. 1911, p. 1319, § 12, and St. 1911, p. 1319, § 14, pro-

viding that certain errors shall not invalidate lien.

13. Constitutional law $\Leftrightarrow$ 70(1)—Courts cannot change requirements of statute as to perfecting of mechanics' liens or change claim of lien.

Courts cannot change requirements of statute as to perfecting of mechanics' liens or change claim of lien in view of Code Civ. Proc. § 1858.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by the Diamond Match Company against the Sanitary Fruit Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

George F. Jones, of Oroville, and James T. Matlock, of Red Bluff, for appellant.

McCoy & Gans, of Red Bluff, for respondent.

HART, J. This action was brought to foreclose a materialmen's lien, filed against certain real property situated in the town of Red Bluff, Tehama county.

The second amended complaint states that, on or about the 9th day of October, 1920, one Jasper W. Bandy entered into a contract with plaintiff whereby the latter agreed to furnish and did furnish and deliver to Bandy lumber and building material of the agreed value of \$3,209.58, to be used for the erection of a building for the defendant, Sanitary Fruit Company, on the real property specifically described in the complaint; that the latter, at the time said building material was being furnished, knew that the same was being used by said Bandy in the construction of a building on said Sanitary Fruit Company's real property; that said Fruit Company has not paid the sum due for said lumber, etc., although demand for such payment has been made. Other essential facts in an action of the character of this are alleged, and then the complaint avers that the structure was completed on the 15th day of March, 1921, and that within 90 days after such completion plaintiff filed in the office of the county recorder of Tehama county its claim of lien against said land and building. It is further alleged that said claim of lien, which is annexed to the complaint and made a part thereof, contained all the matters which the statute in such cases requires. It is further alleged that no notice of the completion of the building was ever filed in the office of the county recorder as required by the lien law; that the defendant fruit company, at the time of the filing and recording of the claim of lien by plaintiff, was indebted to said Bandy for erecting said building in the sum of \$3,209.58.

Defendant, Sanitary Fruit Company, demurred to the second amended complaint on

the general ground. The demurrer being overruled said defendant filed an answer denying specifically the averments of the complaint and setting up a special or an affirmative defense, the nature of which, as will presently be seen, is not of material importance in the decision of the case. After introducing testimony showing that building materials had been furnished Bandy to be used in the erection of a warehouse on the real property described in the complaint, that said materials were so used, the value thereof and that the same had not been paid for, the plaintiff offered the purported notice of lien in evidence. This offer was objected to by counsel for the defendant, Sanitary Fruit Company, on the ground that in a certain material particular the instrument did not and does not comply with the requisites of the statute governing the preparation and filing of such liens and that it was, therefore, void and without legal force. The court sustained the objection. The defendant thereupon moved for a nonsuit and the motion was granted. The appeal here is by the plaintiff from the judgment entered upon the order granting the nonsuit.

Thus the sole question presented for our solution is whether the purported notice or claim of lien complies with section 1187 of the Code of Civil Procedure setting forth the matters to be contained in such an instrument. Said section provides, in part, as follows:

"Every original contractor, claiming the benefit of this chapter, within sixty days after the completion of his contract, and every person save the original contractor claiming the benefit of this chapter, at any time after he has ceased to perform labor or furnish material, or both, for any work or improvement mentioned in this chapter, and until thirty days after the completion of such work or improvement, may file for record with the county recorder of the county or city and county in which such property or some part thereof is situated a claim of lien containing a statement of his demand after deducting all just credits and offsets, the name of the owner or reputed owner, if known, a general statement of the kind of work done or materials furnished by him, or both, the name of the person by whom he was employed or to whom he furnished the materials, and a description of the property sought to be charged with the lien sufficient for identification; which claim of lien must be verified by oath of claimant or some other person."

The instrument filed for record by the plaintiff as a claim or notice of lien sets forth that the materials therein referred to were furnished by plaintiff to Bandy, the contractor, to be used and that they were actually used in the construction of the building on the real property described therein, and states in detail the terms of the contract between plaintiff and said Bandy for the furnishing of said materials. In brief, the instrument contains a statement of all

the matters required to be set forth in such an instrument by section 1187 of the Code of Civil Procedure, with a single exception, to wit, the name of the owner or reputed owner of the real property against which a lien was sought by plaintiff to be filed, and as to that requirement the document attempts to comply therewith in the following fashion, "The Diamond Match Company, a corporation, is the name of the owner and reputed owner of said contractor." The instrument is entitled, "The Diamond Match Company, a Corporation, v. Sanitary Fruit Company, a Corporation, and Jasper W. Bandy, also known as J. W. Bandy." Attached to the lien is an itemized statement of the materials furnished, and this statement is under the following heading: "Sold to J. W. Bandy—Tag No. — Job: Sanitary Fruit Company. Warehouse." The plaintiff contends that the foregoing statement in the purported claim of lien and the itemized statement of the account attached thereto clearly show that a clerical mistake was made by inserting its own name instead of that of the defendant as the owner of the property (or of the "contractor," as the instrument reads), and that the mistake is one which falls with-in the spirit, though confessedly not with-in the letter, of section 1203 of the Code of Civil Procedure, which was added to our Mechanic's Lien Law by the Legislature of 1907 (Stats. 1907, p. 858) and re-enacted by the Legislature of 1911 (Stats. 1911, p. 1319). Said section provides:

"No mistake or errors in the statement of the demand, or of the amount of credits and offsets allowed or of the balance asserted to be due to claimant, nor in the description of the property against which the claim is filed, shall invalidate the lien, unless the court finds that such mistake or error in the statement of the demand, credits and offsets, or of the balance due, was made with the intent to defraud, or the court shall find that an innocent third party, without notice, direct or constructive, has since the claim was filed, become the bona fide owner of the property lien-ed upon, and that the notice of claim was so deficient that it did not put the party upon further inquiry in any manner."

It will be noted that within the mistakes or errors enumerated by the above section, which will not be treated as having the effect of invalidating a claim of lien, is not included a mistake or error in stating the name of the owner or the reputed owner of the property to which it is intended that a lien shall attach. It is the contention that, since it is clear from the whole instrument that the insertion of its own name therein as the owner was purely a mistake on the part of the plaintiff, and that likewise it is clear that the owner or reputed owner is the defendant, the broad and liberal principle underlying section 1203 should be applied, and the name of the defendant read into the doc-

ument as the owner or reputed owner of the property. That this should be done, so it is argued, is further emphasized by section 14 of the Act of 1911 (Stats. 1911, pp. 1319-20), which declares, among other things, that the provisions of the lien law "shall be liberally construed with a view to effect its purpose."

[1-3] The right of mechanics, materialmen, etc., to a lien upon property upon which they have bestowed labor, or in the improvement of which material which they have furnished have been used, for the value of such labor or materials, is guaranteed by the Constitution, the mode and manner of the enforcement of such right being committed to the Legislature. Article 20, § 15, Const. Manifestly, the Legislature is not thus vested with arbitrary power or discretion in attending to this business. Indeed, rather than power so vested in the Legislature, it is a command addressed by the Constitution to the lawmaking body to establish a reasonably framed system for enforcing the right which the organic law vouchsafes to the classes named. Clearly, it is not within the right or province of the Legislature, by a cumbersome or ultratechnical scheme designed for the enforcement of the right of lien, to impair that right or unduly hamper its exercise. Every provision of the law which the Legislature may enact for the enforcement of the liens mentioned in section 15 of article 20 of the Constitution must be subordinate to and in consonance with that constitutional provision. *Hampton v. Christensen*, 148 Cal. 729, 737, 84 P. 200. The rules embraced in section 1203 of the Code of Civil Procedure and section 14 of the Act of 1911, supra, were adopted to prevent a denial of the benefit of a lien duly filed, merely because of immaterial or unsubstantial mistakes or errors in the taking of the steps prescribed or doing the things required to perfect a lien.

[4-8] But, while all that has been said above is true, it will not be denied that it is no less the duty of the Legislature, in adopting means for the enforcement of the liens referred to in the constitutional provision, to consider and protect the rights of owners of property which may be affected by such liens than it is to consider and protect the rights of those claiming the benefit of the lien laws. The liens which are filed under the lien law against property, as a general rule, grow out of contracts which are made by and between lien claimants and persons (contractors) other than the owner of the property so affected, and such liens may be filed and so become a charge against property without the owner having actual knowledge thereof. The act of filing, as the law requires, constitutes constructive notice to the owners and others that the property stands embarrassed with a charge which will operate as a cloud upon the title thereof so long as the lien remains

undischarged, and that the property may be sold under foreclosure proceedings unless the debt to secure which the lien was filed is otherwise sooner satisfied. The filing of the claim in the recorder's office is intended to protect the owner of the property against double payment to the contractor or payment for his services and the materials he uses in the work of improvement in excess of what his contract calls for. The notice is also intended for the protection of those who may, as to such property, deal with the owner thereof—that is, third persons as purchasers or mortgagees. *Corbett v. Chambers*, 109 Cal. 178, 182-183, 41 P. 873; *Wyman v. Quayle*, 9 Wyo. 326, 63 P. 988. For these reasons, the requirement that the claim of lien shall contain the name of the owner or the reputed owner of the property is imperative, and must be complied with, where such owner is known to the claimant, to perfect the lien. *Hooper v. Flood*, 54 Cal. 218; *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 22 P. 231; *Palmer v. Lavigne*, 104 Cal. 30, 37 P. 775; *Corbett v. Chambers*, supra; *Bryan v. Abbott*, 131 Cal. 222, 63 P. 363; *Lucas v. Gobbi*, 10 Cal. App. 650, 103 P. 157; *Malter v. Falcon Min. Co.*, 18 Nev. 209, 2 P. 50; *Blattner v. Wadleigh*, 48 Kan. 290, 29 P. 165, 167; *Gordon v. Deal*, 23 Or. 153, 31 P. 287; *White v. Mullins*, 3 Idaho, 434, 31 P. 801; *Wyman v. Quayle*, supra. The importance of this requirement and the necessity of complying with it are emphasized by section 4132, subd. 16, of the Political Code, which provides that—

every recorder (of the counties) "must keep * * * an index of notices of mechanics' liens, labeled 'Mechanics' Liens,' each page divided into three columns, headed, respectively: 'Parties against Whom Claimed,' 'Parties Claiming Liens,' 'Notices—When and Where Recorded.'"

What is said in *Corbett v. Chambers*, supra, speaking of a section of the Political Code, then known and numbered as "4236, subd. 16," which was substantially in the same language as subdivision 16 of section 4132, supra, is equally pertinent here:

"It is by this index that a subsequent dealer with the property is to be guided in ascertaining whether there are any incumbrances upon the owner's title, and it is apparent that this index would afford no notice to subsequent purchasers or incumbrancers if the owner whose name is to be stated in the claim is one who at some previous time had been owner, but who had long prior to filing the claim parted with all interest in the property."

See, also, *Wyman v. Quayle*, supra.

It is clear that it was intended by subdivision 16 of section 4132 that the owner of the property, so far as are concerned incumbrances of the character of those with which property may be charged under the lien law, is not required to make any further inquiry into the status of the title to his property

than an examination of the index prescribed by said section.

[9] In the instant case, the owner of the property, or any other person in a deal with the owner affecting the property, would be justified in at once concluding, upon an examination of the recorder's index of liens to ascertain whether the property had been charged with a lien, that the property was entirely free from embarrassments in the form of liens authorized by section 15 of article 20 of the Constitution. The name "John Doe," or "John Smith," in the claim of lien herein involved in the place of that of the plaintiff in the recorder's index would convey no less accurate information as to the identity of the real or the reputed owner of the property than does the name of the plaintiff.

[10, 11] The claim that the caption of the claim of lien, considered with the notation on the itemized statement of the demand, as above indicated, sufficiently shows that the defendant is or was the owner of the property, is subject to several answers. The first is that the law does not require that the caption of the claim of lien or the itemized account or demand should itself be included in the index, except in so far as the index is to be regarded as involving a reference to the entire document and its contents. In other words, the index to which alone the owner or an interested party is required to look to learn whether the property has been and is charged with a lien, is required only to contain the name of the party or parties against whom the lien is claimed, the party or parties claiming the lien, and an indication of the time of filing the claim and where and in what book in the recorder's office it may be found. Secondly, it cannot be told from the caption whether the Sanitary Fruit

Company or J. W. Bandy is such owner or reputed owner. Indeed, it cannot be told from the caption whether either is the owner or the reputed owner thereof. The same is to be said of the notation at the head of the itemized statement of the account purporting to designate the particular building for the construction of which the materials were furnished. These matters could go no further, even if to that extent, than affording an inference that the Sanitary Fruit Company and J. W. Bandy, or one or the other, might have some sort of interest in the property or the building, but such inference is entirely too remote and indefinite to justify a definite finding or conclusion that either or both is or are the owner or owners or reputed owner or owners of the property, and such inference might lead to a false conclusion.

In *Malter v. Falcon Min. Co.*, supra, the notice of lien contained the declaration that the claimants intend "to hold and claim a lien upon * * * that certain Howland

pulverizing and wet crushing and amalgamating mill, situated in Rock creek, on the millsite owned or claimed by the Falcon Mining Company, in Elko county, state of Nevada." The Supreme Court of Nevada, by Hawley, C. J., answering the contention that the foregoing statement in the claim of lien was a sufficient identification of the owner of the property upon which the labor was bestowed and for which materials were furnished by the contractors, the lien claimants, said:

"There is no statement that the Falcon Mining Company is the owner, or the reputed owner, of the mill. *The question of ownership is left to inference only, and the inference to be drawn from such a statement that the Falcon Mining Company is the owner, or reputed owner, of the property, may or may not be true. It does not necessarily follow that because the company claims to be the owner of the millsite, that it is the owner, or reputed owner, of the mill erected thereon.*" (Italics ours.)

In *White v. Mullins*, supra, there was an omission to state the name of the owner or reputed owner in the notice of lien, and there was no statement therein that the owner or reputed owner was unknown to the claimants. The notice of lien was entitled "White and Mallison, Subcontractors and Claimants, v. R. J. Bledsoe, Contractor, and B. G. Mullins, Owner." The Idaho statute prescribing the essentials of a claim of lien was substantially in the same language as is our section 1187. It was contended in that case that the name of the owner was sufficiently shown by and so could readily be ascertained from the caption of the claim as filed for record, and as indicated above. The court said:

"It can hardly be claimed that the descriptive personae at the head of the notice [here follows the caption as above shown] is a direct and unequivocal allegation of the name of the owner."

It is true that the rule in Idaho was that the lien laws should be strictly construed. Possibly that rule was grounded on the reason that the right of lien was given by statute and not by the Constitution. But be that as it may, the significance of the utterance of the Idaho Supreme Court, as given above, is in the importance attached to the requirement that the name of the owner or the reputed owner, if known to the lien claimant, shall clearly be made to appear in the claim of lien.

In *Santa Cruz Rock Pavement Co. v. Lyons*, 133 Cal. 114, 119, 65 P. 329, cited by appellant as presenting a situation analogous to that which appears herein, one Ellen Lyons was the owner of the property to which the lien attached in her separate right. The trial court found that her husband was the reputed owner of the property involved at the time the contract for the improvement of

the same was made and that "he, both in his own individual behalf, and as the ostensible agent of his wife, Ellen, and in her behalf, though in his own name, entered into a written contract with the plaintiff for the performance" of the work. The court said:

"If plaintiff made any mistake in thus stating the ownership, it was an honest one, and in no sense was it fraudulently made, or made for the purpose of deceiving any person, and the mistake could not prejudice his right to a lien. * * * It has been held * * * that if the lienholder in good faith 'gives the name of the reputed owner, he shall not lose his lien if he shall afterward ascertain that some other person was the owner.' Corbett v. Chambers, 109 Cal. 178."

In the present case, as will be noted, the notice or claim of lien does not state either the name of the owner or the reputed owner of the property, nor is it therein stated that the owner or reputed owner or the name of such owner or reputed owner is or was unknown to the claimant. Indeed, according to the complaint, the plaintiff could not have honestly made such a statement in the claim of lien, for that pleading unequivocally states that:

"The defendant, Sanitary Fruit Company, a corporation, was, at the time of the making of said contract and at the time of the delivery of said lumber and building material upon the land hereinafter described, and now is the owner and the reputed owner of said property."

If the claim of lien in this case had stated that "the Sanitary Fruit Company, a corporation, is the owner or reputed owner of the contractor," we would then have a case which would probably come within the spirit or contemplation of section 1203 of the Code of Civil Procedure and section 14 of the Act of 1911, supra, and also a case something like that of McDonald v. Backus, 45 Cal. 262, 264, cited by appellants here, wherein the lien claimant, in stating the name of the contractor by whom he was employed to do certain work on the building constructed, used the word "occupied" instead of the word "employed," so that the claim read:

"* * * Swain is the name of the person by whom he (plaintiff) was 'occupied.'"

While there is no express statement in the opinion itself to that effect, we think the reporter's interpretation in the syllabus of the opinion that "a mere mistake in the use of a word in a claim of lien filed to secure a mechanic's lien will not vitiate it, but the court will insert the word intended to be

used," is a fair and reasonable deduction from the opinion and that the conclusion that the mistake was immaterial is eminently sound.

In Allen v. Wilson, 178 Cal. 674, 678, 174 P. 661, 663, the following statement from West Coast Lumber Co. v. Newkirk, 80 Cal. 277, 22 P. 231, is approved:

"The plaintiff [lien claimant] is only required to state names mentioned (owner, etc.), if known. If the names are not known the claim filed is sufficient if it is silent on the subject."

That case has no application here, however. As shown, the plaintiff did know, at the time it prepared and filed its notice of lien, the name of the owner or reputed owner of the property.

[12, 13] Appellant insists that this case should be disposed of on broad, equitable considerations, but such considerations can enter into the determination of the case only in so far as the lien statute itself permits it. The Legislature has introduced into the system for the enforcement of liens of mechanics, etc., the only equitable principles which can be invoked in the decision of any case arising under such statute in the rules enunciated in section 1203 of the Code of Civil Procedure and section 14 of the Act of 1911, and unless the case is one which is subject to the mollifying influence of the rules declared in those sections, then, if the default or neglect be material to the perfection of a lien, it is beyond the remedial scope of equity, in the exercise of its usual powers, to protect the lien claimant against the untoward consequences of what may be and probably was his own neglect. The courts cannot read either into the statute or the claim of lien what is not there, nor take from either what is there. Code Civ. Proc. sec. 1858. If the courts may say that the name of the owner or reputed owner, where known by the claimant, need not be stated in the notice of lien, with equal reason may they hold that any other requisite of the statute need not be observed and followed. Indeed, the index of notices of liens required to be kept by the county recorder by subdivision 16 of section 4132 of the Political Code would be of little efficacy or its object wholly thwarted, if the provision of the lien law requiring the statement in the notice of lien of the name of the owner or reputed owner of the property to which the lien is to attach, may be held not to be a material requirement.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

71 Cal. App. 42

JACOBS, MALCOLM & BURTT v. NORTHERN PAC. RY. CO. (Civ. 5011.)

(District Court of Appeal, First District, Division 1, California. Jan. 30, 1925.)

1. Attachment ⚡7—Action, construed as tort in case of doubt and attachment, does not lie.

In view of Code Civ. Proc. § 537, if action is in tort, remedy of attachment does not lie, and, if any doubt arises as to nature of action, it shall be construed as tort.

2. Attachment ⚡5—Action against carrier held to sound in contract rather than in tort, rendering attachment proper.

In determining whether action was contract or tort as bearing on question whether issuance of attachment was proper, allegation that in consideration of reasonable hire carrier agreed to transport potatoes under standard ventilation, which meant that ventilators should be closed at 32° above zero and opened above that temperature, *held*, in absence of legal showing to contrary, to impose on carrier greater duty than law imposed, and to make action sound in contract rather than in tort for violation of public duty.

3. Attachment ⚡7—Whether action tort or contract not determined exclusively by language of complaint.

Whether action is founded in tort or upon contract as bearing on propriety of issuance of attachment is not to be determined exclusively from particular language in complaint, if it be made to appear that nature of obligation sued upon constitutes a tort.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Jacobs, Malcolm & Burtt, a partnership consisting of Albert J. Jacobs and Joseph Moyes against the Northern Pacific Railway Company. From an order denying its motion to dissolve attachment, defendant appeals. Affirmed.

Ford, Johnson & Bourquin, of San Francisco, for appellant.

Glensor, Clewe & Van Dine, of San Francisco, for respondents.

KNIGHT, J. This is an appeal by the defendant railroad company from an order denying a motion to dissolve an attachment, issued in an action brought by plaintiff to recover of and from the defendant the sum of \$371.25, as damages, for the breach of a contract, wherein, it is alleged, defendant agreed to give "standard ventilation" to a shipment of 403 sacks of potatoes which were being transported by defendant, as the initial carrier, from Wapato, Wash., to San Francisco.

Defendant is a foreign corporation and the issuance of the writ of attachment was predicated upon an affidavit, filed on behalf

of plaintiff in which it was stated, in substance, that the action was upon contract against a defendant not residing in the state.

[1] The single question presented by the appeal is whether the action is upon contract or in tort. If it be an action in tort, the remedy of attachment does not lie. *Hallidie v. Enginger*, 175 Cal. 505, 166 P. 1; *Mudge v. Steinhart*, 78 Cal. 34, 20 P. 147; Code Civ. Proc. § 537. And, if any doubt arises as to the nature of the action, it should be construed as one in tort. 10 Cor. Jur. 1026. But, if the action be one upon contract, appellant concedes that the motion for the dissolution of attachment was properly denied.

[2] It is the contention of appellant that the respondent's cause of action is the common one against the carrier to recover damages for injury to goods while in transit, and is therefore founded upon a breach of public duty, which constitutes a tort. 10 Cor. Jur. 107; 4 Cal. Jur. 868; Civ. Code, § 2194. With respect to that it may be granted that it is the carrier's duty, independent of contract, to properly ventilate its cars in order to preserve perishable goods in transit, and that any failure to comply with such duty resulting in loss or injury to the shipper renders the carrier liable for the damage sustained. 10 Cor. Jur. 93.

In respondent's complaint it is alleged that—

"In consideration of certain reasonable hire and reward to be paid therefor" the defendant "promised and agreed to transport said potatoes under and give them 'standard ventilation.' That in and by the terms 'standard ventilation' was meant and intended, and was so understood by the parties hereto, that all ventilators on said car should be closed when the outside temperature fell to 32 degrees above zero; that all ventilators should be opened when the outside temperature rose above 32 degrees above zero."

We are of the opinion that, in the absence of any legal showing to the contrary, the contract pleaded in the complaint imposed upon the carrier a duty or obligation in respect to the goods beyond that which the law itself imposed, and which was of advantage to respondent; that, therefore, the action must be construed as one upon contract rather than one for the breach of carrier's public duty. *Hutchinson on Carriers* (3d Ed.) §§ 1331 and 1328, and cases cited. If the complaint had alleged merely that the appellant had failed to give the shipment "proper ventilation," or if there had been any contra showing made by affidavit or otherwise at the time this motion was presented to the effect that the obligation of the contract sued upon extended no farther than to require the performance of the common public duty, or if a sufficient averment of facts had been presented in that regard, to even raise a

doubt upon that question, a different situation would be presented.

[3] Appellant contends, and correctly so, we think, that the question of whether or not the action is founded in tort or upon contract is not to be determined exclusively from the particular language employed in the complaint, if it be made to appear that the nature of the obligation sued upon constitutes a tort. *Hallidie v. Enginger*, supra. But, as before stated, there was nothing whatever before the trial court, and nothing here, by which such fact is made to appear. The allegations of respondents' complaint stand undisputed, and, in the absence of any evidence as a basis, we are not prepared to hold, as a matter of law, that the common public duty of a carrier to properly ventilate potato shipments requires that all ventilators should be closed when the outside temperature falls to 32 degrees above zero and shall be opened when the temperature rises above that degree.

The order appealed from is affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

71 Cal. App. 50

LUITWIELER v. LUITWIELER et al.
(Civ. 4285.)

(District Court of Appeal, Second District, Division 1, California. Jan. 30, 1925.)

1. Husband and wife ⇨270(7) — Complaint held to state cause of action even if deficient as complaint for fraud and conspiracy.

Complaint, in action by husband against wife, alleging wife's appropriation and retention of proceeds of community property contrary to agreement, *held* to state a cause of action even if deficient as a complaint for fraud and conspiracy.

2. Appeal and error ⇨1011(1)—Finding of trial court on conflicting evidence will not be disturbed.

Finding of trial court on conflicting evidence will not be disturbed.

3. Husband and wife ⇨270(8)—Verdict for plaintiff sustained in action by husband against wife on agreement for division of proceeds of land.

In action by husband against wife on agreement for equal division of proceeds of land when sold, evidence *held* to sustain findings for plaintiff.

4. Appeal and error ⇨761—Assignments of error not entitled to be considered, in absence of argument or citation of authority.

Assignments of error as to admission and rejection of evidence were not entitled to be considered, where, without argument or citation of authority, rulings were merely set out in brief with a short statement of evidence in connection with each ruling.

5. Husband and wife ⇨266—Agreement held not to constitute husband and wife a partnership.

Agreement between husband and wife for a division of net proceeds of land described therein, when sold, equally between them, *held* not to constitute parties thereto a partnership.

6. Trial ⇨397(5)—Omission to make any finding on issues made by amendment to answer, not stating defense, held not erroneous.

Omission of court to make any finding on issues made by amendment to answer asserting existence of partnership *held* not erroneous, where amendment as basis of claim of partnership set up written agreement not having effect of creating partnership, as it failed to state sufficient facts to constitute a defense.

7. Trial ⇨397(5)—Court not required to find on immaterial issue.

Court is not required to find on any immaterial issue made by pleading.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by Samuel W. Luitwieler against Sophia C. Luitwieler and another. Judgment for plaintiff, and named defendant appeals. Affirmed.

See, also, 57 Cal. App. 751, 207 P. 931.

Haas & Dunnigan, Bradner W. Lee, Bradner W. Lee, Jr., and Kenyon F. Lee, all of Los Angeles, for appellant.

W. S. Taylor and E. W. Forgy, both of Los Angeles, for respondent.

CURTIS, J. There are four principal grounds advanced by appellant for reversal of the judgment herein. They are: First, that the complaint does not state facts sufficient to constitute a cause of action; second, that the court erred in denying appellant's motion for a nonsuit; third, that the evidence is insufficient to justify the findings; and, fourth, errors of law in admission and rejection of evidence.

[1] Considering these grounds in the order named, we will first take up the appellant's contention that the complaint does not state facts sufficient to constitute a cause of action. Among other things, the plaintiff has alleged, in his complaint, that respondent and appellant are husband and wife; that certain real property described therein is their community property; that said parties had entered into a written agreement of date August 7, 1912, concerning said real property, wherein they had agreed that the proceeds from the sale thereof, "whether in land, money or securities, shall be divided between the parties hereto share and share alike, each party to receive one-half thereof"; that appellant had received and used large sums of money coming into her hands from the sale of certain portions of said real property, over and above the amount to

which she was entitled, and refused to account to plaintiff for any of the money so received by her; that she has taken in her own name notes and mortgages given to secure the purchase price of certain portions of said land sold by said parties; and that she has refused to execute deeds or to sell the remaining 40 acres of said land, or any portion thereof. In addition to these allegations, the complaint contains further statements that appellant had conspired with the defendant Henry L. Miller, the son-in-law of appellant and respondent, to defraud plaintiff of his interest in said lands, and in other property belonging to plaintiff. Appellant now contends that the complaint does not state a cause of action with respect to alleging fraud and conspiracy, and that the allegations of the complaint in other respects are so dependent upon those alleging fraud and conspiracy that it fails to state any cause of action whatever. In this contention of appellant we are unable to agree. The substance of these allegations of the complaint, after eliminating all reference to fraud and conspiracy, we have briefly stated above, and we think that they sufficiently state a cause of action against appellant. It may be that the complaint, when considered as a pleading charging fraud and conspiracy, is deficient, yet if it contains allegations which, independent of any fraud or conspiracy, set forth a legal demand against the defendant in favor of the plaintiff, a cause of action is stated therein. The position of appellant that such allegations are so dependent upon the allegations of fraud and conspiracy that they do not in themselves state a cause of action is untenable. Take, for instance, the allegation of the complaint that appellant has used large sums of money coming into her hands from the sale of the community property, and that she has used this money fraudulently and in furtherance of the conspiracy entered into between herself and the said Miller. The gist of this allegation is the illegal retention of all of the money by appellant. As far as the appellant is concerned, this injury to the plaintiff is the same, whether she unlawfully used this money in conspiracy with Miller, or whether she did so otherwise. Eliminate all reference to the conspiracy in the above allegation, and there still remains a sufficient material fact—the unlawful use of the money. We find this condition to exist generally throughout the complaint; that is, after striking therefrom all reference to any fraud or conspiracy, there is left a statement of facts sufficient to constitute a good cause of action in favor of the plaintiff and against the defendant and appellant.

[2, 3] Under appellant's contention that the evidence is insufficient to support the findings, she has specified some twelve instances wherein she contends that the evidence is lacking in this respect. We will con-

sider briefly some of the more important of these specifications. Appellant first contends that the evidence is insufficient to sustain or justify the finding that the notices from the defendant, and her acts, prevented the sale of any of the unsold portions of the land. The land described in said agreement had been purchased by the respondent, an undivided one-half thereof in the year 1889, and the balance in the year 1891. It was subdivided into lots and blocks, and a map thereof was made and filed for record in the office of the county recorder of the county of Los Angeles. After the subdivision of said lands and after the agreement of September 2, 1912, a number of lots therein were sold by the parties. These sales were made by deeds executed by both appellant and respondent in favor of the respective purchasers. In 1919 one Reese was acting as the agent of the parties for the sale of these lands. A short time prior to September 25, 1919, the respondent, in so far as he was able, made arrangements with the said Reese for the sale of the unsold portions of said lands and so advised appellant. Upon being notified of this fact, appellant wrote Reese on September 25, 1919, as follows:

"I am vested with all the right, title, and interest in and to the lots in question and you are not authorized to sell the same."

As a result of this letter received by Reese from appellant, no further sales were made of said lots. There was other evidence, some of which tended to show that the respondent had refused to sign any deeds to any of said lots during the year 1919. With this state of the evidence the court found that it was the acts of appellant which prevented the sale of the unsold portion of this land. As the evidence was conflicting, according to the well-established rule in such cases, this court will not disturb the finding of the trial court. There is a further finding that the sales were interrupted in the year 1919 by both parties joining in an oil lease to the Standard Oil Company. Appellant objects to this finding as unsupported by the evidence. Assuming that appellant is correct in this contention, we cannot see that any importance whatever can be attached to the fact found therein which would be of any advantage to appellant. If the lease to the Standard Oil Company did not prevent the sale of said land, then the action of appellant in notifying Reese on September 25, 1919, not to make any further sales of the lots in question, might be construed to be the sole cause which prevented the further sale of said land. The court further found that one of the purposes of making said agreement of September 2, 1912, was to settle and remove the objections of appellant to respondent involving said land in his manufacturing business, and it was the intention of the parties thereto to quickly dispose of all of the lands de-

scribed therein. This finding, appellant contends, finds no support in the evidence. Respondent testified that "she objected to my putting any money in my business and that was the grounds of the agreement." The evidence further shows that at the time the agreement was made the lots were selling rapidly, and we can assume that the parties considered that this condition would continue. From this evidence, we are not prepared to say that the court was not justified in concluding that the parties, at the time they entered into the agreement, contemplated an early sale of all the property. Appellant also objects to the finding of the court that no complete account was kept after May, 1917, as unsupported by the evidence. It appears that after May, 1917, the books of account were kept by respondent himself, while residing in Rochester, N. Y., but only from data furnished him by appellant, who was carrying on the business in Los Angeles, Cal. There was evidence tending to prove that the appellant did not report to respondent all transactions which should properly be entered in the books, and for this reason no entry of the matters involved in those transactions was ever made in the books. This evidence was sufficient to support the finding last referred to, and, taken in connection with the additional proof that appellant claimed to be the sole owner of said property and entitled to all proceeds therefor, it justified the further finding of the court that appellant had received large sums of money from sales of said property, "of which plaintiff has no account and of which defendant has refused to give any account, and which she has without right appropriated to her own use and account." While the report of the referee, thereafter appointed by the court, cannot properly be considered primarily as any evidence tending to support this finding, the fact that this report of the referee (which was approved by the court) showed that the appellant had appropriated to her own use \$15,353.55 is at least some confirmation of the court's conclusion in this matter. The other specifications of insufficiency of evidence have all been carefully considered by us. Some of the issues involved in these findings covered by these specifications are of little or no concern to either party in this controversy, and their determination one way or the other would not affect the ultimate results of this action. Those findings relating to matters of any material importance are supported by competent evidence. On the whole, we are satisfied that all the material findings in this action find reasonable and substantial support in the evidence.

[4] A large number of the rulings of the court on the admission and rejection of testimony are claimed by appellant to have been erroneous. These assignments are unsupported by any argument or citation of

authority. The appellant, in her brief, has merely given the rulings of the court with a short statement of the evidence in connection with which each ruling was made. It is a well-established rule of the appellate courts of this state that questions thus presented should not receive consideration. 2 Cal. Juris. 732; *Thomas v. Hacker*, 179 Cal. 731, 178 P. 855. Nevertheless, we have examined the rulings questioned by appellant and discover no error therein to the prejudice of the appellant.

[5] In addition to the contentions of appellant set forth in the four grounds above stated, she further claims that the agreement of September 2, 1912, is a copartnership agreement, and that upon the dissolution of the copartnership formed thereby, there should be returned to her, before any division of the copartnership property is made to either of the parties, all property contributed by her to such copartnership. She further claims that the lands described in said agreement were her own separate property and that their value at the date of the agreement should first be paid to her, and, if, after making this payment to her, anything remains of the partnership property, it should be divided between herself and the respondent. This agreement of September 2, 1912, is as follows:

"Memorandum of agreement made this second day of September, 1912, between Samuel W. Luitwieler of the first part and Sophia C. Luitwieler, his wife, of the second part, witnesseth: That in consideration of one dollar by each to the other in hand paid at and before the ensailing and delivery of these presents, and of other good and valuable consideration, said parties have agreed and hereby agree that when their lands, known as the Whittier property, situated in the state of California, are finally sold or disposed of the net proceeds thereof after paying all liens and incumbrances thereon and expenses of sale—whether in land, money or securities, shall be equally divided between the parties hereto, share and share alike, each to receive one-half thereof.

"Witness our hands and seals the day and year first above written.

"Samuel W. Luitwieler. [L. S.]

"Sophia C. Luitwieler. [L. S.]"

There is nothing, in our opinion, contained in this agreement that would constitute the parties thereto a partnership. All it purports to do is to provide for a division of the net proceeds of the sale of the land described therein, equally between the parties thereto. This interpretation coincides with the testimony of the respondent, who stated that just prior to the execution of this agreement, "Mrs. Luitwieler asked me to make arrangements to give her half of that property.

* * * In response to that I sat down and wrote out the contract and said 'Take that to Mr. Bentley, our lawyer, and submit it to him.'" The contract thus referred to by the respondent was the agreement of Sep-

tember 2, 1912, slightly modified by Mr. Bentley. But, even if the transaction should be construed as a partnership, we find nothing in the evidence to justify appellant's claim that this property belongs to her as her separate estate. The evidence shows that this land was originally acquired by the respondent as the community property of himself and appellant, and in our opinion there is nothing in the evidence to indicate that it ever lost its character as community property. In the agreement itself, the parties thereto refer to it as "their lands." This reference would tend to negative the claim that the property was the separate estate of either of the parties. Therefore, to construe the agreement as creating a partnership between the parties would not benefit appellant's position.

[6, 7] The claim of appellant that a partnership existed between herself and respondent was not made in her original answer, but at the conclusion of the evidence the appellant was granted leave to amend her answer to conform to the proof, and thereafter, under this leave granted, she filed an amendment to her answer, wherein, for the first time, she set forth in her pleadings her contention that a partnership existed between herself and husband. The court made no findings upon the allegations of this amendment to her answer, and the appellant now assigns this failure of the court as prejudicial error entitling her to a reversal of the judgment. In this amendment to her answer, appellant set up the agreement of September 2, 1912, as the basis of her claim of the existence of this partnership. We think it apparent, as we have already stated, that this agreement wholly fails to establish any such partnership. Therefore the amendment failed to state facts sufficient to constitute any legal defense in said action, and the omission of the court to find upon any of the issues made by said amendment would not amount to error on its part. As the amendment failed to state any legal defense, its allegations were not material, and the court is not required to find upon any immaterial issue made by the pleadings.

Judgment affirmed.

We concur: CONREY, P. J.; HOUSER, J.

71 Cal. App. 59

PEOPLE v. HOLMES et al. (Cr. 1156.)

(District Court of Appeal, Second District, Division 2, California. Jan. 30, 1925.)

Rape — § 51(4)—Evidence held to sustain conviction of rape by force and threats of great bodily harm.

Evidence that prosecutrix traveled from place to place with defendant and his common-

law wife, was constantly submitted to abuse and ill treatment by them, and continually under their surveillance, and that at time of alleged rape prosecutrix was in a delicate condition, held to sustain conviction of rape by force and by threats of great bodily harm, in violation of Pen. Code, § 261, subs. 3 and 4.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Don Holmes was convicted of rape, and he and Yetta Ratiante were convicted of contributing to the delinquency of a girl under the age of 21, and they appeal. Affirmed.

Shreve, Dorn, Shreve & Tyler, of San Diego, for appellants.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CRAIG, J. The appellant was charged by information with having committed the crime of rape in violation of the provisions of subdivisions 3 and 4 of section 261 of the Penal Code, and was also charged jointly with one Yetta Ratiante with having contributed to the delinquency of a girl under the age of 21 years. Both defendants were convicted by a jury, and this appeal is taken from the judgment and order denying a motion for new trial upon the charge of rape.

The portions of said section which are relied upon by respondent read as follows:

"Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances:

"* * *

"3. Where she resists, but her resistance is overcome by force or violence;

"4. Where she is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution, * * *"

Appellant's contention in his brief is that the prosecutrix cohabited with him continuously for a period of about two years from March, 1922, until the 14th day of May, 1924, and that from that fact, coupled with all the evidence in the case, he succeeded in proving that there was no resistance, or prevention of resistance accompanied by apparent power of execution; that such a condition of depravity was shown to have existed that the jury concluded, contrary to the evidence, that he "should be in the penitentiary regardless of the fact that he had not committed the offense alleged." It is argued that the testimony of the prosecutrix was so inherently improbable and unworthy of belief that it should have been rejected, and that without it there was no proof of the exercise by appellant of any force or violence toward her.

The only authority attempted to be cited by appellant is section 4½ of article 6 of the

Constitution, which he contends has been violated in spirit and intent by the failure of the trial court to grant him a new trial. This section provides that:

"No judgment shall be set aside, or new trial granted, * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

It is suggested that a proper understanding of the case requires a careful review of the entire record, in order to obtain an adequate and comprehensive knowledge of the facts. We are in accord with appellant's admonition, but are unable to conceive of a jury rendering a different verdict upon the sordid state of facts presented in this case.

Appellant's only defense consisted of an uncorroborated denial of the testimony of six witnesses, of documentary evidence and of circumstances, all of which tended to support the testimony of the prosecutrix in every material respect. She had been reared upon a farm in the state of Washington, to the age of 14, when she left home, and when appellant met her on the streets of Los Angeles one evening in June, 1922, she was apparently without experience, and without friends. Appellant was an itinerant painter, who was traveling from place to place with a common-law wife whom he hastily married in Imperial county about five days after the commission of the offense with which he is here charged. It was testified by the prosecutrix and by others, including disinterested witnesses who conducted road camps, that appellant traveled by automobile and slept in the same bed with both women for a period of two years; that he prevented other people from conversing with the prosecutrix, that he cursed her, compelled her to lift heavy trunks and ladders, and struck her. His consort joined him in preventing the girl's escape. One or the other held her when she attempted to leave them, and on at least two occasions sought her out and compelled her to return when she had obtained employment through the assistance of strangers whom she importuned to befriend her. Appellant attacked one Foughty for talking to the prosecutrix, striking him on the head with a board or club, and tried to shoot him, and it was during an altercation that officers were notified, which resulted in this prosecution.

Appellant had originally promised to carry the prosecutrix to her mother in Washington, according to her testimony, but, as they approached the northern part of this state, he would turn back. She would ask him when he expected to take her home, and he would offer some excuse. It appears from all the evidence that she was kept under constant surveillance, was enslaved and abused; that she was in fear of both the appellant and of

his paramour. She testified that she hated him from the first, and that she fought him whenever he insisted upon illicit relations with her. Men who had traveled with them testified that at the times the prosecutrix was so severely mistreated by appellant that she would sob and become hysterical. In March, 1924, she gave birth to a child, and she testified that appellant had intercourse with her two days thereafter when she was ill.

On May 14, 1924, the night of the alleged offense, appellant was driving toward a camp in San Diego county, unaccompanied except by the prosecutrix. It appears that other members of the camp were driving another machine ahead of them. The girl swore that he stopped the car by the roadside, dragged her from the machine, and after a struggle succeeded in committing the offense. She stated that she fought him with all her strength, but that since the birth of her baby she had been weak; that he would hold her arms at times so that she could not move; that he threw her down, and tore some of her clothes to pieces; that thereafter he admonished her to tell others at the camp that he had been delayed by tire trouble. Foughty testified that the prosecutrix on the following day complained to him of appellant's cruelty, and told him of this latter occurrence.

Appellant testified in his own defense, making a complete denial of the use of profanity and tyranny toward the prosecutrix, although a careful review of the testimony of various witnesses shows convincingly that such conduct by him was common. He denied having written her from the county jail after his arrest, or having given letters to Edward Bishop; yet Bishop testified that he was confined in the jail with appellant for a time, and that on May 25, 1924, he wrote two letters "word for word" as dictated to him by appellant, and that the latter signed them; that appellant cautioned him that when released he should be very careful in smuggling them out of the jail, because if found they would go against appellant. These letters were taken from Bishop by the jailer and were produced in evidence. One was addressed to a woman by the name of Thompson, saying, among other things:

"You do all in your power to turn Hazel to drop these charges against me and my wife."
"Do all you can to get her away."

The other letter was addressed to the prosecutrix, stating:

"I want you to do everything I say." "Hazel, the best thing you can do is to drop these charges and skip out of the country." "Don't tell anybody about my forcing you to do anything with me."

Bishop testified that he wrote them for appellant because the latter was very nerv-

ous; that he told the witness to take the letters to prosecutrix and talk to her, to "see if you cannot get her out of the country."

Respondent relies upon *People v. Bonzani*, 24 Cal. App. 549, 141 P. 1062. The comparative strength of the parties was there an issue, it appearing that the woman was unusually large, while the prosecutrix in the case at bar was a slender girl weighing but 123 pounds. It was said in that case, however:

"It does not necessarily follow that, because a person may be of extraordinary avoirdupois, he is possessed of corresponding or even approximately corresponding physical strength and vigor. * * * Mrs. de Bell testified that she resisted the defendant with all her power and, by every means available to her, attempted to prevent him from accomplishing sexual relations with her. Moreover, she testified that she was very much frightened—in fact, so determined to accomplish his purpose did the defendant appear to be, she said, that she was in constant fear that he would inflict upon her serious bodily injury or perhaps might take her life. She described his appearance at the time as that of a man with a fixed determination to accomplish at any cost the act upon which his mind was set."

And, in announcing the rule, it was further said:

"So, in all such cases, of which this is typical, since there is evidence in the record tending to show that the prosecutrix was much frightened and terrified, it is always with the jury to say, where there is some credible evidence of the fact, whether the female was, at the time of the assault, possessed of such fear as would likely have the effect of impairing, if not altogether destroying, her ability to so resist her assailant as to prevent actual intercourse."

In the instant case the prosecutrix was confronted by two persons with whom she was compelled to contend much of the time, and experience had evidently convinced her that resistance was hopeless, and was usually productive of dire results. This fact, coupled with her delicate condition so soon after confinement, was sufficient to authorize the jury to conclude that her physical powers were of little avail as against the efforts of a man of ordinary strength. Appellant admitted that upon one occasion he knocked Foughty down, and from his continued life in the open, and the nature of his vocation, it is apparent that he possessed at least an average physique. It cannot be successfully denied that the jury was justified in believing that he perjured himself upon many of the material facts testified to by all the other witnesses, and from the entire record we think the jury was justly convinced that he falsified as to the one vital issue in the case. He emphatically denied under oath that he had ever had intercourse with

the prosecutrix; yet it is conceded, and argued by his counsel as a ground for reversal, that appellant's cohabitation with her for a period of about two years was conclusive evidence of the absence of force or resistance.

We think the proof was amply sufficient to support the charge by the prosecution under both subdivisions 3 and 4 of section 261 of the Penal Code, and the judgments and orders denying motion for a new trial are affirmed.

We concur: FINLAYSON, P. J.;
WORKS, J.

71 Cal. App. 45

ENGLISH v. SHIPLEY et ux. (Civ. 4998.)

(District Court of Appeal, First District, Division 2, California. Jan. 30, 1925.)

1. **Frauds, statute of** §144—**Defense that contract for sale of land was within statute held waived.**

Defense that contract for sale of land was within statute of frauds, Civ. Code, § 1624, held waived, where transaction was presented to trial court by parol proof, and no question was raised regarding defense of statute of frauds.

2. **Vendor and purchaser** §14—**Contract for sale of land held supported by consideration.**

Contract for sale of land held supported by consideration, where vendor sold and purchaser agreed to buy his equity for stated sum, and vendor thereon immediately left property and did not in any way attempt to take possession from purchaser.

3. **Bills and notes** §370—**Absence of consideration not defense against holder in due course.**

In action on notes given in payment for land, against maker, by holder in due course, defense of absence of consideration was not available to maker in view of Civ. Code, § 3109.

4. **Bills and notes** §509—**Makers entitled to show that interest had not been paid on notes before acquired by holder in due course.**

In action on notes by holder in due course against makers, defendants were entitled to show that interest due on notes had not been paid before acquired by plaintiff.

5. **Appeal and error** §1056(1)—**Exclusion of evidence that interest on notes acquired by holder in due course had not been paid held harmless.**

In action on notes by holder in due course against makers, exclusion of evidence that interest due on notes had not been paid before they were acquired by plaintiff held harmless.

6. **Bills and notes** §343—**Knowledge of holder in due course that notes had been executed by maker in executory agreement for sale of land held immaterial.**

Knowledge of holder in due course in action on notes of their execution by makers as one step in executory agreement to buy and sell

land, *held* immaterial, where she did not know of any infirmity in that transaction, either in nature of fraud or breach of contract.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by D. E. English against C. R. Shipley and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

U. G. Hayden, of Fresno, for appellants.

L. B. Hayhurst, and Harris & Hayhurst, all of Fresno, for respondent.

STURTEVANT, J. The plaintiff sued to recover the amounts due on two promissory notes. Judgment went for the plaintiff, and the defendants have appealed.

The controversy arose out of a real estate transaction. An alfalfa farm near Fresno was owned by Mr. Mason. He entered into a contract by which he agreed to sell to J. J. Williams and R. L. Inman. Inman was to purchase an undivided two-thirds, and Williams was to purchase an undivided one-third. The terms of that instrument were such that the purchasers were to go into possession, and one-half of the alfalfa hay was to be delivered to Mr. Mason. After the purchasers had been in possession for a period of time they allowed C. R. Shipley to farm the alfalfa, harvest the hay, and deliver to Mr. Mason the portion to which he was entitled under the contract. After that arrangement had been followed for a while, on the 5th day of June, 1922, Shipley made oral contracts. By the terms of one agreement he agreed to purchase the two-thirds interest of Inman, and by the terms of another agreement he agreed to purchase the one-third interest of Williams. As to Williams the purchase price was \$933. Of that sum Shipley paid in cash \$133 and executed two promissory notes. Each note was dated June 5, 1922. One note was payable 17 months after date and the other one was payable 29 months after date. Each note bore interest at the rate of 7 per cent. per annum, and was payable annually. Each note contained a provision that if the interest was not paid as agreed that the note should immediately become due at the option of the holder. The defendant Shipley signed the notes on the day they were dated. About three months later Mrs. Shipley, the other defendant, signed the notes. As recited above Shipley was in possession of the farm caring for the crops at the time the agreements last above mentioned were executed. Thereafter he continued in possession, and, as the hay was harvested, made deliveries to Mason, or for Mason's account, and Williams does not appear to have been on the place excepting to make an occasional call. The terms of the agreement between Shipley and Inman were such that Shipley was to build a house at Parlier for Inman, and that the house and lot were to be accepted by Inman

in payment of his equity. Later, Shipley not having performed his part of the contract with Inman, Inman retook possession of the alfalfa farm.

On or about October 1, 1923, Frank English and his wife, D. E. English, entered into a contract with Williams whereby the Englishes agreed to sell and Williams agreed to purchase a house and lot in Fresno for the sum of \$4,500. As a part of the purchase price Williams transferred to the Englishes the two notes above mentioned, and guaranteed "the payment of said notes and interest in the sum of \$870, and, if the same are not paid promptly when due, then the same shall not be a credit on said purchase price, and said real property shall revert back to the said first parties hereto, and the interest of the second party in this contract and in said premises shall be at an end." There is no evidence that Mrs. English, the respondent, knew any infirmity regarding the notes. The evidence is slightly conflicting as to whether her husband knew any infirmity regarding the notes before he had executed the contract with Williams. However, shortly after that contract had been executed, Frank English called on Shipley, and at that time Shipley stated to him the facts hereinabove recited. Later, the interest was not paid upon request being duly made, and this action was commenced. The trial court made findings on all of the issues against the defendants and in favor of the plaintiff. Among other findings the trial court found that the notes were "sold, assigned, and transferred by the said J. J. Williams to the said plaintiff D. E. English, prior to the maturity of said notes, or either of them, and that at the time of the transfer of said notes by the said J. J. Williams to the said plaintiff, plaintiff had no knowledge or information that the said defendants disclaimed liability on said notes, or either of them, or that the said notes were not what they purported to be on their face."

Before proceeding further it will be best to dispose of one fact that entered into the proof, but which strikes us as being immaterial. Before Inman and Williams entered into their contracts with Shipley, Williams entered into a contract with Inman by the terms of which he agreed to sell his equity to Inman. That contract was recorded; but it was never carried out by the parties, but on the other hand it was by the parties mutually abandoned. For all of the purposes of this case we think that the agreement between Inman and Williams stands as though it were never executed.

[1] The appellants call attention to the fact that the agreement between Williams and Shipley was oral, that it involved the sale of an interest in real property, and that the agreement was therefore invalid. Civ. Code, § 1624. The respondent replies that whether valid or invalid the defense of the stat-

ute of frauds has been waived. In this behalf the respondent calls attention to the fact that in their answer the defendants pleaded the agreement between Shipley and Williams as recited by us hereinabove, and that they did not in the trial court present any question regarding the statute of frauds. On the other hand respondent calls attention to the fact that the whole transaction was presented to the trial court by parol proof, and no contention was made in that court regarding the defense of the statute of frauds. Thereupon the respondent contends that the defense of the statute of frauds may not be presented by the appellants in this court at this time, and respondent cites *Armstrong v. Barceloux*, 34 Cal. App. 433, 167 P. 895. The case cited, and numerous other cases contained in respondent's brief, fully support her contentions.

[2] The appellants rely upon a want of consideration as a defense. As to C. R. Shipley we cannot understand his contention in this behalf. The record does not contain any conflict regarding the agreement being to the effect that Williams agreed to sell his equity to Shipley for the sum of \$933, and that Shipley agreed to pay the same. Moreover, it is equally clear that Williams thereupon immediately left the property, and has not in any way attempted to take the possession from Shipley. As to the defendant C. R. Shipley the defense is entirely without merit.

[3] As to the defendant Ethel Shipley it appears from the evidence that she signed some three months after the notes had been delivered to her father, J. J. Williams. There is no evidence to the effect that the respondent, or her agent, Frank English, knew at the time the notes were purchased from Williams that Shipley signed and delivered the notes on one date, and his wife delivered the notes on another date. The evidence shows that the respondent is a holder in due course. As against her the appellant Ethel Shipley may not set up the defense of absence of consideration. Civ. Code § 3109.

[4, 5] The fact that the interest was due and payable in June, 1923, and that it had not been paid, was a fact which the appellants were entitled to present to the consideration of the trial court on the issue as to whether the plaintiff is a holder in due course. However, that fact is not controlling. It is not of such weight as to disturb the finding of the trial court.

[6] It does not appear from the evidence that when the respondent accepted the notes she knew that they had been executed by the maker as one step in an executory agreement to buy and sell land. However, if she did know it, nevertheless, it is further certain that she did not know of any infirmity in that transaction either in the nature of fraud

or breach of contract. It follows that the position of the respondent as a holder in due course is not weakened. *McNight v. Parsons*, 136 Iowa, 390, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265, 15 Ann. Cas. 665.

The appellants cite and rely on *Griswold v. Morrison*, 53 Cal. App. 93, 200 P. 62, and *American Nat. Bank v. Kerley*, 109 Or. 155, 220 P. 116, 32 A. L. R. 262. The second case cited involves the law applicable to pre-existing debts. The first case cited is helpful in so far as it construes section 3135 of the Civil Code on the subject of partial payments. But the respondent did not agree to make partial payments. There is nothing in either case at variance with the views hereinabove expressed.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

70 Cal. App. 720

ELLIS LANDING & DOCK CO. v. CITY OF RICHMOND et al. (Civ. 5108.)

(District Court of Appeal, First District, Division 1, California. Jan. 24, 1925. Hearing Denied by Supreme Court March 24, 1925.)

1. Evidence ☞83(2)—Presumed city council will do duty.

It will be presumed that a city council will do its duty, and will not attempt willfully to violate the law.

2. Municipal corporations ☞226—One dealing with municipality must take notice of powers.

Every one dealing with a municipality is bound to take notice of the limitation of its powers and ascertain whether the power has been exercised in the mode required by law.

3. Injunction ☞118(3)—Writ not issued on unsupported conclusion stating intended violation of official duty.

Writ of injunction will not be issued upon the mere declaration of a pleader that public officials are about to violate their duties, without the recital of some facts justifying such conclusion.

4. Municipal corporations ☞993(2)—Demurrer held properly sustained to complaint of taxpayer seeking to enjoin city from acting under void lease.

A demurrer held properly sustained to complaint of taxpayer seeking to enjoin defendant city from carrying out and operating under a void lease, to prevent irreparable damage to himself as a taxpayer, where it appeared from the affirmative allegations defendant's council did not authorize the lease, as required by Richmond City Charter, art. 3, § 7; that it was abandoned; and that the city was to derive a profit without incurring obligations from operations to be carried out under the lease.

Appeal from Superior Court, Contra Costa County; H. V. Alvarado, Judge.

Action by the Ellis Landing & Dock Company against the City of Richmond and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Elmer E. Robinson, of San Francisco, for appellant.

D. J. Hall, City Atty., and Preston & Duncan, of San Francisco, for respondents.

TYLER, P. J. This action is one brought by plaintiff as a taxpayer of the city of Richmond for the purpose of enjoining said city from proceeding, carrying out, and operating under a lease that is void because of its execution in excess of the powers of the city, and in a manner other than provided by the charter. The court sustained a demurrer to the complaint, without leave to amend. This appeal is from the judgment for the purpose of reviewing the order.

The complaint was filed August 7, 1923. It is alleged therein in substance that the city of Richmond was at the commencement of the action, and at all times mentioned in the complaint, the owner in fee-simple absolute of and in possession of certain real estate situate in the city of Richmond and containing some 1.098 acres of land, which is alleged to be a portion of the waterfront of said city. It is further alleged that the city holds such property under a public trust for the improvement of commercial facilities by the erection of wharves and other commercial conveniences along its water front, and the regulation and collection of wharfage and dockage and other income from its use. The complaint, proceeding, charges the city of Richmond, "by the mayor and clerk thereof," and defendant Draughon with having entered into a certain agreement with reference to the property which is wholly void and of no effect, as the agreement exceeds the power, jurisdiction, and authority of the city of Richmond and of the council of said city, for the reason that it is ultra vires and the said mayor and said clerk had no power, authority, jurisdiction, or right to execute the same, and that the council of said city likewise had no authority, jurisdiction, or right to authorize, direct, or provide for or ordain its execution. It is then alleged that the said Draughon has abandoned said agreement and no longer has or holds any lease upon the property in question, but that the defendants and their officers, employees, and agents, notwithstanding such abandonment, seek to operate thereunder. Then follows an allegation that if the carrying out of said agreement is not restrained the income of said city will be reduced and the taxable burden of plaintiff will be increased, to his irreparable injury and damage. The prayer is that the defendants and their agents be enjoined from doing anything under or in pursuance of the agreement, and that it be

declared wholly null and void and of no effect, and that it be vacated and set aside.

A copy of the agreement referred to in the pleadings is attached to the complaint, and it provides, among other things, that the lessee shall within 10 days from its date file with the proper authorities such application as may be legally required to procure all necessary franchises and permits in order to install and operate a ferry service provided for in such agreement; that the lessee shall within six months from the date thereof commence the construction of a ferry slip on the property of a capacity sufficient to accommodate and permit to be docked within the government bulkhead line the ferries provided for in the agreement. Provision is made for the deposit of a certain sum of money by the lessee to insure the faithful performance of the contract, and also for the payment of specified rentals to the city for such property, and of a percentage upon all freight carried by said ferry system.

As above stated, a demurrer was interposed to the complaint and sustained, and we think rightfully so, as we are of the opinion that the plaintiff has alleged himself out of court, and that only a moot question is raised by the pleadings.

The charter of the city of Richmond provides that all powers therein granted to and vested in the city of Richmond shall be exercised by its council, which shall have the power to fix and establish the method and manner in which such powers shall be exercised. It further provides that no ordinance shall be passed or contract made unless approved and authorized by the council, and that no ordinance shall be passed, no officers appointed or removed, no contract established or awarded, and no obligation incurred in excess of \$300, without the affirmative vote of at least five members of the council. Section 7, art. 3, Charter of the City of Richmond (Stats. 1909, p. 1263).

[1] The complaint alleging as it does that the contract was executed on behalf of the city by the mayor and clerk alone, and not authorized by the council, it is manifest, as stated by respondents, that it is mere waste paper, as its execution was in direct disregard of the mode prescribed for the exercise of the powers of the municipality, which is to be carried out only by the council, and, the contract being ultra vires and void, and also totally abandoned, the plaintiff as a taxpayer can suffer no irreparable injury therefrom. The mayor, as such, has no more power than any of the other members of the council; his duties being the same as theirs, except that he shall sign all contracts on behalf of the city when properly authorized by the council to do so. The mere conclusion of the pleader in the complaint that the defendants, and their officers, employees, and agents, and each of them, long after the abandonment of the

agreement, come out and threaten to proceed to act under and in pursuance of the terms of the attempted agreement, without the recital of any facts showing such intention, can add nothing to the complaint. It is to be presumed that the council will do its duty, and will not attempt to willfully violate the law. *McBride v. Newlin*, 129 Cal. 36, 61 P. 577.

[2-4] Everyone dealing with the municipality is bound to take notice of the limitation of its powers and ascertain whether the power has been exercised in the mode required by law. In a case where, as here, it appears by affirmative allegations, first, that the council never authorized the lease, and that it was abandoned; and, second, that the city was to derive a profit and to incur no obligation from the operations to be carried out thereunder, it is difficult to see how any irreparable damage will result to a taxpayer. It is not the policy of the law to allow a writ of injunction to be invoked upon the mere declaration of a pleader that public officials are about to violate their duty, without the recital of some facts justifying such conclusion. *Barto v. Supervisors*, 135 Cal. 496, 67 P. 758.

Something is said in the briefs of the power of the city to execute a lease of the character here attempted, and also of the right of this particular plaintiff to maintain the action. Considering our conclusion, these questions are unimportant, and we are not here concerned with them.

The judgment is affirmed.

We concur: KNIGHT, J.; St. SURE, J.

71 Cal. App. 1

PEOPLE ex rel. TERRY v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR SAN BERNARDINO COUNTY, DEPARTMENT NO. 1, et al. (Civ. 4817.)

(District Court of Appeal, Second District, Division 2, California. Jan. 29, 1925.)

Prohibition ⚡13—Petition for prohibition dismissed, where questions raised therein are moot.

Where complaint and indictment charging petitioner with bribery have both been dismissed, proceedings in prohibition seeking determination of abstract question of right of judge of superior court to try petitioner raised moot question only, and petition must be dismissed.

Original prohibition by the People of the State of California, on the relation of A. W. Terry, against the Superior Court of the State of California in and for the County of San Bernardino, Department No. 1, and another. Petition dismissed.

Fred Duffy, of San Bernardino, for petitioner.

O. N. Hilton and Caesar A. Roberts, both of Los Angeles, for respondents.

CRAIG, J. Petition for writ of prohibition. The petitioner, A. W. Terry, was charged by complaint filed in the justice's court of San Bernardino township with having accepted a bribe, and was subsequently indicted by the grand jury of San Bernardino county for the same offense. He caused to be made, in the superior court of said county, a motion for trial before a judge other than the respondent; this motion was based upon certain affidavits which petitioner contended set forth facts showing bias and prejudice of the trial judge against him. The motion was denied, and petitioner thereupon filed in this court a petition for writ of prohibition against the respondent trying the case, and praying that the latter be directed to transfer the same to another department or to call in another judge for that purpose.

It appears that the complaint and indictment above mentioned have both been dismissed, and that no charges are pending against the petitioner in the premises. The proceedings before this court therefore seek the determination of an abstract question which does not arise upon any existing facts or rights, and is moot. It follows that the petition must be dismissed, and it is so ordered. *Munger's Laundry Co. v. Rankin*, 8 Cal. App. 448, 97 P. 95.

We concur: FINLAYSON, P. J.; WORKS, J.

70 Cal. App. 770

Ex parte DUNLAP. (Cr. 1207.)

(District Court of Appeal, Second District, Division 1, California. Jan. 28, 1925.)

1. Criminal law ⚡991(2)—Sentence imposing illegal minimum punishment for robbery held not void in toto.

The imposition under Pen. Code, § 213, as amended by St. 1923, p. 271, of a minimum sentence of five years for robbery committed prior to the amendment, held not to render the sentence void in toto.

2. Habeas corpus ⚡50—Appellate court will not consider question of excess of sentence until expiration of term for which accused may be lawfully confined.

The appellate court will not, on habeas corpus, consider question of excess of sentence under Pen. Code, § 213, as amended by St. 1923, p. 271, until the expiration of the time for which accused may be lawfully confined.

Original application by Harry J. Dunlap for writ of habeas corpus. Writ denied.

Milton M. Golden, of Los Angeles, for petitioner.

CONREY, P. J. In this proceeding the petition for a writ of habeas corpus shows that the applicant was convicted on five counts of robbery, out of a larger number stated in an indictment, and that all of said offenses were charged as having been committed prior to August 18, 1923. On each of three of these charges Dunlap was sentenced to prison for terms of "one year to life," and on each of the other two the sentence was for "five years to life." These sentences were imposed on the 29th day of August, 1924.

The applicant claims that his imprisonment under said sentences is illegal in this, that said sentences for a minimum term of five years were not authorized by the law in force at the time when the offenses were committed.

Prior to August 18, 1923, section 213 of the Penal Code read as follows: "Robbery is punishable by imprisonment in the state prison * * * not less than one year." By amendment effective August 18, 1923, that section was made to provide that robbery in the first degree is punishable for not less than five years, and robbery in the second degree for not less than one year.

[1,2] Assuming that, as petitioner contends, the punishment to be imposed on defendant is limited by the law in force at the time when the offenses were committed, and that therefore the sentences which provided a minimum of five years were not authorized, it is sufficient to say that they are not void in toto. The judgment having been pronounced less than one year prior to this time, it is clear that the petitioner has not served the time for which he may be lawfully imprisoned. "It is the established practice of this court not to consider any question of excess of sentence until the expiration of the time for which the prisoner may be lawfully confined. It is clear, therefore, that a writ should not be granted at this time." In re Moreck, 180 Cal. 384, 181 P. 657.

The application for a writ of habeas corpus is denied.

We concur: HOUSER, J.; CURTIS, J.

70 Cal. App. 663

POWELL v. ALLAN et al. (Civ. 4788.)

(District Court of Appeal, Second District, Division 2, California. Jan. 21, 1925. Hearing Denied by Supreme Court March 20, 1925.)

1. Municipal corporations ☞371 — "Any" bonds as used in street improvement statute held to mean "all" bonds not disposed of at sale.

In Street Improvement Act of 1913, the provision in section 30 that "any bonds" not sold at expiration of 15 days after the advertisement of the sale provided for in section

29 shall be turned into the special improvement fund, the words "any bonds" mean "all bonds" not disposed of at the advertised sale, "any" being properly construable in some instances as meaning all.

2. Municipal corporations ☞518(1)—Interest of "penalty" for delinquency.

Sum exacted as "interest" of delinquent property owner is in fact a penalty.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Penalty.]

3. Municipal corporations ☞954 — "Interest" on street improvement bonds held "penalty" for delinquency.

The "interest" provided for in street improvement bonds issued pursuant to Street Improvement Act of 1913 is not a charge for delinquency, in view of section 34 et seq., which makes specific provisions for penalties when property owner assessed defaults in payment of principal or interest of bond after its maturity, but is "interest" within Civ. Code, § 1915, i. e., compensation for the use or forbearance of money, and as such is distinguished from a penalty, which is a punishment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interest.]

4. Municipal corporations ☞371—Payment of incidental expenses or awards of damages held exclusive purpose for which city may "advance" money for use in special street improvement fund; "advances."

Under Street Improvement Act 1913, § 32, payment of incidental expenses or awards of damages, or both, held exclusive purpose for which city may make advances of money for use in special improvement fund; "advance" being something which precedes; to advance money meaning to pay it before it is due, or to furnish it for a certain specified purpose, with the understanding that it or some equivalent, is to be returned, and, as used in section 32, means to furnish for a certain specified purpose.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Advance—Advances.]

5. Municipal corporations ☞371—When city may make advances to special street improvement fund and receive bonds in exchange stated; "any," "either."

Street Improvement Act, § 32, providing that if a city advances money to the special street improvement fund to pay incidental expenses or awards of damages, or both, "in any event" the city may make advances and receive bonds in exchange, empowers the city to make the exchange only in either of those events in view of sections 30, 33; the word "any" being synonymous with the word "either," or as equivalent with the term "any such"; "any" being a word of several meanings, according to the subject which it qualifies (citing Words and Phrases, First Series, "Any").

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Either.]

6. Municipal corporations — 371 — Contractor held entitled to receive in payment pro tanto of contract price all bonds remaining in special improvement fund after sale.

Where a city in connection with street improvement work under Street Improvement Act, § 9, made no advances within section 32 for incidental expenses or awards of damages, contractor, on city's final acceptance of improvement, held entitled to receive payment pro tanto of contract price, all bonds issued for the improvement and remaining in special improvement fund after a sale had under section 29, with accrued interest, in view of §§ 10, 25, 30, 33 and section 46, subd. 6.

Original application for writ of mandate by C. L. Powell against R. M. Allan and others, as officials of the city of Los Angeles. Peremptory writ granted.

Hearing denied by Supreme Court; Myers, C. J., and Seawell, J., dissenting.

Emmet H. Wilson, of Los Angeles, for petitioner.

Jess E. Stephens and Lucius P. Green, both of Los Angeles, for respondents.

FINLAYSON, P. J. This is an original proceeding in mandamus to compel respondents, city officials of the city of Los Angeles, to deliver to petitioner certain street improvement bonds.

By proceedings regularly had under the Street Improvement Act of 1913 (Stats. 1913, p. 954), a written contract was entered into on April 2, 1920, between the city of Los Angeles and petitioner's assignor, one John Hayes, whereby the latter, as the contractor, undertook to construct for the sum of \$995,773.21 a tunnel in the city of Los Angeles, commonly referred to as the Second Street tunnel. Thereafter assessments were levied upon the lots within the improvement district. Assessments equal in the aggregate to about one-half of the total amount assessed were paid in cash, and bonds were issued, at the election of the lot owners to represent the remaining assessments. The principal of the bonds amounted to the sum of \$542,656.17. Work was commenced within 20 days after March 23, 1921, that being the date when the contractor received notice from the board of public works that there was sufficient money and bonds in the special fund devoted to the proposed improvement to pay the contract price. Numerous extensions of time were regularly granted for the performance of the work, which was finally completed some time in July, 1924, and prior to the expiration of the last extension of time. The improvement has since been accepted by the board of public works, and we may assume that it likewise has been accepted by the city council, for we are informed by respondents in their brief that the tunnel has been finally com-

pleted and is now open to public use. On January 9, 1922, Hayes assigned to petitioner all of his right, title, and interest in and to the moneys and bonds due or to become due under the contract.

On March 22, 1921, the bonds in the special fund devoted to the improvement were regularly offered for sale by the city, pursuant to proceedings had under section 29 of the act. It seems that at that time there was some question as to the validity of the bonds, due to certain litigation then pending wherein the legality of the proceeding was attacked, and the city succeeded in selling bonds only to the amount of \$8,497.07, leaving unsold and in the special fund devoted to the improvement a large number of bonds, the aggregate par value of which is \$534,159.10.

It never became necessary for the city to advance to the special improvement fund any money whatever to pay any incidental expenses in connection with the improvement, or to pay any of the awards of damages; and, in fact, the city never has made any such advances nor have any of the bonds ever been sold or used for the payment of incidental expenses or awards of damages.

It seems that the doubt which was cast upon the validity of the bonds by the litigation pending at the time when they were offered for sale was not finally removed until the Supreme Court of the United States, in a decision rendered March 3, 1924, ordered the dismissal of a certain action, wherein the complainants had challenged the validity of the proceeding. Shortly after this decision, namely, on April 28, 1924, the city council, notwithstanding the fact that no money had ever been advanced to the special improvement fund by the municipality to pay for incidental expenses or for awards of damages, directed the city treasurer to transfer to such special fund from the reserve fund the sum of \$534,159.10 in money, and to deliver to the city in exchange therefor the bonds which remained in the special fund after the sale of March 22, 1921, i. e., the bonds the aggregate par value of which amounts to the sum of \$534,159.10. This action was taken by the city council upon the assumption that such exchange is authorized by section 32 of the Improvement Act. The city treasurer complied with the direction of the city's legislative body, and by reason thereof the municipality has ever since claimed to be the rightful owner of the bonds. Petitioner disputes the city's claim, and has brought this proceeding to compel respondents to deliver the bonds to him. His contention is, that by virtue of the statutory provisions presently to be mentioned, the bonds should be treated as so much money in the special improvement fund, and that he,

as the assignee of the contractor, became entitled to receive the bonds in payment pro tanto of the contract price of the improvement immediately upon final acceptance of the work.

The provisions of the Improvement Act bearing upon these respective claims are the following: No work is to be commenced by the contractor until assessments have been made on the lots in the improvement district and he has received written notice "that there is sufficient money or bonds, or money and bonds in the special fund devoted to the proposed improvement to pay the contract price." Section 9. If bonds have been issued at the election of any of the property owners to represent the assessments against their lots, the city, after advertising the bonds for sale, may sell them, or any number of them, to the highest bidder for cash, and the "proceeds of the sale of such improvement bond shall be paid into the fund of the proceeding to represent assessments in which said bonds were issued." Section 29. The next section reads, in part, as follows:

"Section 30. Any bonds not sold at the full expiration of 15 days after the completion of the publication of the advertisement provided for in the preceding section shall be turned into the fund for the improvement for which the assessment is made, and shall be deemed and treated as so much money in said fund, and shall upon final acceptance of said improvement be issued to and accepted by the contractor for the work, or his assigns, in payment pro tanto of the contract price of said improvement, provided there is sufficient money in the said fund to pay all incidental expenses and all awards of damages that must be paid prior to the doing of the work."

The remainder of the section relates to advances of money by the contractor to the special improvement fund to pay incidental expenses and awards of damages, when there is not sufficient money in the fund for those purposes. Section 32 reads:

"The legislative body of any municipality may, in its discretion, upon the failure of any contractor to advance sufficient money to the fund devoted to any improvement to pay the incidental expenses and the awards of damages as hereinabove provided, advance from the general fund, or from such fund as said legislative body may designate, to said fund the amount necessary for such purposes. Whereupon the city treasurer shall issue to said city bonds of the improvement in an amount equal at their par value to the amount of money so advanced by the said city, *and in any event* (italics ours) it shall be competent for the city to advance to the appropriate fund the par value of all or any part of said bonds, in which case the said bonds shall be issued to the city, and the said city shall have the same rights in respect to the enforcement and collection thereof as other purchasers. Where the city advances money as in this section provided, it shall have full authority at any time to sell said bonds at a

point acceptable to the legislative body thereof."

The italicized words "and in any event" are those upon which respondents mainly rely to justify the city's position. Section 33 is as follows:

"Whenever the contractor or the city has advanced to the appropriate fund an amount sufficient to pay the incidental expenses and awards, and has received bonds at their par value in an amount equal to the sum so advanced, as hereinbefore provided, the bonds remaining shall be turned into said fund, and shall be treated and regarded as so much money in said fund, and shall upon final acceptance of the work be issued to and received by the contractor in payment pro tanto of the contract price of the said improvement."

[1] We think it clear that unless the words of section 32 which we have italicized necessitate a different conclusion, there can be no question as to petitioner's right to receive the bonds and to apply them, at their par value, in payment pro tanto of the contract price of the improvement. The act, in section 29, makes provision for but one sale of bonds. In section 30 the lawmakers expressly and specifically declare that "any bonds" not sold at the expiration of 15 days after the advertisement of the sale provided for in the preceding section "shall be turned into" the special improvement fund. The words "any bonds," as here used, undoubtedly mean "all bonds" not disposed of at the advertised sale. There are instances, and this plainly is one of them, where the word "any" is properly construed to mean "all." See note to State v. Kansas City, Ann. Cas. 1916E, p. 8. It further is provided in section 30 that the bonds so turned into the special fund at the expiration of 15 days after the advertisement of sale "shall be deemed and treated as so much money in said fund," and that upon the final acceptance of the improvement the bonds thus turned into the special fund "shall * * * be issued to and accepted by the contractor for the work, or his assigns, in payment pro tanto of the contract price of said improvement," provided there is sufficient money in the special fund to pay all incidental expenses and all awards of damages. In the instant case there was sufficient money in the special improvement fund to make all such payments. By section 33 it likewise is expressly declared that if the contractor or the city shall have received bonds in an amount equal to any sum which he or it may have advanced to pay for incidental expenses or for awards, "the bonds remaining" shall be turned into the special improvement fund, shall be treated and regarded as so much money in said fund and "shall," upon the final acceptance of the work, "be issued to and received by the contractor in payment pro tanto of the contract price of the said improvement."

There is no uncertainty in this mandatory language. The two sections (30 and 33) declare unequivocally that any bonds not sold under section 29 of the act, and which are not used to reimburse the city or the contractor for advances made by it or him to meet incidental expenses or awards of damages, shall be issued to the contractor in payment pro tanto of the contract price.

Notwithstanding the plain and positive injunction contained in sections 30 and 33, respondents confidently assert that the language of these two sections leaves it optional with the city to say whether the contractor shall or shall not receive any bonds in payment of the contract price. We can perceive no merit in this claim, but because it has been made we shall consider its tenability before adverting to that part of section 32 upon which respondents mainly rely to sustain the city's claim to the bonds.

The imperative language of sections 30 and 33—the positive declaration that upon final acceptance of the work the bonds remaining in the special fund *shall* be issued to and received by the contractor in payment pro tanto of the contract price—would seem to be completely at variance with any notion of a privilege on the part of the city to deliver the bonds to the contractor or not, as it sees fit. But respondents, stressing the use of the term “contract price” as employed in the provision to the effect that the contractor shall receive the bonds “in payment * * * of the contract price,” argue that if interest has accrued upon the bonds prior to the completion and acceptance of the work, the contractor, if he receives the bonds at their par value in payment of the contract price, will receive, to the extent of such accrued interest, a sum over and above the “price” at which he contracted to do the work. This argument is more plausible than convincing. Where there is no question as to the validity of the bonds, and they are readily salable in the market, the contractor, to the extent of the interest which has accrued on the bonds, will, it is true, receive a sum in excess of the amount named in his agreement as the contract price. But the bonds may be absolutely void, or, because of some real or supposed irregularity in the proceeding leading up to their issue, their marketability may be so far impaired that they can be sold only to speculators at sums much below their nominal value. But whether valid or invalid, questionable or unquestionable, the contractor not only must accept them in payment pro tanto of the contract price, but he must accept them at their nominal or par value. The statute enters into the contract and becomes a part of it. The bidders for the work are deemed to know this. Every bidder, therefore, doubtless fixes the amount of his bid with a view to the possibility that he may be compelled to accept bonds

in payment of a part at least of the contract price. It is true that whether the successful bidder shall be compelled to accept any bonds, and, if he shall be, what amount of bonds he may be compelled to take, are questions which lie in the misty realm of speculation and uncertainty at the time when the bids are made. But this very uncertainty, involving as it does the possibility that the successful bidder may be compelled to take worthless bonds for his work, affords all the more reason why he should, as he doubtless does, fix the amount of his bid to meet all possible contingencies, including the possibility that when the work is accepted he will receive bonds upon which interest has accrued.

Nor does the fact that the contractor may receive the interest which has accrued upon the bonds at the time when the work is finally accepted necessarily afford a ground for respondents' claim that if the statute be construed as contended for by petitioner the contractor will, in effect, be paid a premium for unreasonably delaying the completion of the improvement. All bonds issued to represent these local assessments draw interest from their date. Section 25. Therefore, the contractor who is obliged to take bonds for his work will receive the same amount of interest whether he performs his work diligently or dilatorily, provided, of course, he has not forfeited his contract by reason of delay in its performance. By performing his work expeditiously and by promptly receiving his pay for it, whether that compensation take the form of money or bonds or of money and bonds, he may the sooner satisfy any interest-bearing obligations which he may have been compelled to incur in order to finance the job. By speedily completing the improvement he hastens the day when he can put an end to the running of the interest which he, as a borrower, may be obligated to pay. For this reason it is quite within the range of possibility that the motive which impels him to hasten the work will be the same whether he be paid in money or in bonds. Whether the motive is the same in either case is a matter depending largely upon the rate of interest at which he is able to borrow. If that interest be equal to or greater than the interest which the bonds draw, he may gain by completing the work as soon as possible and liquidating his debts with the money or bonds received by him in payment of the contract price.

There is a greater reason for holding that the statute should be construed as not giving to a city which has made no advances for incidental expenses or for awards of damages the privilege of taking bonds at their par value, thus enabling it to make a profit to the extent of the accrued interest, than there is for holding that the bonds with their accrued interest should not be delivered to the con-

tractor in payment pro tanto of the contract price. The principle underlying special assessments to meet the cost of local improvements is that the property upon which they are imposed is peculiarly benefited, and that, therefore, the owners do not in fact pay anything in excess of what they receive by reason of the improvement. But the constitutional guarantees for the protection of private property would be seriously impaired if, under the guise of local assessments, the Legislature should attempt to make the lot owners in a local improvement district contribute to the general revenue for the use of the public at large. *Norwood v. Baker*, 172 U. S. 269, 19 S. Ct. 187, 43 L. Ed. 443. In *McCormack v. Patchin*, 53 Mo. 36, 14 Am. Rep. 440, the Supreme Court of Missouri says:

"The whole theory of local taxation or assessments is, that the improvements, for which they are levied, afford a remuneration in the way of benefits. A law which would attempt to make one person or a given number of persons, under the guise of local assessments, pay a general revenue for the public at large, would not be an exercise of the taxing power, but an act of confiscation."

Every assessment levied under the provisions of this Street Improvement Act must include its proportion of the total amount of incidental expenses necessarily incurred by the city in connection with the proposed improvement. Section 10 and subd. 6 of section 46. If by reason of the issuance of bonds there be any expense to the city which is not included within the statute's definition of the term "incidental expenses," it must, as a general rule, be a trifling sum as compared with the amount of interest which may accrue upon the bonds prior to the city's acceptance of the improvement. If, therefore, the city, without having made any advances for incidental expenses or for awards, but at its option and at any time before the final acceptance of the work, may transfer from its general fund to the special street improvement fund a sum of money equal only to the par value of the street improvement bonds remaining in the latter fund, receiving such bonds in return for the moneys so transferred by it, and if, as in the instant case, the validity of the bonds has been determined beyond peradventure, then the accrued interest represents a very considerable profit to the city—a sum of money which the property owners paid into the city treasury for a purely local improvement, and which, therefore, could very properly be paid to the contractor as a part of the cost of the improvement. But if in such case the city receives the accrued interest the profit which it makes out of the transaction will not be used by it to defray any part of the cost of the local improvement for which it was paid. On the contrary, if the

profit be retained by the city, it may be used by it for any of the numerous purposes to which the municipality's general revenue is devoted. A construction of the statute which permits this to be done opens up a grave constitutional question which, if we do not find it necessary to decide, must at least give us pause. We do not decide it, simply because we think the language of sections 30 and 33 is too plain to permit the construction which respondents seek to place upon it.

[2, 3] It cannot successfully be claimed that the interest provided for in the bonds is of the nature of a "penalty" to which the city is entitled simply because it is a penalty. Where, under the guise of "interest," a sum is exacted of a delinquent property owner, such sum, though denominated "interest," is in fact a penalty, as was held by the Oregon supreme court in *Colby v. Medford*, 85 Or. 485, 167 P. 487. There the court said:

That "when interest is charged on a delinquent tax it is not regarded as interest in the sense that it is a consideration for the forbearance of money, but it is deemed to be a penalty."

But the "interest" provided for in these street improvement bonds is not a charge for delinquency. No part of a bond is delinquent until the lot owner has defaulted in the payment of the principal or interest of the bond after it has become due. When that happens the statute makes specific provision for the only "penalties" which are imposed by reason of such default. Sections 34 et seq. Therefore the interest which is provided for by these bonds, interest which runs from the date of each bond, is interest in the true sense of the term, i. e., it is compensation for the use or forbearance of money and as such is distinguished from a penalty, which is a punishment. In *re Ashland Emery, etc., Co.* (D. C.) 229 F. 829; *Sparks v. Lowndes County*, 98 Ga. 284, 25 S. E. 426; *Shmuck v. Wheeler*, 98 Wash. 535, 167 P. 1126, 25 C. J. 1178; Civ. Code, § 1915. Clearly, it was not the intention of the Legislature to punish the property owner simply because he sought to avail himself of the statutory privilege of having a bond issue to represent the assessment against his lot.

[4] Our conclusion from the foregoing is that if sections 30 and 33 stood alone, petitioner, without doubt, would possess the unconditional right to receive the bonds in payment pro tanto of the contract price. Having arrived at this conclusion, we shall now consider whether there is anything in the language of section 32 which justifies the city's position. That section, after declaring, in substance, that the city may advance money to the special street improvement fund for the purpose of paying incidental expenses and awards of damages if

the contractor has failed to make such advances, and that the city treasurer shall issue bonds to the city equal, at their par value, to the amount so advanced by the city for incidental expenses or awards, goes on to say:

"* * * and in *any* event (italics ours) it shall be competent for the city to advance to the appropriate fund the par value of all or any part of said bonds, in which case the said bonds shall be issued to the city, and the said city shall have the same rights in respect to the enforcement and collection thereof as other purchasers."

Respondents claim that this language is broad enough to justify the city in making advances of money to the special fund in exchange for bonds in "any" event, and quite regardless of whether the advances were made by it for the specific purpose of paying incidental expenses or awards of damages. This might be true if the general words "in any event" were not used in connection with a very definite subject-matter and in immediate association with language of much narrower import. In this section of the act the Legislature is dealing with "advances" to meet incidental expenses and awards. As respondents construe the section, the city is, in effect, not merely empowered to make advances, but is authorized to "purchase" the bonds outright, just as any purchaser might do at a sale held under section 29 of the act. If that had been the intention, the Legislature, we may presume, would have employed more appropriate language to express the intent. But here the language is that it shall be proper for the city to "advance" to the appropriate fund an amount equal to the par value of the bonds. An "advance" is something which precedes. "To advance money is to pay it before it is due, or to furnish it for a certain specified purpose, with the understanding that it, or some equivalent, is to be returned." *Ebeling v. Ebeling*, 61 Misc. Rep. 539, 115 N. Y. S. 895. (Italics ours.) Without doubt, the word "advance," as used in this section of the act, means "to furnish for a certain specified purpose." The payment of incidental expenses or of awards of damages, or both, is the only purpose for which money could possibly be furnished by the city for use in the special fund to which the advances are made. We may safely conclude, therefore, that advances of money for such limited purposes constitute the subject-matter of the section.

[5] "Any" is a word which may have one of several meanings, according to the subject which it qualifies. Like all other general words, its meaning is often restrained and limited by the context or subject-matter. In *Barber v. Morgan*, 89 Conn. 583, 94 A. 984, Ann. Cas. 1916E, p. 102, it is held that a statute providing that "every such corpora-

tion" may increase or reduce its capital stock and the number and par value of its shares, and that in case of a reduction of the capital stock of "any corporation" by any mode which shall render it insolvent, the stockholders assenting thereto shall be liable for the debts of the corporation, applies only to joint stock corporations, and the words "any corporation" must be limited to joint stock corporations. There the court says:

"What corporations did the Legislature have in mind when they used the words 'any corporation'? Naturally, joint stock corporations with which they were dealing, and for the reduction of whose stock provision was made in the same section and sentence in which these words are found. Clearly by 'any corporation' was intended any *such* corporation (italics ours), and the general words must be limited to that meaning."

In *Richardson v. Ainsa*, 218 U. S. 289, 31 S. Ct. 23, 54 L. Ed. 1044, the United States Supreme Court, construing an act of Congress, gave to the general words "in any case"—words which are synonymous with the term "in any event"—a limited scope and meaning in harmony with reason and with the evident purpose of Congress as disclosed by its entire legislation upon the subject. In *United States v. Hom Hing* (D. C.) 48 F. 635, the court had occasion to construe an act of Congress which provides:

That "in any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage."

The court held that the words "in any case" do not mean broadly any case where one of the parties to a controversy desires the evidence of a foreign witness, but any case of which the court granting the commission has jurisdiction. For other cases in which the word "any" has been restricted to the subject-matter of the statute, or to the subject-matter of the particular section or clause in which it occurs, see *Indiana, etc., Coal Co. v. Neal*, 166 Ind. 458, 77 N. E. 850, 9 Ann. Cas. 424. Also *In re Licenses* (Iowa) 179 N. W. 609, and the cases there cited.

Not infrequently the word "any" has been construed in accordance with the *ejusdem generis* doctrine. 3 C. J. 231. "It may be admitted," says the federal Supreme Court in *United States v. Bitty*, 208 U. S. 402, 28 S. Ct. 398, 52 L. Ed. 543, "that in accordance with the familiar rule of *ejusdem generis*, the immoral purpose referred to by the words 'any other immoral purpose', must be one of the same general class or kind as the particular purpose of 'prostitution' specified in the same clause of the statute." In *Hubbell v. Higgins*, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, p. 822, it was held that a statute providing that all hotels be kept

and maintained in a clean and sanitary condition, free from any effluvia, gas or offensive odors arising from any sewer, drain or privy, "or from any other source whatever" within the control of the owner, manager or person in charge, does not confer on the hotel inspector arbitrary power to declare a nuisance solely because of "offensive odors," since, under the rule *ejusdem generis*, the words "any other source whatever" refer to a source of like kind with "sewer, drain and privy." See, also, *Ex parte Neet*, 157 Mo. 527, 57 S. W. 1025, 80 Am. St. Rep. 638.

It has been held that "any" should be construed as synonymous with "either" whenever it is necessary to do so in order to prevent destroying the evident intention of the Legislature. *Fenet v. McCuiston*, 105 Tex. 299, 303, 147 S. W. 867; *Dowling v. State*, 5 Smedes & M. (Miss.) 664; *State v. Antonio*, 2 Tread. Const. (S. C.) 776, 783; 3 C. J., p. 231; *Words and Phrases*, vol. 1, p. 414; note to *State v. Kansas City*, *supra*, Ann. Cas. 1916E, p. 11.

We think that the word "any," as used in the phrase "in any event" in section 32 of this act, should be construed as synonymous with the word "either" or as the equivalent of the term "any such," and that when the Legislature said that "in any event" it shall be competent for the city to advance money to the special fund in exchange for bonds, it had in mind that if it became necessary for the city to advance money to that fund for the purpose of paying incidental expenses or awards of damages, or both, then and in either of those events, or in any such event, it would be competent for the city to make the advances and to receive bonds in exchange. Any other construction would bring the section into irreconcilable conflict with sections 30 and 33, and we should be confronted with a situation as absurd as that involved in the hypothetical case of an irresistible force meeting with an immovable body. It cannot be presumed that, in adopting section 32, the Legislature intended to destroy the evident meaning of sections 30 and 33.

[6] Our conclusion is that petitioner's interpretation of this statute is correct, and that, therefore, upon the final acceptance of the work, he became entitled to receive all of the bonds which were in the special improvement fund immediately prior to the action taken by the city on April 28, 1924, the bonds to be accepted by petitioner at their par value in payment pro tanto of the contract price.

Let the peremptory writ of mandate issue.

We concur: WORKS, J.; CRAIG, J.

C. L. POWELL, Plaintiff and Appellant, v. CITY OF LOS ANGELES (a Municipal Corporation) et al., Defendants and Respondents (Nellie A. Hill, Intervener and Appellant). (Civ. 4790.)

(District Court of Appeal, Second District, Division 2, California. Jan. 21, 1925. Hearing Denied by Supreme Court March 20, 1925.)

Appeal by plaintiff and intervener from a judgment of the Superior Court of Los Angeles county, Ralph H. Clock, Judge, in an action to enjoin defendant from asserting claim to certain street improvement bonds. Reversed.

MYERS, C. J., and SEAWELL, J., dissent.

Emmet H. Wilson, of Los Angeles, for appellants.

Jess E. Stephens and Lucius P. Green, both of Los Angeles, for respondents.

FINLAYSON, P. J. Plaintiff is the assignee of one John Hayes, the contractor to whom was awarded a contract to do certain street work in the city of Los Angeles under the Street Improvement Act of 1913 (St. 1913, p. 954). The action was brought to enjoin defendants from asserting any claim by the city to the ownership of certain street improvement bonds. The plaintiff here is the same person who applied to this court for a writ of mandate in the proceeding entitled *C. L. Powell v. R. M. Allan et al.* (No. 4788) 234 P. 339, and which was this day decided in favor of the petitioner. Substantially the same facts are alleged in the complaint in this action that are set forth in the petition there. One of the property owners against whose lots bonds had been issued to represent the assessments thereon, and who claimed an interest in the matter in litigation here adverse to the defendants and in favor of the plaintiff, filed a complaint in intervention in which she joined with plaintiff in praying that the defendants be enjoined from asserting the city's claim to such of the bonds as were issued against her property. The defendants demurred to the complaint and likewise to the complaint in intervention. Both demurrers were sustained, and thereupon judgment was entered in favor of defendants. Plaintiff and the intervener have appealed from that judgment and likewise from an order refusing to grant their application for an injunction.

In the brief on behalf of respondents it is stated that "the same questions of law are involved" in this action that were presented in the mandamus proceeding, and it is conceded, in effect, that the appeal here should be governed by the decision made in the former proceeding. *Powell v. Allan* discusses every issue which is raised on this appeal, and our decision there, which is against the city, necessitates a reversal here.

The judgment and the order appealed from are reversed.

We concur: WORKS, J.; CRAIG, J.

195 Cal. 577

UNITED STATES FIDELITY & GUARANTY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 11480.)

(Supreme Court of California. March 9, 1925.
Rehearing Denied April 6, 1925.)

1. Master and servant ⇨398—Employer held to have waived limitation of time for claiming compensation.

Where claimant was injured on June 29, 1922, and was sent by employer, who paid bill, to hospital for operation for hernia, resulting from injury, some time after June 23, 1923, employer held to have waived Workmen's Compensation, Insurance and Safety Laws, § 11, imposing limitation of six months for bringing claim.

2. Master and servant ⇨398—Waiver by employer of limitation of time for presenting claim, binding on insurer.

Waiver by employer of provision of Workmen's Compensation, Insurance and Safety Laws, § 11, barring claims not presented within 6 months, by paying expense of subsequent operation, held binding on insurance carrier, in view of section 30.

3. Insurance ⇨591½—Insurance carrier not merely surety, in view of Compensation Act.

Under Workmen's Compensation, Insurance and Safety Laws, § 30, raising conclusive presumption that insurance contract contained clause to effect that carrier should be directly and primarily liable to employee, status of insurance carrier is not merely that of surety.

4. Master and servant ⇨405(6)—Finding disability had not terminated sustained.

Evidence held sufficient to sustain inference that claimant's disability had not terminated, although he testified that wound was healed up but still hurt badly, as against contention that award was predicated on pain alone.

In Bank.

Proceeding under the Workmen's Compensation Act by John Avila for injuries, opposed by the United States Fidelity & Guaranty Company, insurer. From an order of Industrial Accident Commission, insurer brings application for writ of review to annul award. Award affirmed.

Horace W. B. Smith and P. R. Lund, both of San Francisco, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondents.

PER CURIAM. We are satisfied with and hereby adopt the following portions of the opinion prepared herein by Mr. Justice Sturtevant of the District Court of Appeal:

"This is an application to have an award made by the defendant Commission annulled.

"On December 5, 1922, John Avila filed with the Commission an application for adjustment of claim. In that application he set forth that prior to the 29th day of June, 1922, he was employed by the Associated Milk Producers at

Los Banos; that on the 29th day of June, 1922, in the course of his employment he was lifting heavy sacks of casein and strained himself causing a hernia; that he purchased a truss and returned to work on July 1, 1922; that he continued to work until July 7, 1923; that on the date last mentioned his trouble had increased to such an extent that he quit work; that during the same month he was operated on for the hernia; that he returned to work September 5, 1923; that on October 22, 1923, the above-mentioned injury became aggravated and he was compelled to quit work and that he lost five months' time to the date of said application. In his application the claimant further set forth that he notified his employer of the injury received on the 29th day of June, 1922, and that he consulted Dr. Jadarola and Dr. Sprague who attended him for the injury received; that Dr. Eaves performed the operation above mentioned and that Dr. Eaves was paid for the operation by the employer; that neither the hospital bill, nor Dr. Jadarola, nor Dr. Sprague have been paid; and that other sums have not been paid for medicines. The application also set forth that the employee was receiving \$120 a month payable monthly and that he worked seven days a week. The application was answered by this petitioner. In the answer the petitioner alleged that it was the insurance carrier and as such appeared for the purposes of the case and asked to be substituted in the place of the employer. In its answer the insurance carrier, as the defendant, denied that the applicant was injured in the course of his employment with the employer on or about the 29th day of June, 1922; admitted that the applicant was in its employment on the date mentioned and was receiving \$120 a month seven days per week. The defendant also denied that bills were incurred at St. Mary's Hospital, or that doctor bills were incurred as above stated. In their answer they also set forth: 'As a separate and affirmative defense to the application herein, defendants allege that more than six months have elapsed between the time of the alleged injury on June 29, 1922, and the time of the filing of the application herein, and by reason thereof the right of the applicant to file application for adjustment of claim herein is wholly barred, as provided by section 11 of the California Workmen's Compensation, Insurance and Safety Laws of the State of California.' (St. 1917, p. 841.)

"On the pleadings so framed the parties presented the proceedings concerning the claim of the employee. The Commission made findings in which it found every fact in favor of the employee and made its award 'in favor of John Avila against the United States Fidelity & Guaranty Company in the sum of \$161.23, payable to applicant forthwith, and the further sum of \$17.10 a week beginning October 12, 1923, until the termination of disability or the further order of this Commission. * * *

The evidence taken commenced with a date prior to June 29, 1922, and extended over the ensuing date down to the 15th day of January, 1924. No objection was made as to any testimony being without the issues. All of the testimony came in without objection.

"On turning to the evidence introduced, it

appears that on June 29, 1922, the day the hernia was caused, the employee notified the employer of the injury. It also appears that said notice was frequently repeated, but that the employer never notified the insurance carrier until about the 23d day of June, 1923. On that date Avila came to San Francisco. After telling his story to the officers of the Associated Milk Producers, they sent him to the insurance carrier. The insurance carrier denied liability. Thereafter the attorney for the employer called on the insurance company and received a reply of similar import. Thereupon the employer sent the employee to St. Mary's Hospital, where he was operated upon at the expense of the employer. No claim is made that the insurance company is liable to the employer for these expenses. On September 5, 1923, the employee returned to work and continued at his work until October 12th following. At that time he quit work because an open sore existed at the point where he had been operated on for the hernia. Thereupon Avila consulted Dr. Sprague, who proceeded to treat the wound and continued to treat it until about December 20, 1923. At that time the running sore had been healed, but as the witness stated on the witness stand on January 15, 1924, 'It is healed up now but it still hurts me bad.'

[1, 2] "Claiming that Avila suffered but one injury, the hernia, and that injury was on June 29, 1922, the petitioner asserts that the defense of the statute of limitations was a complete defense and that the Commission erred in making any award. In asserting that claim the petitioner overlooks entirely all that portion of the story subsequent to the apparent healing of the incision made at the time of the operation. If there were no more facts involved, there would be more in the contention of the petitioner. However, when we consider all of the facts, we think that there is nothing in the claim of the petitioner. * * * The employer may waive the terms of the statute, and the employer in this case did waive the terms of the statute when it sent its employee to the hospital to be operated on for hernia and the expenses of the operation to be borne by the employer. The statute in that behalf provides as follows: 'Sec. 11 (c). The payment of compensation, or any part thereof, or agreement therefor, shall have the effect of extending the period within which proceedings for its collection may be commenced, six months from the date of the agreement or last payment of such compensation, or any part thereof * * *'. It is clear that, as to the employer, the defense of the statute of limitations was waived. The insurance company, so far as the record disclosed, became liable to the employee under the same circumstances and to the same amount as the employer. The statute on that subject provides: 'Sec. 30 (c). Every contract insuring against liability for compensation, or insurance policy evidencing the same, must contain a clause to the effect that the insurance carrier shall be directly and primarily liable to the employee and, in the event of his death, to his dependents, to pay the compensation, if any, for which the employer is liable. * * * (d) * * * Every contract insuring against liability for compensation, provided by this act, or insurance policy evidencing the same shall be con-

clusively presumed to contain all of the provisions required by this act.' When, as here, the employer could not successfully plead the statute of limitations, it is difficult to see how its agent the insurance carrier could successfully do so for the employer."

[3] We are satisfied that for the purposes of the proceeding here under review the employer could and did waive the statute of limitations and that such waiver is equally binding upon the insurance carrier. The contract of insurance was not in evidence before the Commission, and we are not here concerned with the question whether or not that contract was breached, as between the immediate parties thereto, by the act of the employer in waiving the statute. In the face of the conclusive presumption that the contract of insurance contains a clause to the effect that "the insurance carrier shall be *directly and primarily liable* to the employee * * * to pay the compensation, if any, *for which the employer is liable*" (section 30c, italics added), there is no merit in the contention that the status herein of the insurance carrier is merely that of a surety.

[4] We are of the opinion that the testimony before the Commission was legally sufficient to sustain the inference that Avila's disability had not terminated on December 20, 1923, or on January 15, 1924. It cannot be said therefore that the finding was based upon mere speculation, or that it was predicated upon the theory that pain alone is sufficient to justify an award of compensation.

The award is affirmed.

195 Cal. 532

JENKS v. LURIE et al. (S. F. 11515.)

(Supreme Court of California. March 11, 1925.)

1. Appeal and error $\hookrightarrow$ 1126—When Supreme Court will entertain motion to affirm judgment because appeal without merit stated.

Supreme Court may entertain motion to affirm judgment on grounds that appeal is without merit, when record discloses nothing which would justify a reversal.

2. Appeal and error $\hookrightarrow$ 801(4)—Motion to dismiss appeal not considered, where investigation of merits is necessary.

In action to rescind conveyance, made by plaintiff as executrix, and confirmed by court in probate proceedings from which no appeal was taken within required time, motion to dismiss appeal on grounds that issue was moot, but contention being in reality that matter was res adjudicata, could not be entertained; investigation into merits of case being necessary.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by May Harley Jenks, executrix, against Louis R. Lurie and others, to set aside a sale of a contingent reversionary interest in real property. Judgment for defendants, and plaintiff appeals. On motion to dismiss appeal. Denied.

Hiram W. Johnson, Jr., and L. J. Rabinowitz, both of San Francisco, for appellant.

Louis Ferrari, R. H. Morrow, and Henry E. Monroe, all of San Francisco, for respondents.

PER CURIAM. This is a motion to dismiss the appeal upon the grounds that the controversy involved therein has been determined in a proceeding over which this court has no jurisdiction; that such determination has become final so that this court cannot grant effectual relief upon this appeal; and that, therefore, this controversy is moot and presents no genuine issue to this court.

[1, 2] This action was brought by plaintiff, as executrix of said estate, to rescind and set aside upon the grounds of fraud and mistake a sale and conveyance theretofore made by her of a contingent reversionary interest in certain real property arising out of building restrictions contained in a previous conveyance of said property. The answer sets up as an affirmative defense that the sale and conveyance sought to be rescinded was made by plaintiff as executrix; that the sale was duly reported to and confirmed by the court in the probate proceedings; that no appeal was taken from the order of confirmation; that the time for appeal therefrom has elapsed and the same has become final; and that the matters involved herein are therefore res adjudicata. The facts so pleaded are the facts which are relied upon in support of this motion to dismiss the appeal. It thus appears that the grounds of this motion are not in reality that the appeal has become moot, or even that the controversy herein is moot. The real ground of the motion is the claim that respondents' defense of res adjudicata, or estoppel by judgment, was a valid and complete defense to the action; that it ought to have been sustained by the trial court; that the judgment in favor of the defendants, therefore, was correct; and that the appeal therefrom is without merit. But this is a question going to the merits of the action which was litigated in the trial court herein, and which is involved and to be determined upon this appeal. This court has sometimes entertained a motion to affirm the judgment on the ground that the appeal is without merit, in that the record on appeal discloses nothing which would justify a reversal of the judgment. But this is done ordinarily in cases where the lack of merit in the appeal is plainly apparent from a mere inspection of the record (as, for example, where the appeal is upon the ground of insufficiency of the evidence, or errors in ruling thereon,

and there is no duly authenticated bill of exceptions or reporter's transcript in the record upon appeal). In order to entertain and act upon this motion we must, perforce, consider and decide one of the principal questions going to the merits of the action and one which was litigated and determined in the trial court. The general rule is that this court will not entertain a motion to dismiss an appeal in cases where a determination of the motion necessitates an investigation and consideration of the merits of the case. *Ricketson v. Torres*, 23 Cal. 636, 649; *Foscalina v. Doyle*, 48 Cal. 151; *In re Blythe*, 108 Cal. 124, 127, 41 P. 33; *Estate of Sharp*, 10 Cal. App. 1, 100 P. 1071. If we should entertain this motion and ultimately grant it, the result would be in effect an advancement of this cause (without any showing of good reason therefor) and the decision thereof upon the merits in advance of other cases which are ahead of it upon our calendar. If we should take this motion under submission and ultimately deny it, the result would be that we should thereafter have to again take the same case under submission as to the remaining questions involved in this appeal. In other words, we should be rendering two opinions in the same case upon the same appeal, each of which would determine but a portion of the case upon the merits. See 2 Cal. Juris. § 749.

The motion is therefore denied without prejudice to the future consideration upon this appeal of the questions involved therein.

195 Cal. 599

ISERT v. RIECKES, Sheriff, et al. (Sac. 3513.)

(Supreme Court of California. March 6, 1925.)

1. Justices of the peace ⚡40—Justice of peace has jurisdiction to entertain motion to quash service of summons.

Justice of peace has jurisdiction to hear motion to quash service of summons on ground that defendant is not resident of county nor party to contract to be performed therein.

2. Justices of the peace ⚡40—Default judgment obtained in county other than residence of defendant, who never made contract to be performed therein, is void, though not void on its face.

Default judgment against defendant sued in justice's court in county of which he was not and never had been a resident, who never entered into contract to be therein performed on which suit was predicated, is wholly void for want of jurisdiction, under Code Civ. Proc. § 848, though not void on its face.

3. Justices of the peace ⚡128(3)—Defendant having moved to quash service of summons held to have sufficiently pursued legal remedy to entitle him to equitable relief against enforcement of default judgment.

Where defendant, wrongfully sued in justice court in county other than that of his

residence, specially appeared and moved to quash service of summons, he was not required to move to set aside default judgment, or to recall execution, or to appeal before being entitled to enjoin enforcement of such judgment.

4. Appeal and error ¶954(1)—Injunction ¶135—Granting of injunction pendente lite is within discretion of court, whose action will not be disturbed except for abuse of discretion.

As general rule, granting or denial of injunction pendente lite rests in sound discretion of trial court, whose action will not be disturbed, except for abuse of discretion.

5. Execution ¶171(3)—Denial of temporary injunction pending suit to enjoin enforcement of void judgment held unwarranted.

Application for temporary injunction pending suit to enjoin sheriff from selling realty on execution issued on void judgment held to present no occasion for exercise of court's discretion, and denial of injunction was unwarranted.

In Bank.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Suit by J. M. Isert against W. H. Riecks, as Sheriff of County of San Joaquin, and the State Compensation Insurance Fund. Judgment for defendants, and plaintiff appeals. Reversed.

A. H. Carpenter, of Stockton, for appellant.

Neumiller & Ditz, of Stockton, for respondents.

MYERS, C. J. This was a suit in equity for an injunction to restrain the defendant sheriff from selling certain real property of the plaintiff situate in San Joaquin county, upon an execution issued out of the justice's court of the city and county of San Francisco. The plaintiff herein, Isert, was made defendant in an action brought in the justice's court of the city and county of San Francisco to recover the sum of \$100 alleged to be due to the defendant State Compensation Fund, plaintiff in that action, as a premium upon a policy of insurance alleged to have been issued by said fund to him. In the complaint in that action it was alleged that the said Isert had "agreed in writing to pay at the city and county of San Francisco, state of California" the premium sued for. The summons therein was served upon Isert in San Joaquin county, and in due time he appeared specially in the justice's court upon a motion to quash the service of summons, upon the ground, as stated in his affidavit and notice of motion, that he was a resident of San Joaquin county; that he was not and never had been a resident of the city and county of San Francisco, and that he had never made or entered into any agreement in writing or otherwise to purchase said

policy of insurance or to pay any premium thereon. This motion came on regularly for hearing upon notice in the justice's court of the city and county of San Francisco, and after hearing thereon the motion was denied. Isert took no further action in the justice's court proceeding, and thereafter judgment was rendered against him by default for the sum sued for. Execution issued upon this judgment was delivered to the defendant sheriff of San Joaquin county, and was levied by him upon real property in that county belonging to Isert, which was advertised for sale, whereupon Isert brought this action in the superior court of San Joaquin county to enjoin such sale, and to have the judgment vacated and annulled. The plaintiff having applied for an injunction restraining the sale of said property pendente lite, an order to show cause was granted thereon, and in connection therewith an interim restraining order. Upon the return of the order to show cause, and after a hearing thereon, the court made its order denying plaintiff's application for an injunction pendente lite and vacating the interim restraining order theretofore made. Thereafter the general demurrer of the defendants to the complaint herein was sustained by the court, and, the plaintiff declining to amend, judgment in favor of defendants followed. Plaintiff appeals herein from said judgment and also from the order denying his application for an injunction pendente lite and vacating and dissolving the interim restraining order theretofore entered.

[1, 2] The effect of the demurrer being to admit all of the allegations of the complaint which were well pleaded, we must assume, for the purpose of reviewing the judgment upon appeal, that all of the facts of the case are as alleged in the complaint herein. We must assume, therefore, that Isert has never been a resident of the city and county of San Francisco, but was at all times a resident of San Joaquin county; that the alleged contract which forms the basis of the action in the justice's court was not made or entered into within the city and county of San Francisco, and that it was not to be performed therein. It follows that while that court had jurisdiction to hear and determine the motion to quash the service of summons (*History Co. v. Light*, 94 Cal. 56, 31 P. 627), nevertheless, assuming the facts to be as alleged in the complaint herein, that court never acquired jurisdiction of the person of the defendant therein, and its judgment was wholly void, though not void upon its face. *Code Civ. Proc.*, § 848; *Smith v. Ross*, 48 Cal. App. 360, 191 P. 974; *Newman v. Barnet*, 165 Cal. 423, 132 P. 588.

[3] Respondents concede in effect the validity of the foregoing conclusions, but contend that the plaintiff herein is nevertheless

not entitled to the equitable relief which he is here seeking, for the reason that it was incumbent upon him to first exhaust his remedy at law, either by moving in the justice's court to set aside the judgment, or to recall the execution, or by appealing to the superior court from the judgment of the justice's court. In support of this contention they cite a long list of decisions, of which the case of *Luco v. Brown*, 73 Cal. 3, 14 P. 366, 2 Am. St. Rep. 772, and *Smith v. Ross*, supra, are fairly illustrative, holding that an injunction will not lie to restrain the enforcement of an execution on a judgment by default in a justice's court, which is void for the reason that the court never acquired jurisdiction of the person of the defendant, unless such defendant shall have first pursued his remedy at law, either by motion in the justice's court to set aside the execution or judgment, or by appeal therefrom to the superior court.

The cases cited by respondents are not at all determinative of the question of the extent to which a defendant who has been wrongfully sued in a justice's court of a county other than that of his residence is required to pursue his remedy at law before he may properly seek equitable relief. In none of those cases did the defendant make any effort whatsoever to obtain relief at law, either by motion to quash the service of summons or by motion to vacate the judgment or to recall the execution or by appeal from the judgment. Those cases, therefore, hold no more than this: That such a defendant must have made some effort to obtain relief at law, either by motion in the case or by appeal from the judgment or by some other means, before he is entitled to invoke injunctive relief in a separate action. The case of *Newman v. Barnett*, supra, is much more nearly in point herein and sheds more light upon this question. The plaintiffs in that action, who were residents of Alameda county, were sued in the justice's court in San Joaquin county in an action upon contract for goods sold and delivered. The complaint in that action contained no allegation as to the residence of defendants therein, nor did it allege whether or not the contract sued upon was in writing. The defendants, having been served with summons, made no appearance in the justice's court until after judgment had been rendered against them upon default. Thereafter they appeared specially in the justice's court and moved to set aside the service of summons and the default judgment, which motion was denied. An execution issued under the judgment having been levied upon defendants' real property, they brought suit in equity, as did the plaintiff herein, for an injunction to restrain the sale thereof. Upon appeal from the judgment granting the injunction, the defendants' contention was

substantially the same as made by the defendants herein, namely, that the plaintiffs were not entitled to the equitable relief of an injunction for the reason that they had not wholly exhausted their remedy at law—citing *Luco v. Brown*, supra, and *History Co. v. Light*, supra. In response to this contention the court said:

"These cases relied on, applying the general rule above stated, held that a party will not be heard in a court of equity to enjoin the sale of property under an execution issued on a justice's judgment, until he has made application in a justice's court for relief—made some appropriate motion to set aside the judgment or annul proceedings under it. But the clear answer to this contention of the appellant is that the defendants did make their application for relief in the justice's court and it was denied. It was not necessary for them to move in that court, in terms, for the recall of the execution or for a stay of further proceedings on the judgment. A full compliance with the equitable rule was had when they moved to set aside service of the summons and the judgment which, if granted, would have set at large all process and proceedings taken under it. No appeal lies from the action of the justice's court on such a motion, hence, when respondents made their motion to set aside the judgment and it was denied, they had done all they were required to or could do as a prerequisite to invoking the interposition by injunction of a court of equity to obtain the relief they sought in the present action and which the court properly awarded them."

This is, in effect, a holding that a defendant in such circumstances, who has made an appropriate though ineffective application for relief in the justice's court, by an appropriate motion, supported by a proper showing, has done all that he is required to do as a condition precedent to invoking injunctive relief. We are unable to see that it makes any difference whether such application is made before or after judgment in the justice's court. A motion to quash the service of summons is as appropriate to this end as would be a motion to vacate the judgment or to recall the execution. Each of these motions would be based upon precisely the same ground, to wit, that under the facts of the case the service of summons in a county other than that in which the action was commenced was unauthorized and, therefore, void. We are aware of no reason, and none has been suggested by respondents herein, for concluding that plaintiff herein should have waited until after judgment was rendered before making his motion to quash the service of summons, or that he should have repeated the same application by a motion to vacate the judgment. The ruling of the justice's court upon such motion would have been the same in either event, because both motions would be governed by the same state of facts and the same rules of law. The plaintiff herein hav-

ing duly presented in the justice's court his motion to quash the service of summons upon the ground that the same was unauthorized and therefore void, and that motion having been denied after a hearing thereon, it would have been a vain and useless thing for him to thereafter present the same motion to the same court upon the same ground in the form of a motion to vacate the judgment.

The purpose of the cited code section is to protect a defendant, who has been sued in violation thereof in a justice's court of a county other than that of his residence upon a small claim, from the expense, inconvenience, and loss of time incident to the conduct of litigation at a place far distant from his residence. To hold that he must make repeated applications for relief to the justice's court in which he is thus wrongfully sued would be to defeat pro tanto the purpose of this statute. It is suggested that:

"In the Newman v. Barnet Case the plaintiffs proceeded to the point where the invalidity of the justice's court judgment was disclosed and where the court responsible for it refused any relief from it."

That is precisely what happened in the case at bar. The plaintiff herein proceeded to the point where the invalidity of the justice's court judgment was disclosed to that court, and that court denied relief (assuming the facts to be as alleged in the complaint herein). We are satisfied that the case at bar is ruled by the case of Newman v. Barnet, supra, and that the plaintiff herein has done all that he is required to do preliminary to the seeking of an injunction. It is suggested that the case of Newman v. Barnet is inapplicable to the case at bar for the reason that the judgment in that case was void upon its face, whereas the judgment herein, though void in fact, is not void upon its face. We are not prepared to hold that the judgment in the Newman Case was void upon its face. It did not appear from the record therein that the defendants therein were not residents of the county in which the action was brought. Neither did it there appear that the contract sued upon was not in writing, except as this might be inferred from the failure to allege in the complaint that it was in writing. But, assuming that the judgment in that case was void upon its face, we are aware of no reason, and none has been suggested to us, why this circumstance should lead to a different rule with respect to the duty of the defendant seeking relief therefrom. This court did not base its decision in that case upon the circumstance that the judgment was void upon its face. It did not even so decide. On the other hand, this court has held that, while a judgment which is void upon its face

may be attacked at any time, either directly or collaterally, the better practice in the case of a judgment which, while void in fact for want of jurisdiction, is not void upon its face, is to attack it by a separate action. *People v. Harrison*, 84 Cal. 607, 608, 24 P. 311; *People v. Thomas*, 101 Cal. 571, 575, 36 P. 9.

[4, 5] It is the general rule that the granting or denial of an application for an injunction pendente lite rests in the sound discretion of the trial court and its action thereon will not be disturbed upon appeal except where it appears that such discretion has been abused. However, it does not appear that there was herein any occasion for the exercise of such discretion upon the application for the temporary injunction. There was here no occasion for the balancing of equities, and there was no question involved as to whether the probable injury to the defendants from the granting of the temporary injunction would be greater than the probable injury to the plaintiff from the denial thereof. The defendants' lien upon plaintiff's land by virtue of the levy of execution thereon will continue until the termination of this action. They are fully protected, therefore, and cannot be substantially injured by an injunction restraining the sale pending the determination of the action, and the temporary injunction should have been granted.

The order and judgment appealed from are therefore reversed.

We concur: WASTE, J.; LENNON, J.; LAWLOR, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.

195 Cal. 584

PEOPLE v. CONNELLY. (Cr. 2726.)

(Supreme Court of California. March 12, 1925. Rehearing Denied April 7, 1925.)

1. Homicide $\S$ 253(1)—Evidence held sufficient to establish guilt of first degree murder while committing robbery.

Testimony of eyewitnesses to robbery and to shooting and to planning and preparation for robbery, together with other incriminatory and corroboratory circumstances arising from conduct and flight following shooting, held sufficient, if believed, to positively establish guilt of first degree murder.

2. Criminal law $\S$ 1159(5)—Implied finding identifying defendant as murderer supported by ample evidence cannot be disturbed on appeal.

There being ample evidence to sustain implied finding identifying defendant as person who committed homicide during robbery, and that being province of jury, it will not be disturbed on appeal, notwithstanding certain discrepancies arising from attempt of witnesses to reproduce descriptively from mental pic-

tures features of defendant where on facing defendant each identified him positively.

3. Criminal law ⚡396(2)—Entire conversation in nature of confession admissible where partially drawn by defendant from sheriff on cross-examination.

Where defendant charged with murder, on cross-examination of sheriff brought out part of subject-matter of conversation between latter and himself in which sheriff said, "You had a gun you are not used to, and in the scuffle it accidentally went off," it was proper for witness to tell all that was said on subject, and to give defendant's answer that he thought it happened that way.

4. Criminal law ⚡523—Untrue statement by sheriff to defendant held not to exclude confession.

Sheriff's untrue statement to defendant that finger prints on cash register robbed at time of commission of murder corresponded with defendant's, *held* not to render inadmissible defendant's statements in nature of confession, under rule that deception does not exclude confession unless calculated to produce false statement.

5. Criminal law ⚡516—Statements held to be merely evidence of consciousness of guilt and not "confessions."

Statements of defendant charged with murder that he was glad of arrest since strain had been hard, that he had lung and kidney troubles, and it did not matter much now, and that he could not be blamed if he tried to escape, and that during flight he had tried to disguise himself, and that he would plead guilty if assured he would get no more than life imprisonment, *held* merely evidence of consciousness of guilt, and not to amount to "confessions," latter term being restricted to acknowledgements of guilt.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Confession.]

6. Criminal law ⚡409—Admissions as to matters tending when connected with other facts to prove guilt admissible without preliminary proof as in case of confessions.

Admissions as to truth of matters, which, while they do not themselves involve guilt, when connected with other facts tend to prove guilt, *held* admissible and competent, without the preliminary proof necessary in case of confessions.

7. Criminal law ⚡532(2), 1153(6)—Whether confessions voluntary is for court and not to be disturbed but for abuse.

Question whether confessions were freely and voluntarily made is preliminary one, addressed to court's discretion, exercise of which will not be disturbed, in absence of showing of abuse.

8. Criminal law ⚡520(1)—State need not also show that officer accompanying sheriff had not induced confessions.

Contention that statements in nature of confessions were not admissible unless it also be shown that officer who accompanied sheriff

in returning prisoner had not induced them, *held* without merit, where sheriff purported to testify fully in the matter, and where defendant made no claim that, the other officer attempted to procure confession.

9. Homicide ⚡300(12)—Instruction on murder omitting accident and intent held not objectionable.

Instruction that if defendant killed officer endeavoring lawfully to arrest him on felony charge, of which there was reasonable grounds, it cannot be excused as self-defense or mitigated for provocation, *held* not objectionable as omitting killing by accident or without intent, where there was no evidence of accidental, justifiable or excusable homicide, and where other instructions covered intent and other elements of murder.

10. Criminal law ⚡957(2)—Offer to prove by jurors that they acted under misapprehension of law held properly refused.

Refusal of offer on motion for new trial following conviction of first degree murder with death penalty, to prove by jurors that they acted under misapprehension that court could fix punishment at life, and that they disagreed upon interpretation of law and asked to speak with court but because of unavailability of district attorney decided question for themselves, *held* proper under rule that juror cannot impeach his verdict except where result of resort to chance.

In Bank.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

John Connelly, also known as Joe Kelly, was convicted of murder in the first degree, and he appeals. Affirmed.

Arthur M. Bundy and J. E. Ebert, both of Marysville, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., and Ray Manwell, Dist. Atty., of Marysville, for the People.

SEAWELL, J. The defendant, John Aloysius Connelly, was, on the 27th day of June, 1924, by an indictment returned against him by the grand jury of the county of Yuba, this state, accused of the crime of murder, alleged to have been committed by him in said county of Yuba on or about the 6th day of February, 1922, by unlawfully and premeditatedly taking the life of one Francis Heenan. The defendant was indicted under the name of Joe Kelly, alias John Connelly, but at the trial he claimed his true name to be as first above stated.

In due time he was placed upon trial for said crime, and the jury returned a simple verdict of murder in the first degree against him. The court thereupon pronounced the judgment which the law imposes in such cases, to wit, the death penalty. From the judgment of conviction and the order denying a new trial, the defendant has appealed.

The several specifications of error made

by appellant will be noticed as the importance of the same may require. The facts of the case are simple, and briefly narrated are:

At about the hour of 9 o'clock p. m. February 6, 1922, an armed man, identified by a number of persons as the defendant, entered a soft-drink parlor in which intoxicating liquor was sold as well as soft drinks, known as the Canteen saloon, in the city of Marysville, for the purpose of committing a robbery. Within a small private room, which is a part of said saloon premises, the entrance to which was by way of a gate or opening in the bar, were seated two mutual friends and acquaintances of the barkeeper. These persons were out of the line of vision of any one entering the saloon from the front doors. The barkeeper was at the moment of defendant's entry engaged in conversation at the bar with a third party, who fled from said premises and was not present at the trial. All of the persons in the place when the entry was made by the bandit, four in number, except the one who fled, were natives of Greece. The defendant, according to the testimony of three eyewitnesses, entered one of the double swinging doors and advanced as near to the barkeeper as the bar would permit. He was not masked. The barkeeper was behind the bar, and the defendant, pointing a pistol at him, commanded him to hold up his hands, which the barkeeper either declined to do or was slow in complying with the command, and the defendant thereupon said, "Come on; I will blow your brains out." The barkeeper testified that as the defendant put the pistol to his face he "ducked" and the pistol was discharged, the bullet passing close to him, but the distance was not definitely fixed. The barkeeper then ran to the private room, where his two acquaintances were, and attempted to unlock a door that opened into the street, without success. The evidence indicates that a money safe was in this room. The defendant followed the barkeeper into the private room as quickly as physical barriers would permit, and, with drawn revolver, ordered all three of the men to throw up their hands. The order was complied with. Some conversation took place as to the safe. The barkeeper's statement is to the effect that the defendant asked as to the location of the safe, while the other men in the room, one of whom spoke superior English, testified that the barkeeper told the defendant that he could not open the safe; that he had no key. At any rate the defendant compelled all of the men to follow him from the private room and take positions behind the bar. The cash register was on the back bar, and the barkeeper was ordered to open it. He declined and told the defendant to open it himself, which he did with his left hand after some manipulation, keeping the pistol all the while pointed at the barkeeper and requiring all present to continue to keep their hands up. About \$100 in coin and currency was taken

from the cash register. The defendant then retired from behind the bar, backing toward the swinging door entrance with the pistol leveled at the barkeeper, and compelling the latter to follow him at a distance of 4 or 5 feet as he was backing toward the door. The distance from the bar to the swinging doors was in the neighborhood of 15 feet.

When the defendant arrived at a point very close to the swinging doors, the deceased, who was a police officer of the city of Marysville and attired in a uniform of his rank, entered. The officer, before he entered, had been informed that a robbery was being committed in the place. As the officer entered the door he said to the defendant, who was near to him, "Now, what are you doing here?" or "What's going on here?" or made some such inquiry. Instantly the defendant threw his gun upon the officer and fired a shot, which pierced the body of the officer and cut the arch of the aorta causing almost instant death. The officer uttered an exclamation merely and reeled to the floor, dead. The bullet had passed through his body. The defendant fled and was pursued by the barkeeper, who had been handed the officer's pistol by one of the men who were in the saloon during the robbery. In the pursuit he lost sight of the defendant and returned to the saloon. The news of the death of the officer aroused the citizens, many of whom joined in a search for the bandit. At about 1:40 o'clock on the following morning, P. D. Scandalis, a member of the searching party, met the defendant, who was traveling slowly with a roll of blankets upon his back, and upon stopping him and making a search of his person and roll of blankets for arms, permitted him to go his way. The defendant was walking at a slow, hobbling gait, and claimed to be shivering from cold, and begged the witness to let him go, as he was looking for a place to lie down. His conduct was unusual. He gave as an excuse for being out at that hour of the night that the officers had chased him from a box car. He was cursing the officers and said he wished he had a gun. The defendant, according to the witness, appeared to be very careful of his hat. In fact, he had taken his hat off. This was the last seen of the defendant in this state by any one who was able to identify him as the suspect until he was arrested near Douglas, state of Wyoming, and returned to Marysville some two years after the homicide.

The defendant, according to his own story, left Marysville on the morning of February 7, 1922, and made his way to Oroville, thence to Portola, where he was storm bound for a period of three days, and thence to Ogden, Cheyenne, and finally to Caspar, Wyoming. At Oroville and other places he read in the press an account of the murder and a description of the bandit suspected of having committed the crime, whose name was given

as Joe Kelly. He admitted that he was known by the name of Joe Kelly, but, as the description of the murderer did not fit him, except as to his name, and as to his hair being gray, he continued to make his way out of the state. Upon leaving Marysville he assumed and retained the name of Farley. At Portola he disposed of his hat and bought a cap. His effort at the trial to create the impression that had the description of the suspect which he had read in the papers fitted him he would have returned to disprove any suspicion that may have been cast upon him was wholly inconsistent with the excuse he offered for continuing his flight from the state, to wit, that the slaying of a popular officer had aroused a bitter feeling in the public mind, which made it dangerous for any one who might be accused of the crime, and the further disadvantage that he would have been put to by reason of having suffered a former conviction for felony, were odds against which, though innocent, he could not hope to prevail.

In addition to the direct testimony given by the three persons that were held in duress by the unmasked defendant for something like ten minutes while he was executing the robbery, a fourth person, who was a waiter in a local coffee house, and who was well acquainted with the defendant, was an eyewitness to a part of the crime. This witness, at the time the first shot was fired, was engaged in conversation with the officer who was killed a few minutes later, at a point not more than 160 feet distant from the Canteen saloon. At the report of the pistol shot this witness and the officer started to investigate the report. The witness preceded the officer slightly, and as he came to the place that was being robbed he paused and looked through a window and observed the defendant behind the bar in the act of taking the money from the cash register drawer and putting it into his pocket. Defendant had the pistol in his hand. The witness warned the officer, who was approaching the saloon door, that it was a holdup, and to look out. The officer entered the saloon hurriedly, while the witness lagged a little behind. As the officer entered he made some inquiry as to what was going on, and the defendant immediately pointed the pistol at him and fired, with the result already related. The defendant, as he fled, passed quite near to the witness, with the pistol smoking in his hand, and disappeared into the darkness. The witness, who had known the defendant quite well for some time past, said that he had a good view of the defendant's face, both while he was behind the bar committing the robbery and as he passed by him leaving the saloon.

A fifth witness, who had served time in the Montana state prison at the same time that the defendant was serving on a felony conviction—1916-1918—and who was well

acquainted with the latter, was brought from the Montana state prison, where he was serving a second term, to testify in the case. His testimony was that he met the defendant twice during the evening on which the murder was committed. The first time was at the hour of about 6:30 o'clock, and the second time was at about 8:45 o'clock, as the witness was returning to his home after having attended a picture show. The defendant was then talking with a friend called Gimp Riley, and, as the witness approached the two, they engaged him in conversation. The defendant said to him if he wanted to see some fun to "stick around." The witness asked what he was going to do, and he replied that he was going to make Parades place "elevate," and then he was going to "get the wop joint on the corner." Upon being asked what he meant by the term "wop joint," he replied that he meant the Canteen saloon. He exhibited to the witness a white-handled pistol which he was carrying in the inside pocket of his coat. The witness at the time was engaged as a janitor in a local church, and on the following day he reported the matter to a parish priest and to the sheriff and the district attorney of the county and gave them a description of the defendant. An intensive search was made, but the defendant could not be found in or about Marysville. That the defendant fled the state and concealed his identity to avoid meeting the charge of having murdered the officer there is not the slightest room for doubt.

[1] The evidence in the case, if believed, positively established the guilt of the defendant. Four eyewitnesses testified to the robbery, three of whom actually witnessed the shooting, and the fourth saw a pistol in the hand of the defendant immediately before the shot was fired and saw smoke issuing from it as the defendant held it in his hand as he left the place where the killing occurred immediately after the fatal shot was fired. A fifth witness testified to the planning and preparation of the robbery by the defendant. To this may be added other incriminatory and corroboratory circumstances arising from the defendant's conduct and flight immediately following the shooting.

[2] Appellant assails the character of the principal witnesses for the people, on the ground that one was serving a second term in a penitentiary, the second was an admitted violator of the National Prohibition Act and two others, by reason of their presence in and patronage of the Canteen saloon, were aiding and abetting the violation of said act. We are also reminded of the claim made that the barkeeper, in particular, identified another person as the bandit shortly after the homicide was committed. Two or three persons, including newspaper representatives, testified that the description given by the barkeeper, and by two other witnesses to the

killing, did not tally with the defendant in some important physical respects, and the clothing worn by the defendant did not agree with the wearing apparel described by said witnesses. It is true that shortly after the killing and barkeeper leaned strongly to the opinion that a person who was detained as a suspect was the person who had committed the crime. He explained, however, that while the resemblance was strong, the suspect had the appearance of being quite a bit younger than the defendant. At any rate, the suspect was not held upon the identifications made by any of the witnesses to the shooting. The barkeeper, from a number of photographs shown him, selected the photograph of the defendant as being the picture of the man who actually committed the murder, and from the moment he first saw the defendant he was very positive in his identification. The other two witnesses were reasonably certain with their identification of the defendant. The waiter, who was conversing with the officer at the time the first shot was fired, and who observed him through a window in the act of committing the robbery, and then again as he left the place of crime, was positive in his identification.

While discrepancies or inaccuracies may have occurred in the attempts of the several witnesses to reproduce descriptively the features and lineaments of the defendant from mental pictures, nevertheless, when the defendant was brought into their presence, each one identified him as the person who took the life of the officer. They had had ample time to observe his features, bodily movements, and, in addition thereto, had heard him speak. Ordinarily the power to accurately describe human features is with most persons a limited power, and therefore on questions of identification, except in special instances, much must depend on the intelligence and honesty of the person called upon to make the identification by personal observation of the person to be identified. It is not reasonably probable that there could exist in the instant case a mistake as to the identity of the defendant and his relation to the murder charged against him. This was a matter wholly within the province of the jury, and, there being ample evidence to sustain an implied finding to that effect, we are not at liberty to disturb it. Counsel for appellant urges the commission of error in admitting in evidence what he terms confessions of guilt made by the defendant to C. J. McCoy, sheriff of Yuba county, both while the defendant was being transported from Wyoming to Yuba city in the custody of said officer and while he was detained in the Yuba county jail awaiting trial.

There are three answers to this claim of error: First, the record does not show that the statements or admissions made by the defendant—save possibly in one instance and

for this the cross-examination of the sheriff by appellant's counsel was responsible—amounted to confessions; second, the admissions or statements objected to as confessions were made prior to the advice, which the court ruled fell within the rules of exclusion, given by the sheriff to the defendant and which was made the ground on which the court held that whatever was thereafter said in the nature of a confession by the defendant to the sheriff or district attorney was inadmissible; third, if the admission complained of amounted to a confession, the court, in the exercise of its discretion by admitting the evidence objected to, determined it to be legally free and voluntary. And we cannot say under the evidence herein that it committed an abuse of discretion in so doing.

The fraud and imposition claimed to have been practiced upon the defendant as an inducement to influence or obtain a confession from him consisted in the sheriff telling the defendant that the finger prints made upon the cash register had been taken, and that they corresponded with the prints of the defendant. As a matter of fact, an attempt was made by Hart S. Schroeder, Jr., the state identification and microanalytical expert, to take the finger prints, but it was known to the sheriff that no reliance could be placed upon them as other finger prints had been superimposed upon the cash register. The expert said that they may have been the prints of the defendant or "of any person." Like error is claimed because of the admission of testimony given by the sheriff to the effect that the defendant had told the sheriff that he, defendant, had read in the newspapers that he knew he was wanted for murder, and that he was glad that he was arrested, as he had been keeping out of the way of the officers for a long time, and it had been a hard strain on him. In this connection he stated to the sheriff that he "had lung and kidney troubles, and it didn't make much difference to him now." The sheriff admitted that he told the defendant exactly the evidence the state had against him and gave him the names of the witnesses. The defendant narrated his flight, and said that it was his intention at one time to let his beard grow; he also said he was going to make his "getaway" if he possibly could. His words in this respect were: "You can't blame a man in the same condition I am if a chance comes up to make a getaway." Also the defendant admitted that he bought the cap at Portola for the purpose of disguising his identity. The concluding portion of the testimony, to which appellant particularly objects as having influenced the defendant in making the statement or admissions claimed to have been made by him, but which he denied making at the trial, as found in the record, are:

"I (sheriff) told him I had located certain witnesses. He said to me, 'you have all the witnesses?' And I said, 'Yes.' He said: 'I have been identified by all of them?' Then he said: 'I think I will go upstairs and enter a plea of guilty. What do you think the judge will do with me?' I told him the judge would hang him. Then he went on and told me that he didn't think he had a chance, and he wanted me to send for the district attorney, and I told him the district attorney was out of town. Then I said to him, 'Why don't you make a confession to the district attorney?' Then he said to me, 'I think I will have you send for my lawyers, so I can tell them I am going to plead guilty.'"

The sheriff then left and did not return until several hours thereafter. The defendant then requested him to send for the district attorney. Upon the arrival of the district attorney, the defendant, sheriff, and district attorney went into the sheriff's private office. At this point in the proceedings the court announced that the objection as to any conversation or any part of any conversation that may have taken place between the defendant, the district attorney, and the sheriff would be sustained on the ground that the inquiry made by the sheriff of the defendant, to wit, "Why don't you make a confession to the district attorney?" amounted to advice and counsel coming from one in authority and was, therefore, inadmissible. Whatever was said by any of the parties to the conversation was not told. Later it developed that the request of the defendant to be taken to the district attorney's office occurred before the sheriff asked why he did not make a confession to that officer, but the court's ruling was not changed.

[3] On cross-examination, counsel for the defendant drew from the sheriff by direct interrogatory the following answer on a specific subject not touched upon by the district attorney:

"Q. Didn't you say to him on one of your visits to him prior to July 3d in substance this: 'Joe, I don't think you are a cold-blooded murderer; the way I figure it out is this: You had a gun you are not used to, and in the scuffle it accidentally went off, and that is the way he was killed.' Didn't you make that statement to him? A. 'I did; yes.'"

Upon redirect examination the district attorney attempted to fix the time in the order of events when the above question was asked and answer given; that is, whether it was prior or subsequent to the time the defendant was asked why he did not confess to the district attorney, which occurred on July 3. The witness answered that he did have a conversation with the defendant in regard to a "gun" before July 3. The court, in an effort to straighten out the confused situation, said: "You make any explanation you desire." The witness then proceeded:

"I told him, I says, 'Joe, I don't think you are a cold-blooded murderer; you had a gun, one of these guns you fan, you can't cock it; the only way you can do is hold the trigger back?' He says, 'I think that is the way it happened,' but I told him all the time he was talking to me, when he was talking about going up stairs and pleading guilty, I told him if he went up there the judge would hang him.'"

This testimony seems to have been brought out without objection on redirect examination, and no motion was made to strike it out. As a part of the subject-matter was brought out by the defense, it was proper for the witness to tell all that was said on that subject, even though the balance was not favorable to the defendant.

Objection was also made to the testimony of the witness Scandalis, which was directed to a conversation which he had with the defendant at the county jail on July 19 while he was there for the purpose of delivering some article of merchandise to another prisoner. The objection was made on the ground that anything he may have said in the nature of a confession was influenced by the advice that the sheriff had given to the defendant on July 3, and therefore inadmissible. It was shown by preliminary examination that the witness was in no way connected with any of the law or peace officers and the court admitted the evidence. The witness remarked to the defendant that a report was on the streets that he was going to confess, and asked him if the report was true. The witness' answer was:

"He told me he would confess if he knew the judge would give him life, but he knew the judge was going to hang him; that is why he wouldn't confess."

[4] The untrue statement made to the defendant by the sheriff to the effect that the finger prints taken from the cash register corresponded with his was not legally sufficient to justify the exclusion of the statements subsequently made by the defendant. While the indulgence in deceptive methods or false statements is not morally justifiable or a commendable practice, this alone would not render even a confession of guilt inadmissible. In the recent case of *People v. Castello et al.* (Cal. Sup.) 229 P. 855, we had occasion to review the text-books and the decisions of this court on this particular subject, and adopted the following paragraph as a sound exposition of the principle:

"The fact that a confession was procured by the employment of falsehood by a police officer, detective, or other person does not alone exclude it; nor does the employment of any artifice, deception or fraud exclude it, if the artifice or fraud employed was not calculated to procure an untrue statement. Neither does the fact that a confession was obtained by a promise of secrecy render it in-

competent, if there was no motive to produce a false statement." 16 C. J. 729.

[5-7] We are of the opinion that none of the statements made by the defendant amounted to a confession of guilt. At no time did he admit his guilt. His statements may be regarded as some evidence of a consciousness of guilt, but this does not bring them within the definition of a "confession." In *People v. Ammerman*, 118 Cal. 23, 50 P. 15, a confession is defined as "a person's declaration of his agency or participation in a crime. The term is restricted to acknowledgments of guilt. *People v. Strong*, 30 Cal. 151; *People v. Parton*, 49 Cal. 632; *People v. Le Roy*, 65 Cal. 613; 1 *Greenleaf on Evidence*, § 170." While the defendant did not deny the commission of the crime, as the defendant did in the *Ammerman* Case, he made no confession of guilt. The rule is that the admission of the truth of matters which, while they do not themselves involve guilt, but when connected with other facts tend to prove guilt, does not render the proof of such matters inadmissible. Proof of such admissions is competent without the preliminary proof. *People v. Ammerman*, *supra*, and cases cited therein.

As we have before stated, the only statement that could in any sense be regarded as a confession was the statement concerning the discharge of the pistol, which was brought into the case as heretofore explained. All other statements were guarded as to a confession, and the one last specifically mentioned is not a definite confession of guilt. But even though the admissions be regarded as confessions, the question as to whether they were freely and voluntarily made was a preliminary question addressed to the trial court, and its discretion will not be disturbed in the absence of a showing that the court abused its discretion. The statement made by the defendant to the witness Scandalis, to the effect that he would enter a plea of guilty if assured by the judge that no graver judgment would be pronounced than life imprisonment, was not a confession of guilt. Moreover, the court found that it was freely made.

[8] There is no merit in the contention that the testimony of the sheriff as to the statement made to him by the defendant was not admissible, unless it should also be shown by Officer Booth, who assisted the sheriff in bringing the defendant to Yuba county, that said officer had not induced the defendant in any way to make said statements to the sheriff. The sheriff purported to testify fully as to all that was done or said by him in the matter. No serious contention was made at the trial that any statement or confession was made to Booth in the absence of the sheriff. The defendant took the witness chair in his own behalf, and testified to conversations had with the sheriff, but made

no claim that Booth had at any time or in any manner attempted to procure a statement or confession from him. There was nothing surreptitious in Booth's absence from the trial.

[9] We have examined the assignments of error presented by the defendant as to the court's rulings on questions of evidence and we are satisfied that no prejudicial errors were committed. Exception is taken to that portion of the court's charge which reads as follows:

"Therefore, if any one kills an officer while such officer is lawfully making or endeavoring to make an arrest, or properly or in lawful manner doing any other official act, the homicide so committed can neither be excused as an act of self-defense, nor mitigated on the ground of provocation, but is deemed to have been done with malice in willful defiance of public justice, and such killing is murder.

"I instruct you that if you find from the evidence of a moral certainty and beyond a reasonable doubt that the deceased, Francis Heenan, was at the time of the alleged homicide a public officer of the city of Marysville, and that he was then and there properly and in lawful manner endeavoring to arrest defendant upon a felony charge of which he had reasonable ground to believe defendant guilty, and if you should further find beyond all reasonable doubt and to a moral certainty that said defendant, then and there knowing himself to be charged with a felony, and in order to avoid such arrest upon such felony charge, did then and there shoot and kill said Francis Heenan, then I charge you that such killing cannot be excused as an act of self-defense nor mitigated on the grounds of provocation."

The objection made to the criticized instructions is that they omitted to except killing by accident or from any cause which did not show an intent to kill. There was absolutely no evidence tending to show that the killing was accidental. Besides, the court instructed the jury fully as to excusable and justifiable homicide. The jury was further instructed as to intent, and told that in every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence. Read with other instructions there could have been no misunderstanding as to the elements essential to constitute murder. The defendant denied the killing, and there was no evidence offered which tended to show self-defense, or justifiable or excusable homicide or manslaughter. The instructions contain a full, fair, and complete exposition of the law of murder, and informed the jury that it was within their discretion to relieve the defendant of the extreme penalty of the law.

[10] Upon the motion for new trial the defendant offered to call to the witness stand certain of the jurors to prove by them that in arriving at their verdict they acted under a misapprehension of the law, believing that the court had the discretion of fixing the

punishment at life imprisonment; also during their deliberation they disagreed upon the interpretation of the law, and that they had asked that they be allowed to speak with the court. The district attorney not being available, they decided the question for themselves without the aid of further instructions from the court. As before remarked the instructions were full and complete on every phase of the law essential for the guidance of the jury. Besides, it is the well-settled rule in this state that a juror cannot impeach his verdict except where it is the result of the resort to the determination of chance. *People v. Azoff*, 105 Cal. 632, 39 P. 59; *People v. Soap*, 127 Cal. 408, 59 P. 771; *De Cou v. Howell as Ad'm, etc.*, 190 Cal. 741, 214 P. 444. A long list of authorities, definitely settling the law in this respect might be cited.

We have examined the record with care, and find that no prejudicial error was committed in the trial of the case.

The judgment and order appealed from are affirmed.

We concur: MYERS, C. J.; LAWLOR, J.; RICHARDS, J.; SHENK, J.; WASTE, J.; LENNON, J.

195 Cal. 477

MILLER et al. v. BOARD OF PUBLIC WORKS OF CITY OF LOS ANGELES et al. (L. A. 8012.)

(Supreme Court of California. Feb. 27, 1925. Rehearing Denied March 26, 1925.)

1. Constitutional law §81—Police power indispensable prerogative of sovereignty and, though not illimitable, develops to meet changing conditions.

The police power of a state is an indispensable prerogative of sovereignty and, though not to be lightly limited, is not illimitable, and its application depends on whether it is reasonably necessary to promote public health, safety, morals, or general welfare of the people, and it develops within reason to meet changing conditions.

2. Municipal corporations §601—"Zoning" regulations defined.

In its original and primary sense, "zoning" is simply the division of a city into districts and prescription and application of different regulations in each district which are divided into two classes: Those regulations having to do with structural and architectural designs of buildings; and those which prescribe use to which buildings within certain designated districts may be put.

3. Municipal corporations §601—Zoning ordinance valid, when necessary to promote public welfare.

A zoning regulation is a valid exercise of police power which is necessary to subserve ends

for which police power exists, namely, promotion of public health, safety, morals, and general welfare.

4. Municipal corporations §601—Scope of zoning ordinance stated.

Zoning ordinance has much wider scope than mere suppression of offensive uses of property, and acts not only negatively but constructively and affirmatively for promotion of public welfare.

5. Municipal corporations §63(2)—Court required to determine whether zoning ordinances are arbitrary and discriminatory.

In determining validity of zoning ordinance, courts are required to determine, in addition to need thereof, whether or not they are arbitrary and discriminatory and have any reasonable tendency to promote public health, safety, morals, and general welfare.

6. Municipal corporations §601—Zoning plan, if equably applied, is within police power.

The regulations of development of city under a comprehensive zoning plan tends to promote general welfare of community, and the adoption and enforcement of such a plan, when fairly conceived and equably applied, is within scope of police power.

7. Municipal corporations §63(2) — Court must determine whether zoning ordinance is necessary and impartially applied.

Duty of court, in considering validity of zoning ordinance, to determine whether method of classification and districting is reasonably necessary to public welfare, health, safety, morals, or general welfare, and whether it has been applied fairly and impartially in each instance.

8. Municipal corporations §601 — Establishment of private residential district by zoning plan within police power.

The establishment, as part of a comprehensive zoning plan, of strictly private residential districts, from which are excluded and absolutely prohibited apartments, tenements, general public enterprises, and like structures, is a legitimate exercise of police power.

9. Constitutional law §48—Every intendment indulged in favor of validity of exercise of police power and not nullified, unless it clearly has no relation to public health, safety, etc.

A large discretion is vested in Legislature with reference to exercise of police power, and every intendment is to be indulged in favor of its validity, and it is only when it probably has no substantial relation to public health, safety, morals, and general welfare that it will be nullified by the court.

10. Municipal corporations §601—Establishment of residential district is for general welfare.

The establishment of a strictly private residential district, as part of a comprehensive zoning plan, is for general welfare of the community, because it tends to promote and perpetuate the American home.

11. Municipal corporations ☞63(2) — Court will not interfere with establishment of residential district in absence of abuse of discretion.

It is primarily province of municipal body to which zoning function is committed to draw line of demarcation in establishing residential zoning district, and courts cannot interfere with discretion in absence of clear showing of abuse thereof.

12. Municipal corporations ☞601 — Zoning plan should provide for future extensions and modifications.

A comprehensive zoning plan should provide for extensions and modifications of existing features, as unforeseen changes make necessary, to perfect and perpetuate such plan.

13. Evidence ☞23(1)—Judicial notice taken that execution of zoning plan requires time.

It is matter of common knowledge that a comprehensive zoning plan cannot be made in a day, and therefore court may take judicial notice that it will take much time to work out details of plan, and that it would be destructive if, during incubation of plan, parties should be permitted to enter on course of construction which might defeat ultimate execution of plan.

14. Municipal corporations ☞601—Emergency zoning ordinance held valid exercise of police power.

That a comprehensive zoning plan had not matured to point of being an existing ordinance at time that an emergency zoning ordinance was enacted does not detract from validity of emergency zoning ordinance, on theory that zoning ordinance may not be ultimately enforced, as presumption that council will not fail in performance of official duty must prevail, and hence such emergency zoning ordinance, being part of comprehensive plan which has relation to welfare of city, must be held to be a valid exercise of police power.

In Bank.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Application for writ of mandate by George Lee Miller and another against the Board of Public Works of the City of Los Angeles and Charles H. Treat and another, as members of said board, to compel issuance of permit to construct a four-flat building in a residence district. From the judgment denying writ, plaintiffs appeal. Affirmed.

Wm. W. Bearman and W. L. Engelhardt, both of Los Angeles, for appellants.

Jess E. Stephens, City Atty., and Lucius P. Green, Asst. City Atty., both of Los Angeles, for respondents.

LENNON, J. This proceeding in mandamus was instituted in the superior court of the county of Los Angeles to compel the respondents the board of public works of the city of Los Angeles to issue to plaintiffs a permit to erect a four-family flat dwelling on a tract of land located on West Adams

street in said city. At the time the plaintiffs first made application to the board for a building permit, an existing zoning ordinance of said city did not prohibit the erection of four-family flat dwellings in residence district No. 20, wherein plaintiffs' lot was located. A permit for the erection of such building was therefore issued. Shortly thereafter the permit was canceled and revoked by said board, for the reason that the city council of Los Angeles was contemplating a comprehensive zoning plan, covering the entire city and that, as a part of that comprehensive zoning scheme, and in keeping therewith, an ordinance would be enacted prohibiting the erection or construction of four-family flats in that part of the city wherein the plaintiffs' property was located. On September 1, 1921, this action was instituted by the filing of a complaint to compel the issuance of a permit. On September 6, the city council of Los Angeles passed an emergency ordinance, No. 42510 (New Series), which declared it to be unlawful "for any person, firm, or corporation to erect, or construct, alter or maintain, or cause or permit to be erected, constructed, altered, or maintained with the residence zone hereby created any building or premises which shall be used for, or designed or intended to be used for, housing more than two families together with its usual accessories."

The only defense interposed by the board to the issuance of the writ was the existence of the last-mentioned ordinance. The trial court held said ordinance to be a valid exercise of the police power of the municipality and denied the writ of mandate sought by the plaintiffs. From this judgment plaintiffs appeal. No point is made that the board has not the power to revoke a permit once it has been duly issued, nor that the ordinance, if valid, may not operate retroactively to nullify a permit previously issued.

At the threshold of the discussion it may be well to state that in other jurisdictions the question has been presented of whether or not the power to pass a particular zoning ordinance has been delegated to a municipality, but that question is not raised here, obviously for the reason that the power to do so is conferred upon municipalities in California by the fundamental law of the state and by a legislative enabling act, entitled:

"An act to provide for the establishment within municipalities of districts or zones within which the use of property, height of improvements and required open spaces for light and ventilation of such buildings, may be regulated by ordinance." Stats. 1917, p. 1419.

The constitutional grant of power to the municipalities is to be found in section 11 of article 11 of the Constitution, which provides that:

"Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

The enabling act of 1917 declares that:

"For the public interest, health, comfort, convenience, preservation of the public peace, safety, morals, order and the public welfare, the city council, board of trustees or other legislative body of any incorporated city and town of California, hereinafter referred to as the council, may by ordinance create or divide the city into districts within some of which it shall be lawful and within others of which it shall be unlawful to erect, construct, alter or maintain certain buildings, or to carry on certain trades or callings or within which the height and bulk of future buildings shall be limited. The council may by ordinance regulate, restrict and segregate the location of industries, the several classes of business, trades or callings, the location of apartment or tenement houses, clubhouses, group residences, two-family dwellings, single family dwellings and the several classes of public and semi-public buildings, and the location of buildings or property designed for specified uses, and may divide the city into districts of such number, shape and area as the council may deem best suited to carry out the purposes of this act. * * * For each such district regulations may be imposed designating the class of use that shall be excluded or subjected to special regulations and designating the uses for which buildings may not be erected or altered, or designating the class of use which only shall be permitted. * * *" Stats. 1917, p. 1419, §§ 1, 2.

It may also be noted, at the outset, that the ordinance in question is prohibitory in its nature and that the prescribed prohibition is absolute. The ordinance does not attempt to designate and regulate the materials to be used in the buildings, nor does it purport to regulate the height, area, and architectural design of such buildings as may be erected within the designated district. It prohibits the construction of any building, irrespective of height, area, bulk, structural design or architectural features, "designed or intended to be used for the housing of more than two families." It is, in short, purely prohibitory zoning directed solely to use and occupation. The sole question presented is whether or not the ordinance in controversy is a rightful exercise of the police power conferred upon municipalities.

[1] The police power of a state is an indispensable prerogative of sovereignty and one that is not to be lightly limited. Indeed, even though at times its operation may seem harsh, the imperative necessity for its existence precludes any limitation upon its exercise save that it be not unreasonably and arbitrarily invoked and applied. *Hadacheck v. Sebastian*, 239 U. S. 394, 36 S. Ct. 143, 60 L. Ed. 348, Ann. Cas. 1917B, 927; *District of Columbia v. Brooke*, 214 U. S. 138, 149, 29 S. Ct. 560, 53 L. Ed. 941. It is not, however, illimitable and the marking and meas-

uring of the extent of its exercise and application is determined by a consideration of the question of whether or not any invocation of that power, in any given case, and as applied to existing conditions, is reasonably necessary to promote the public health, safety, morals (*Railroad Co. v. Husen*, 95 U. S. 465, 470, 471, 24 L. Ed. 527; *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989), or general welfare of the people of a community (*Chicago, B. & Q. Ry. Co. v. Ill.*, 200 U. S. 561, 592, 26 S. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175). In short, the police power, as such, is not confined within the narrow circumscription of precedents, resting upon past conditions which do not cover and control present day conditions obviously calling for revised regulations to promote the health, safety, morals, or general welfare of the public; that is to say, as a commonwealth develops politically, economically, and socially, the police power likewise develops, within reason, to meet the changed and changing conditions. What was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power. This is so because:

"What was a reasonable exercise [of this power] in the days of our fathers may to-day seem so utterly unreasonable as to make it difficult for us to comprehend the existence of conditions that would justify same; what would by our fathers have been rejected as unthinkable is to-day accepted as a most proper and reasonable exercise thereof." *Streich v. Board of Education*, 34 S. D. 169, 147 N. W. 779, L. R. A. 1915A, 632, Ann. Cas. 1917A, 760.

In its inception the police power was closely concerned with the preservation of the public peace, safety, morals, and health without specific regard for "the general welfare." The increasing complexity of our civilization and institutions later gave rise to cases wherein the promotion of the public welfare was held by the courts to be a legitimate object for the exercise of the police power. As our civic life has developed so has the definition of "public welfare" until it has been held to embrace regulations "to promote the economic welfare, public convenience, and general prosperity of the community." *Chicago, B. & Q. R. v. Illinois*, supra. Thus it is apparent that the police power is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life, and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race. In brief, "there is nothing known to the law that keeps more in step with human progress than does the exercise of this power" (*Streich v. Board of Education*, supra), and that power "may be

put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare" (Noble State Bank v. Haskell, 219 U. S. 104, 31 S. Ct. 186, 55 L. Ed. 112, 32 L. R. A. [N. S.] 1062, Ann. Cas. 1912A, 487).

There can be no question but that there is a prevailing and preponderating sentiment in favor of necessary and reasonable zoning. The growth of this sentiment has been rapid and widespread. The first comprehensive zoning ordinance was that of New York City enacted in 1916. According to a recent bulletin of the United States Department of Commerce, 35 states and the District of Columbia have adopted this form of regulation; 221 municipalities have been zoned and over 22,000,000 inhabitants, aggregating 40 per cent. of the urban population of this country, are living in zoned territory. The rapidity of the growth of the sentiment in favor of comprehensive zoning, coupled with the extensive and successful application of the idea, are evidence of its present and potential value for the promotion and perpetuation, along broader and better lines, of the moral and material welfare of a people.

[2] So thoroughly has the value of zoning been demonstrated that no longer is the constitutionality of the principle open to question. The books abound with cases upholding the constitutional right to zone and sanctioning the principle upon which that right is founded. In its original and primary sense, zoning is simply the division of a city into districts and the prescription and application of different regulations in each district. Roughly stated, these regulations, which may be called "zoning regulations," are divided into two classes: (1) Those which regulate the height or bulk of buildings within certain designated districts, in other words, those regulations which have to do with structural and architectural designs of the buildings; and (2) those which prescribe the use to which buildings within certain designated districts may be put. Both modes of regulation have received the sanction of the Supreme Court of the United States. In *Welch v. Swasey*, 214 U. S. 91, 29 S. Ct. 567, 53 L. Ed. 923, the constitutionality of the right to district a city and set up different regulations with respect to the height of buildings in each district was upheld. In *Barbier v. Connolly*, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923; *Soon Hing v. Crowley*, 113 U. S. 703, 5 S. Ct. 730, 28 L. Ed. 1145; *Reinman v. Little Rock*, 237 U. S. 171, 35 S. Ct. 511, 59 L. Ed. 900; and *Hadacheck v. Sebastian*, 239 U. S. 394, 36 S. Ct. 143, 60 L. Ed. 348, Ann. Cas. 1917B, 927, it was held that by the exercise of the police power certain occupations could be restricted to certain defined portions of a city.

In California it is well settled that there

is no objection to zoning ordinances as such. There are many decisions in this jurisdiction upholding the right to zone for use. Thus it has been held that laundries, livery stables, lumber yards, brickyards and undertaking establishments may be restricted to certain districts. *Ex parte Moynier*, 65 Cal. 33, 2 P. 728; *In re Hang Kie*, 69 Cal. 149, 10 P. 327; *Grumbach v. Leland*, 154 Cal. 679, 98 P. 1059; *Ex parte Quong Wo*, 161 Cal. 220, 118 P. 714; *In re Montgomery*, 163 Cal. 457, 125 P. 1070, Ann. Cas. 1914A, 130; *Ex parte Hadacheck*, 165 Cal. 416, 132 P. 584 L. R. A. 1916B, 1248 [affirmed in *Hadacheck v. Sebastian*, supra]; *Sam Kee v. Wilde*, 41 Cal. App. 528, 183 P. 164; *Boyd v. City of Sierra Madre*, 41 Cal. App. 520, 183 P. 230; *Brown v. City of Los Angeles*, 183 Cal. 783, 192 P. 716.

[3, 4] It is conceded, as indeed it must be, by the opponents of the ordinance in controversy here, that it is within the police power, by zoning, to banish nuisances and "near-nuisances" from certain districts. It is disputed, however, that the police power may be extended by any zoning ordinance, comprehensive or otherwise, to the regulation and isolation of vocations, business enterprises, and residential uses which are not intrinsically obnoxious. A perusal of the decisions in California, which have upheld the prohibition and segregation of certain businesses by means of zoning, indicates that the court has not limited the power to zone to nuisances per se, and has held that certain business establishments, harmless in themselves, may become "near-nuisances" because of the character of the neighborhood in which they are operating. In *Ex parte Quong Wo*, supra, the court justified the exclusion of a certain type of laundry from a residential district upon the theory that a laundry is "of such a nature that it may be confined in the lawful exercise of the police power within defined limits in a city." This is tantamount to saying that, whenever the recognized purposes for which the police power may be called into play are subserved either by exclusion or segregation of any business, it may be thus regulated. This is but another way of saying that any zoning regulation is a valid exercise of the police power which is necessary to subserve the ends for which the police power exists, namely, the promotion of the public health, safety, morals, and general welfare. It will thus be seen that the police power, as evidenced in zoning ordinances, has a much wider scope than the mere suppression of the offensive uses of property (*Des Moines v. Manhattan Oil Co.*, 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 23 L. R. A. 1322), and that it acts, not only negatively, but constructively and affirmatively, for the promotion of the public welfare (*Bacon v. Walker*, 204 U. S. 311, 27 S. Ct. 289, 51 L. Ed. 499).

Much is said about the constitutional guar-

anties attaching to the ownership of property in the individual. In this behalf it will be noted that:

"It is thoroughly established in this country that the rights preserved to the individual by these constitutional provisions are held in subordination to the rights of society. Although one owns property, he may not do with it as he pleases, any more than he may act in accordance with his personal desires. As the interest of society justifies restraints upon individual conduct, so also does it justify restraints upon the use to which property may be devoted. It was not intended by these constitutional provisions to so far protect the individual in the use of his property as to enable him to use it to the detriment of society. By thus protecting individual rights, society did not part with the power to protect itself or to promote its general well-being. Where the interest of the individual conflicts with the interest of society, such individual interest is subordinated to the general welfare. If in the prosecution of governmental functions it becomes necessary to take private property, compensation must be made. But incidental damages to property resulting from governmental activities, or laws passed in the promotion of the public welfare, are not considered a taking of the property for which compensation must be made." *Carter v. Harper*, 182 Wis. 148, 196 N. W. 451; *Chicago, B. & Q. R. v. Illinois*, supra.

[5, 6] It may be taken as now well settled that courts are required in considering the validity of zoning ordinances to determine, in addition to the need thereof, whether or not they are arbitrary and discriminatory in their conception and application, and whether they have any reasonable tendency to promote the public morals, health, safety, or general welfare and prosperity of a community. It may be safely said, we think, that it is the consensus of opinion that the regulation of the development of a city, under a comprehensive and carefully considered zoning plan, does tend to promote the general welfare of a community, and there is no doubt, it seems to us, that the adoption and enforcement of such a plan, when fairly conceived and equably applied, is well within the scope of the police power. The increase of our urban population makes regulation necessary. As the congestion of our cities increases, likewise do the problems of traffic control and police, fire, and health protection. Comprehensive and systematic zoning aids in the successful solution of these problems and obviously tends thereby to affirmatively promote the public welfare. Decisions upon the constitutionality of comprehensive zoning are not numerous, but the weight of authority upon the subject is, however, strongly in favor of the constitutionality of comprehensive zoning. *Lincoln Trust Co. v. Williams Building Corp.*, 229 N. Y. 313, 128 N. E. 209; *Ware v. City of Wichita*, 113 Kan. 153, 214 P. 99; *State ex rel. Carter v. Harper*, supra; *In re Opinion of Justices*, 234 Mass. 597, 127 N. E. 525;

State ex rel. Civello v. City of New Orleans, 154 La. 271, 97 So. 440, 33 A. L. R. 260; *Spector v. Building Inspector of Milton (Mass.)* 145 N. E. 265; *Brett v. Building Commissioner of Brookline (Mass.)* 145 N. E. 269; *State ex rel. Morris v. Osborn*, 22 Ohio N. P. Reports (N. S.) 549.

[7] It cannot be gainsaid, however, that many municipalities, evidently upon the theory that zoning is a panacea for civic ills, have, under the guise of zoning, sought to enact and enforce unreasonable and discriminatory ordinances. Some of these attempted regulations have been palpably for the exclusive and preferential benefit of particular localities. The duty, therefore, devolves upon the courts to determine in each instance whether or not the ordinance, either in whole or in part, is invalid. In the determination of this problem two questions present themselves: (1) Is the scheme of zoning as a whole sound, that is to say, is the method of classification and districting reasonably necessary to the public health, safety, morals, or general welfare? and (2) has the scheme of classification and districting been applied fairly and impartially in each instance? In the instant case it is conceded that the district in question is strictly residential and that if strictly residential districts may be established, plaintiffs have no cause of complaint.

[8] This brings us naturally to the question of whether or not there may be legally established, as a part of a comprehensive zoning plan, strictly private residential districts from which are excluded and absolutely prohibited general business enterprises, apartments, tenements, and like structures. We are of the opinion that it may be done; that the establishment of such districts as a part of a systematic and carefully considered and existing zoning plan is a legitimate exercise of the police power delegated to the municipality.

[9] It is scarcely necessary to reiterate here the well-recognized principle that courts are loathe to substitute their judgment as to the necessity for a particular enactment for the legislative judgment as to the need of such enactment with reference to the exercise of the police power. A large discretion is vested in the legislative branch of the government with reference to the exercise of the police power. *Mehlos v. Milwaukee*, 156 Wis. 591, 146 N. W. 882, 51 L. R. A. (N. S.) 1009, Ann. Cas. 1915C, 1102; *Carter v. Harper*, supra. Every intendment is to be indulged by the courts in favor of the validity of its exercise and, unless the measure is clearly oppressive, it will be deemed to be within the purview of that power. It is only when it is palpable that the measure in controversy has no real or substantial relation to the public health, safety, morals, or general welfare that it will be nullified by the courts. The courts may differ with the

Legislature as to the wisdom and propriety of a particular enactment as a means of accomplishing a particular end, but as long as there are considerations of public health, safety, morals, or general welfare which the legislative body may have had in mind, which could have justified the regulation, it must be assumed by the court that the legislative body had those considerations in mind and that those considerations did justify the regulation. *State ex rel. Civello v. City of New Orleans*, supra. In *Ex parte Hada-check*, supra, the court held in effect that, when the necessity or propriety of an enactment was a question upon which reasonable minds might differ, the propriety and necessity of such enactment was a matter of legislative determination.

That there are reasonable minds which are of the belief that a regulation creating and establishing strictly residential districts is necessary and proper is evidenced by the passage of such ordinances in such widely varying parts of the Union as Massachusetts, Louisiana, New York, Kansas, Iowa, and Wisconsin. In each of these states the problem of the validity of the establishment of a strictly residential district was before the highest court of those respective jurisdictions and in each case such ordinance was held to be within the scope of the police power.

An enabling act of the state of Massachusetts authorized cities and towns by ordinance to provide:

"That certain kinds of dwelling houses and tenement houses shall be restricted to specified parts of the city or town, or shall be excluded from specified parts of the city or town, or that dwelling houses or tenement houses situated in specified parts of the city or towns shall conform to certain regulations in respect to their construction or use which do not apply to such buildings in other parts of the city or town."

It further provided:

That the city or town might be divided "into districts or zones, and the construction and use of buildings in each district or zone may be regulated. * * *" *G. L. c. 40, § 25.*

The Supreme Judicial Court of Massachusetts held that these provisions of the act were not contrary either to the state or the federal Constitution. In re Opinion of Justices, 234 Mass. 597, 127 N. E. 525. See, also, *Building Inspector of Lowell v. Stoklosa* (Mass.) 145 N. E. 262.

The fact that Massachusetts may be the only state which has authorized the passage of zoning laws by constitutional provisions does not detract from the value of the Massachusetts cases as authority. In the cases last cited the act was held not to be within the inhibitions of the federal Constitution. Inasmuch as the provisions of the federal Constitution relating to police power are similar to those of our own state Constitu-

tion, the reasoning of those cases and those decisions are applicable to the precise question presented here. *Carter v. Harper*, supra.

The Court of Appeals of New York, in *Lincoln Trust Co. v. Williams Building Corporation*, supra, held the adoption of a zoning resolution creating three districts—residential, business, and unrestricted—to be a valid exercise of the police power. The Iowa Supreme Court, in *Des Moines v. Manhattan Oil Co.*, 193 Iowa, 106, 184 N. W. 823, 188 N. W. 921, held that a zoning ordinance establishing a restricted residential district was not in contravention of a state statute nor the federal Constitution. And the Supreme Court of Kansas, in *Ware v. City of Wichita*, supra, held that cities could plan and create reasonable zoning districts for the future systematic development of the city and provide therein for residential, commercial, and industrial districts. The Supreme Court of Louisiana pointed out, as do almost all of the cases dealing with the subject, the considerations of public health, safety, morals, and general welfare upon which a zoning ordinance, providing for the creation of residential, commercial, and industrial districts, may be based. *State ex rel. Civello v. City of New Orleans*, supra. The Supreme Court of Wisconsin, in a carefully considered opinion, has likewise upheld, and for much the same reasons, the validity of residential zoning districts. *Carter v. Harper*, supra.

The case of *State of Ohio ex rel. Max Morris v. C. M. Osborn*, 22 Ohio N. P. (N. S.) 549, presents the precise point in controversy here and hence is particularly pertinent. While the decision is not one of a court of last resort, nevertheless we are in accord with the reasoning of the court in refusing a writ of mandamus sought by the petitioner to compel the building inspector to issue him a permit to erect certain apartment houses in a neighborhood zoned as an exclusive single and double family residence property district.

There are some decisions which do not uphold the validity of a zoning ordinance establishing strictly residential districts. We are of the opinion, however, that the better reasoned cases are in favor of the validity of comprehensive zoning which establish strictly private home districts and that the most which can be said of the cases to the contrary is that they merely show that this is a question upon which reasonable minds may differ.

[10] In addition to all that has been said in support of the constitutionality of residential zoning as part of a comprehensive plan, we think it may be safely and sensibly said that justification for residential zoning may, in the last analysis, be rested upon the protection of the civic and social values of the American home. The establishment of

such districts is for the general welfare because it tends to promote and perpetuate the American home. It is axiomatic that the welfare, and indeed the very existence, of a nation depends upon the character and caliber of its citizenry. The character and quality of manhood and womanhood are in a large measure the result of home environment. The home and its intrinsic influences are the very foundation of good citizenship, and any factor contributing to the establishment of homes and the fostering of home life doubtless tends to the enhancement, not only of community life, but of the life of the nation as a whole.

The establishment of single family residence districts offers inducements, not only to the wealthy, but to those of moderate means to own their own homes. With ownership comes stability, the welding together of family ties, and better attention to the rearing of children. With ownership comes increased interest in the promotion of public agencies, such as church and school, which have for their purpose a desired development of the moral and mental make-up of the citizenry of the country. With ownership of one's home comes recognition of the individual's responsibility for his share in the safeguarding of the welfare of the community and increased pride in personal achievement which must come from personal participation in projects looking toward community betterment.

It is needless to further analyze and enumerate all of the factors which make a single family home more desirable for the promotion and perpetuation of family life than an apartment, hotel, or flat. It will suffice to say that there is a sentiment practically universal that this is so. But few persons, if given their choice, would, we think, deliberately prefer to establish their homes and rear their children in an apartment house neighborhood rather than in a single home neighborhood. The general welfare of a community is but the aggregate welfare of its constituent members, and that which tends to promote the welfare of the individual members of society cannot fail to benefit society as a whole.

The entrance of one apartment house or flat into a district usually means the entrance of others, and, while it may mean an enhancement of value of the adjacent property for the building of similar structures, it detracts from the value of neighboring property for home building. The man who is seeking to establish a permanent home would not deliberately choose to build next to an apartment house, and it is common experience that the man who has already built is dissatisfied with his home location and desires a change. In other words, the apartment house, tenement, flat, and like structures tend to the

exclusion of homes. The home owner may move to another district, but this may not be a sufficient solution of his problem, for if no protection can be given to strictly home districts—such as is contemplated by a comprehensive and properly constructed zoning plan—he may be forced by the ever-increasing encroachment of apartments and flats to relinquish, if not altogether abandon, the benefits emanating from a permanent home site.

Of course, the establishment of exclusive residence districts does not mean that all members of a community will perforce be compelled to live in individual homes. It simply means that, by a comprehensive zoning plan, such uses will be segregated to districts best suited to their development with benefit to their own locality and without detriment to the strictly home districts.

We do not wish to unduly emphasize the single family residence as a means of perpetuating the home life of a people. There are many persons, who, by reason of circumstances, find apartment, flat, or hotel life necessary or preferable. Undoubtedly many families do maintain ideal home life in apartments, flats, and hotels; and it is also undoubtedly true that in many single family dwellings there is much of dissension and discord. It cannot be gainsaid, however, that the presence of families is usually not encouraged in apartments, flats, and hotels, and that people having children are discriminated against and in some instances actually barred. It is also a well-recognized fact that apartments, flats, etc., are noted for their transient occupancy. All these influences tend to militate against the permanence and stability of home life.

[11] What has been said about the desirability of encouraging home life in single family dwellings as an element in the promotion of the general welfare of a community may not apply with equal force to a regulation which relates to two-family dwellings. Nevertheless the reasoning in that behalf is not wholly inapplicable to zoning regulations, having as their basis the general welfare of the community, which permit the two-family dwellings in strictly residential districts. A two-family dwelling requires no radical change of architectural design and does not entail any added burdens over the single family residences in the way of fire or health protection or the exercise of those civic safeguards on the part of the body politic which become necessary in localities where many large apartment houses are permitted to prevail. Moreover, the permitting of two-family dwellings does not radically change the character of the neighborhood, which by proper zoning regulations may be devoted to residential purposes. It should require no argument to show the clear distinction between permitting a two-family dwelling and permitting a 20 or even 10 family apartment house.

or a number of either in a residential neighborhood. Somewhere the line of demarcation must be drawn, and it is primarily the province of the municipal body to which the zoning function is committed to draw that line of demarcation, and it is neither the province nor the duty of courts to interfere with the discretion with which such bodies are invested in the absence of a clear showing of an abuse of that discretion. In short, as previously indicated, we are not permitted to substitute our judgment for the legislative judgment. *Brown v. City of Los Angeles*, supra.

It is insisted upon behalf of the appellants that the ordinance in controversy is not what is usually designated as a general zoning ordinance, but is one creating a single exclusive residence zone. On the other hand, it is insisted upon behalf of the respondents that the ordinance is part and parcel of a comprehensive zoning plan, because the ordinance itself declares:

That it was enacted "in contemplation of and in conformity with a general zoning ordinance covering the entire city of Los Angeles and which will create residence, business, industrial and other zones covering the territory within said city in a comprehensive manner; that the district described in this ordinance is provided for in advance of the general zoning ordinance, for the reason that it is a portion of the district which is to be of the highest residential class under such general ordinance; that there are at present no buildings in said district which violate the provisions of this ordinance; and that the best interest and general welfare of the community will be served and the general city plan preserved by the maintenance of this district in this condition."

[12] Obviously, the purpose of comprehensive zoning is the attainment of unity in the construction and development of a city, along lines of reasonable regulations which tend to promote the health, safety, morals, and general welfare of the community, and it is equally obvious that to accomplish this purpose there must be definitely in the minds of the makers of comprehensive zoning a plan, in outline at least, sufficiently extensive so that when embodied in an enacted ordinance a reviewer thereof may say with confidence that it will redound to the welfare of the city as a whole and that any part of that plan is reasonably related thereto. Of course, a comprehensive zoning plan should contemplate and provide for the planning from time to time of the execution of further details, extensions, and such modifications of existing features as unforeseen changes, occurring in the civic conditions, make necessary to the perfection and perpetuation of the plan.

[13] It is a matter of common knowledge that a zoning plan of the extent contemplated in the instant case cannot be made in a day;

therefore we may take judicial notice of the fact that it will take much time to work out the details of such a plan and that obviously it would be destructive of the plan if, during the period of its incubation, parties seeking to evade the operation thereof should be permitted to enter upon a course of construction which might progress so far as to defeat in whole or in part the ultimate execution of the plan.

[14] It follows, it seems to us, that the fact that comprehensive zoning in the instant case had not matured to the point of being an enacted and existing ordinance, at the time the emergency ordinance in the instant case was enacted, does not detract from the validity of the latter ordinance upon the theory that there could be no assurance that the contemplated zoning ordinance would be ultimately enacted and enforced. The good faith of the council in enacting the ordinance in question is not challenged; nor is it asserted that the council will not proceed in good faith to the enactment of a general zoning ordinance and, in the absence of any issue concerning the good faith of the council, the presumption of fair dealing on the part of the council and the further presumption that they will not fail in the performance of an official duty must prevail. That being so, it may be fairly said, we think, that the ordinance in question, being, as it declares, an initial unit in the general zoning of the city, is part and parcel of a comprehensive plan which has relation to the welfare of the city as a whole and therefore it must be held that the ordinance in question is a valid exercise of the police power.

The judgment is affirmed.

We concur: MYERS, C. J.; LAWLOR, J.; WASTE, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.

195 Cal. 497

**ZAHN et al. v. BOARD OF PUBLIC WORKS
OF CITY OF LOS ANGELES et al.**
(L. A. 7822.)

(Supreme Court of California. Feb. 27, 1925.
Rehearing Denied March 26, 1925.)

1. Municipal corporations ⚡601—Zoning ordinance, based on consideration of public welfare, valid exercise of police power.

An ordinance enacted pursuant to a general comprehensive zoning plan, and based on consideration of public health, safety, morals, or general welfare, if applied fairly and impartially, is a valid exercise of police power.

2. Municipal corporations ⚡625—Inclusion of property, in zone restricted to residential purposes, held not arbitrary, unreasonable, or discriminatory.

Findings of referee held not to sustain contention that inclusion of that portion of city

in which petitioners' property is situate, in zone restricting use to residential purposes, was arbitrary, unreasonable, and discriminatory.

3. Municipal corporations ☞601—Zone, restricted to residential purposes, held not better suited for business purposes.

Fact that district, placed in zone restricted to residential purposes, is a main artery for large amount of traffic, productive of noise and confusion, did not show that such district was better suited for business than residential purposes, especially where ~~large~~ portion of district was unoccupied, and much of it had been restricted against business by voluntary act of subdividers.

4. Municipal corporations ☞625—Ordinance, creating zone restricted to residential purposes, not void because business districts permitted at convenient intervals.

Fact that, at convenient intervals along zone restricted to residential purposes, property was zoned for business purposes, thus providing adequate business districts to serve immediate needs of particular neighborhoods, did not render zoning ordinance void as being unreasonable or discriminatory.

5. Municipal corporations ☞625—That inclusion of property, in zone restricted to residential purposes, depreciates value, not controlling.

Fact that inclusion of petitioners' property, in zone restricted to residential purposes rather than in zone restricted to business purposes, depreciates its value, is not of controlling significance, as every exercise of police power is apt to affect adversely property interest of somebody, and provisions of St. 1917, p. 1419, concerning conservation of property values has reference to value as a whole, and not to any particular piece of property.

6. Municipal corporations ☞601—Zoning district may permit existing uses.

It is not necessary for the purpose of establishing zoning districts that existing uses shall be removed.

7. Municipal corporations ☞601—Power to zone not limited to protection of established districts.

The power of city council to zone is not limited to protection of established districts, but zoning in its best sense must also look forward in development of new districts according to comprehensive plan, having welfare of city as its basis.

8. Municipal corporations ☞626—Classification of quasi residential and business districts held not inherently discriminatory.

A classification whereby one zone was restricted to quasi residential district, character of which is not destroyed by occupants conducting professional business in their homes, and another to business district, held not inherently discriminatory, and necessity for such classification is largely within legislative judgment of city council.

9. Municipal corporations ☞63(2)—Court will not interfere with legislative judgment as to zoning ordinance, unless unreasonable.

Where zoning plan was fairly conceived and adopted, and it was not conclusively shown that its application and consequences are unreasonable, court cannot substitute its judgment for legislative judgment that ordinance has reasonable relation to general welfare of community.

10. Constitutional law ☞70(3)—Exercise and application of police power within legislative discretion.

Where a situation presents proper field for exercise of police power, its extent and application is largely within legislative discretion.

11. Municipal corporations ☞63(2)—Court will not, except in clear case, interfere with zoning ordinance.

Every intendment is to be made in favor of zoning ordinances, and courts will not, except in clear cases, interfere with exercise of power thus manifested.

In Bank.

Application for writ of mandate by Hector N. Zahn and another requiring the Board of Public Works of the City of Los Angeles and Charles H. Treat and others, members thereof, to issue permit for construction of a building. Writ denied.

Hill & Morgan, of Los Angeles, for petitioners.

Jess E. Stephens, City Atty., and Lucius P. Green, Asst. City. Atty., both of Los Angeles, for respondents.

LENNON, J. The petitioners presented to this court in the first instance a petition for a writ of mandate, commanding the board of public works of the city of Los Angeles to issue a permit for the construction of a business building upon the property of the petitioners, situate on the south side of Wilshire boulevard, between Cochran street and Duns-muir avenue, in said city. Thereafter an alternative writ was issued by this court and the proceedings transferred to the District Court of Appeal, Second Appellate District, Division 1, for hearing and decision. In that court, after issues joined upon the petition and the answers thereto, a referee was appointed pursuant to stipulation of all of the parties to take testimony and return to the court his findings of fact. A transfer of the cause to this court, after hearing and determination by the Court of Appeal, brought to this court the entire record, which included the findings of the referee, and they therefore will be accepted and approved by this court as if they were returned here in the first instance.

The petition for the writ attacks two ordinances of the city of Los Angeles, viz. Ordinance No. 42666 (New Series), amended by Ordinance No. 44668 (New Series), otherwise

known as the general and comprehensive zoning ordinance of said city, and Ordinance No. 46250 (New Series), which provides for the establishment of a setback line on Wilshire boulevard, between Bronson avenue and the west city boundary of the city of Los Angeles.

The general and comprehensive zoning ordinance, Ordinance No. 42666 (New Series), covers practically the entire area of the city's sphere of activities and is entitled:

"An ordinance providing for the creation in the city of Los Angeles of five (5) zones, consisting of various districts, and prescribing the classes of buildings, structures and improvements in said several zones and the use thereof; defining the terms used herein, prescribing the penalty for the violation of the provisions hereof, and repealing certain ordinances."

The five zones were designated respectively as zones A, B, C, D, and E. By said ordinance, it is provided that in zone A no building shall be erected for any other use than that of a "single-family" dwelling. It is provided that in zone B no building shall be erected "which is designed, arranged or intended to be occupied or used for any purpose other than dwellings, tenements, hotels," and similar uses. In zone C it is provided that no building shall be erected "which is designed, arranged or intended to be occupied or used for any purpose other than a store or shop for the conduct of a wholesale or retail business," and like uses. In zone D it is provided by the ordinance that no building shall be erected therein which is designed or intended to be occupied or used for other than variously designated trades, occupations, and industries such as chlorine manufactories, glue factories, etc. In zone E the property may, by the provisions of the ordinance, be devoted to any lawful use.

The said general comprehensive zoning ordinance, Ordinance No. 42666 (New Series), was adopted by the city council on the 18th day of October, 1921, at which time the tract of land on which is located the property of the petitioners herein was outside of the limits of the city of Los Angeles. On February 28, 1922, by proceedings duly had, said tract was annexed to the city of Los Angeles. On the 21st day of September, 1922, the city council by an ordinance known as Ordinance No. 44668 (New Series), amended said Ordinance No. 42666 (New Series), and thereby included a considerable area lying along Wilshire boulevard and including the petitioners' property within zone B, from which zone, as previously indicated, stores are excluded. By the same amendment, the city council placed a certain region lying along La Brea avenue within zone C, within which zone stores of various kinds are permitted.

Thereafter the petitioners filed an application with the city council requesting that the council declare an exception to the re-

strictions of said ordinance with respect to the property of the petitioners and adopt an ordinance permitting the construction and erection of a business building by the petitioners upon their property. The request of the petitioners was referred by the city council to the public welfare commission of the council for investigation and report with the result that the commission reported that:

"We believe that Wilshire boulevard is destined to become a show street when widened and beautified as contemplated and the encroachment of business upon this boulevard is at this time unnecessary and would be a great detriment to the future residential development of this thoroughfare, and we therefore recommend that the request be denied and filed."

This report of the public welfare commission was on July 19, 1923, unanimously adopted by the city council.

The petitioners on the 25th day of July, 1923, made application to the board of public works, asking that a permit be issued allowing them to construct upon their said property on Wilshire boulevard a one-story business building. The board of public works refused the permit upon the ground that the provisions of Ordinance No. 42666 (New Series), as amended by Ordinance No. 44668 (New Series), forbade the erection in zone B of that class of building for which a permit was sought and that, by section 12 of said ordinance, the board of public works was forbidden to issue a permit for the erection, construction, or establishment of any building in any of the zones contrary to the provisions of said ordinance. The permit was refused upon the further ground that the plans and specifications for said building filed with the application showed that the building was not proposed to be set back a distance of 15 feet from the street line of Wilshire boulevard as provided in Ordinance No. 46250.

In view of the conclusion which we ultimately reach concerning the validity of the ordinance prohibiting the petitioner from building a business building in the zone in question, it will not be necessary for us to decide at this time the question as to whether or not the particular setback ordinance in question here is valid.

Two contentions are made by the petitioners against the validity of Ordinance No. 42666, known as the general and comprehensive zoning ordinance, as amended by Ordinance No. 44668, which amendment placed petitioners' property in zone B, viz.: (1) That the enactment and enforcement of an ordinance by a municipality which divides a city into zones and prohibits the construction in certain zones upon private property of buildings for business purposes without regard to whether the particular use is a nuisance *per se*, or may become a nuisance by reason of the location of the business or the manner

and the method in which it is conducted, constitutes an unlawful exercise of the police power; and (2) that the ordinance in the instant case is unreasonable and discriminatory and contravenes the provisions of the zoning enabling act of 1917 which provides that the council, in designating the class of use to be permitted in each district, "shall give reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the direction of building development in accord with a well-considered plan." Stats. 1917, p. 1419, § 2.

[1] The first contention of petitioners was involved in the case of *Miller v. Board of Public Works*, L. A. No. 8012, 234 P. 381. That case involved the question of whether or not zoning of any character, comprehensive or otherwise, save and except for the purpose of prohibiting nuisances or "near-nuisances" was a valid exercise of the police power. That case has this day been decided and it is held therein that an enactment by a municipality of an ordinance, pursuant to a general comprehensive zoning plan, based upon considerations of public health, safety, morals, or the general welfare, applied fairly and impartially, which ordinance regulates, restricts, and segregates the location of industries, the several classes of business, trade, or calling and the location of apartment or tenement houses, clubhouses, group residences, two-family dwellings, and the several classes of public and semipublic buildings, is a valid exercise of the police power. See, also, *In re Opinion of Justices*, 234 Mass. 597, 127 N. E. 525; *State ex rel. Carter v. Harper*, 182 Wis. 148, 196 N. W. 451, 33 A. L. R. 269; *State ex rel. Civello v. New Orleans*, 154 La. 271, 97 So. 440, 33 A. L. R. 260; *Ware v. City of Wichita*, 113 Kan. 153, 214 P. 99; *City of Des Moines v. Manhattan Oil Co.*, 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 23 A. L. R. 1322; *Spector v. Building Inspector of Milton (Mass.)*, 145 N. E. 265.

A consideration of the findings of the referee in the instant case is necessary to a determination of the second contention of the petitioners; i. e., that the particular ordinance in controversy is so unreasonable and discriminatory as to be beyond the purview of the police power.

The findings of the referee relative to the situation of the petitioners' property and the conditions existing upon Wilshire boulevard, and the territory adjacent thereto, are as follows:

"That, at the time of the adoption and approval of each and all of the ordinances hereinbefore referred to and at the present time, the aforesaid Wilshire boulevard was and is a main thoroughfare extending through a portion of the city of Los Angeles to and through a

large portion of the county of Los Angeles, and from there to other cities and municipalities, and to the Pacific Ocean in the city of Santa Monica. That said boulevard was and is a main artery for a tremendous amount of automobile and vehicular traffic between the said city of Los Angeles and said other communities. That, at all hours of the day and during most of the hours of the night, said boulevard is filled with traffic of every description, including automobile trucks and other vehicles engaged in commerce between said communities, and engaged in other commercial activities. That said Wilshire boulevard is one of the main arteries of travel of the city of Los Angeles. That said automobile traffic creates a great deal of noise, confusion, and congestion along said Wilshire boulevard where the property of petitioners is situated and for long distances in either direction from said property. That there is not located along Wilshire boulevard within one mile in either direction from said property any dwelling house, tenement, hotel, lodging or boarding house, church, private club, public or semipublic institution of any kind, railroad station, or other structure or improvement permissible under B zone, except that there is located on a lot on Wilshire boulevard near said property an old farm house. That there are several real estate offices located along Wilshire boulevard near said property. That on the southeast corner of Cochran avenue and Wilshire boulevard across the street from the property of the petitioners there is a brick store building which at the time of passage of said zoning ordinance was occupied by a grocery store and a market. That on the south side of Wilshire boulevard at the corner of Wilshire and Mansfield avenue, six blocks east of the property of petitioners, there was at said time located a fruit stand. That at the intersection of La Brea street and Wilshire boulevard there is located a two-story brick business block. On the southeast corner of Wilshire and La Brea there is located a real estate office. That on the northeast corner of Wilshire and La Brea streets there is located an oil station with a real estate office adjoining. That on the property of petitioners there is located a real estate office. That all of said buildings above referred to were located on said property at the time said zoning ordinance went into effect, except the brick building on the southwest corner of Wilshire and La Brea. That the property of the petitioners described in paragraph II of said petition would have a market value of from 100 per cent. to 200 per cent. greater than it now has if said property could be used for business purposes. That as to the property fronting on said Wilshire boulevard which is restricted against use for business purposes by deed, the effect of placing property of petitioners and other property unrestricted by deed along Wilshire boulevard in zone C would be to depreciate the market value of said property so long as said deed restrictions should remain in effect. That, under the provisions of said ordinance, the property fronting on said Wilshire boulevard at the intersection of what is known as La Brea avenue, and on either side thereof for a distance of one block, has been selected, designated, and placed within what in said ordinance is referred to as a 'C zone' district, wherein may be constructed buildings and structures for business

purposes. That the property of the said petitioners is located in a tract which adjoins said property so placed, as aforesaid in said C zone. That said La Brea avenue has been dedicated as a through street from Hollywood on the north to several miles south of Wilshire boulevard. That said La Brea avenue is improved from Hollywood on the north to three or four blocks south of Wilshire boulevard on the south, with a paved street, said pavement being about three or four miles long, and that southerly from said point said street was, at that time of the passage of the said zoning ordinance, dedicated, but that no improvement had been made thereon and that said street was at said time impassable, that the property fronting on La Brea avenue to the north of Wilshire boulevard for a distance of approximately two miles is almost entirely unimproved and undeveloped, and that Pico street is a street in the city of Los Angeles running east and west approximately a mile south of Wilshire boulevard; that the property fronting on La Brea street from Wilshire boulevard to Pico boulevard is entirely unimproved and undeveloped. That the property of said petitioners is as well adapted to business purposes and uses as is said other property along La Brea street. That, except for a few real estate offices, none of the buildings on said Wilshire boulevard within a mile from either direction from the property of the said petitioners are set back from the street line of said Wilshire boulevard. That petitioners have taken every step and means provided in said ordinance and within their power under the laws of the ordinances of the city of Los Angeles to obtain relief from the legislative body of the said city of Los Angeles, and have heretofore filed an application with the city council of said city calling the attention of said city council to the conditions existing upon said boulevard as herein set forth, and requesting that the said city council, pursuant to section 4 of said ordinance, declare an exception to the restrictions of said ordinance with respect to the property of said petitioners, and to, pursuant to the provisions of said section 4 of said ordinance, adopt an ordinance permitting the construction and erection of a business building which the said petitioners propose to construct and erect upon their property. That said city council, at a regular meeting thereof held on the 19th day of July, 1923, acted upon the said request of said petitioners by unanimously adopting the report of the public welfare commission of the council relative to said request, which said report is as follows: (The referee's report here quotes said committee report, which closed as follows: 'Your committee desires to state that we believe that Wilshire boulevard is destined to become a show street when widened and beautified as contemplated and the encroachment of business upon this boulevard is at this time unnecessary and would be a great detriment to the future residential development of this thoroughfare and we therefore recommend that the request be denied and filed'). That, prior to the adoption of said Ordinance No. 44668 (New Series), by which ordinance section 2-a-56 was added to said Ordinance No. 42666 (New Series), as aforesaid, making the district in which the petitioners' property is located a part of B zone of said city, the said

district where said property is located had not been zoned and no restrictions by law had been established preventing said property from being used for business purposes. That before the adoption of said Ordinance No. 44668 (New Series), as aforesaid, the city planning commission of the city of Los Angeles had drafted a map, and had recommended to the said city council of said city the adoption of said map as part No. 7 of the zone map of said city by which said property of the said petitioners and property in that vicinity was shown to be restricted against use for business. That thereupon, to wit, on the 5th day of August, 1922, the petitioners herein and other property owners petitioned the said city council protesting against the placing of said property fronting on said Wilshire boulevard in zone B; that on the 7th day of August, 1922, the said city council of said city, at a regular meeting, considered the protest of said petitioners and others, and thereupon the following proceedings were had: * * * (The referee's report here sets forth those proceedings, wherein the city council sustained the protest and voted to place in zone C the property fronting on Wilshire boulevard, from La Brea avenue to westerly city limits. But the referee's report further shows that thereafter the city council received certain communications from citizens protesting against the placing of said territory in zone C; that on the 17th day of August, 1922, after considering said protests, the city council reconsidered its action of August 7th.)

The referee further finds:

"That Pico street is a street in the city of Los Angeles running east and west and traversing said city for almost its entire length and running westerly through the city of Los Angeles and a part of the county of Los Angeles to the Pacific Ocean. That said Pico street has a double track street car line almost to Rimpau boulevard. That said Pico street is improved with pavement for practically its entire length, to the ocean, and is also a street on which there is a great deal of automobile traffic, but that the automobile traffic on said Pico street is not as heavy as on said Wilshire boulevard. That said Pico street and the property abutting thereon for a considerable distance west of Rimpau boulevard is lower in elevation than said Wilshire boulevard and the property abutting thereon. That west of Rimpau boulevard there are fewer business houses and more residences fronting in Pico street than there are fronting on Wilshire boulevard. That included in the term 'business houses' on both Pico street and Wilshire boulevard are real estate offices. That said Pico street for its entire length inside the city of Los Angeles has been placed in zone C. That said Pico street easterly from said Rimpau boulevard is well built up with business houses. That Wilshire boulevard easterly from Rimpau for a distance of approximately three miles was originally built up with high class residences. That before the adoption of said zoning ordinance a number of these residences had been converted into restaurants, lodging houses and tea rooms. That there are on said Wilshire boulevard in the course of construction at the present time easterly of said Rimpau boulevard four or five large apartment houses. That the Am-

bassador Hotel occupies a tract of land fronting on said Wilshire boulevard about two miles east of Rimpau boulevard, and that there are located in said Ambassador Hotel various shops and merchandising establishments. That said hotel is located several hundred feet south of said Wilshire boulevard. That on the corner of Wilshire boulevard and Vermont avenue, a distance of approximately two miles east of said Rimpau boulevard, there is now in course of construction a large business block. That at the intersection of Wilshire boulevard and Western avenue, a distance of about one mile east of said Rimpau boulevard, there are one brick business building and two real estate offices. That Western avenue and Vermont avenue aforesaid have been placed in zone C. That Cochran avenue on which the property of petitioners abuts is, southerly from Wilshire boulevard, a paved and well-traveled street, and that said Cochran avenue does not extend north of said Wilshire boulevard. That there is no car line in Wilshire boulevard for its entire length. That both Pico boulevard and Wilshire boulevard westerly from Rimpau avenue traverse sections of the city of Los Angeles which at this time are but sparsely built up and inhabited, but which are in the course of rapid upbuilding and development. That within the last two years throughout the city of Los Angeles there has been a large amount of development and building, of all kinds. That all the property covered by part No. 7 of the zone map and the extension thereof to the city limits of the city of Los Angeles, so far as the same has been subdivided, is in the course of an extremely rapid development, and that a great many residence buildings have been and are now being erected thereon, except as hereinabove in these findings stated. That there is in the city of Los Angeles a department of the city known as the city planning commission and that G. Gordon Whitnall is and has been, since the creation of said commission in 1920, the secretary consultant of said commission. That immediately upon its creation said city planning commission undertook a study of the entire city of Los Angeles, district by district, for the purpose of enacting a comprehensive zoning plan throughout the said city. That in each district hearings were had and the proposed zone map was posted and public hearings had. That thereafter each of said maps was considered by said city planning commission and presented to the city council with the recommendation of city planning commission. That thereafter the council adopted the ordinances covering the zoning of property in said city of Los Angeles, covering the districts included in said maps. That the zoning maps covering the property in question in this action were prepared and adopted and presented to the council by the said city planning commission, pursuant to the above plan. That the proceedings before the city council with respect to the zoning of the property involved in this action are such as have been heretofore in these findings set forth in full."

[2] These findings of the referee do not in our opinion sustain the contention of the petitioners that the inclusion of that portion of Wilshire boulevard in which their property is situate in zone B was arbitrary, un-

reasonable, and discriminatory. On the contrary, we are satisfied that the council did take into consideration the character of the boulevard and that its designation of the uses for which property fronting on Wilshire boulevard might be devoted was appropriate and proper.

Succinctly state, the objections urged by the petitioners as showing an abuse of the discretion of the council are (1) that Wilshire boulevard is better adapted to business than to residential purposes; (2) other adjacent territory is zoned for business which is not better suited for business than is Wilshire boulevard; (3) the value of petitioners' property will be depreciated if it is retained in zone B; (4) property devoted to business uses at the time of the adoption of the ordinance are permitted to continue; (5) the territory in which petitioners' property is situate is not an established residential district; and (6) there is no natural, intrinsic, or constitutional distinction between the classes of uses permitted in zone B and those prohibited.

[3] The findings of the referee do not show that Wilshire boulevard is better adapted for business than for residential purposes. True, the finding of the referee is that Wilshire boulevard is "a main thoroughfare extending through a portion of the city of Los Angeles to and through large portions of the county of Los Angeles, and from there to other cities and municipalities, and to the Pacific Ocean in the city of Santa Monica," and is "a main artery for a tremendous amount of automobile and vehicular traffic between the said city of Los Angeles and said other communities." This is not necessarily proof that the boulevard is fit only for business. The requirements of a traffic boulevard are that traffic shall be kept moving; whereas it is common knowledge that on business streets traffic is retarded. This naturally arises from the necessity of stopping and parking on business streets. The inevitable result would be that if Wilshire boulevard should become a business street, it would lose much of its usefulness as a main artery for traffic between Los Angeles and the neighboring cities and municipalities. The fact that there is a large volume of traffic upon Wilshire boulevard which necessarily must be productive of incidental noise and confusion is not conclusive that said boulevard is clearly unadapted to use for residential purposes of the character contemplated in zone B. The circumstance that many very large and expensive apartment houses have already been constructed upon this boulevard is in itself substantial evidence that the boulevard is not unadapted to use for such purposes.

The council in designating the class of use to be permitted in the various districts was required to consider among other things "the

character of the district, its peculiar suitability for particular uses." The report of the referee that the region along said boulevard which had been included in zone B was largely unoccupied territory, there being within that area but one store building used for a grocery store and market erected prior to the inclusion of the tract in zone B, and few real estate offices and one oil station, shows that the region was not unsuitable for residential purposes. Moreover, the fact, as found by the referee, that, aside from the 14 blocks along said Wilshire boulevard west of Rimpau street, all other subdivided frontage along said boulevard has been restricted against business by the voluntary act of the subdividers, would tend to negative petitioners' contention that Wilshire boulevard is particularly suited for business.

[4] The objection to the ordinance as unjust and discriminatory because of the fact that property in adjacent territory is included in zone C is not well taken. The petitioners attack the ordinance in this particular upon three grounds: (1) That property fronting on La Brea avenue, which intersects Wilshire boulevard at right angles close to petitioners' property, is zoned for business; (2) that Pico street, which runs parallel to Wilshire boulevard and through the same general territory is likewise zoned for business; and (3) that Wilshire boulevard for a block on each side of La Brea avenue is zoned for business. We are of the opinion that the placing of these properties in zone C is supported by valid reasons. With reference to the contention that it was unreasonable to zone La Brea avenue for business uses and Wilshire boulevard for residential uses, it appears from the report of the referee that, at convenient intervals along Wilshire boulevard, streets intersecting Wilshire boulevard at right angles have been zoned for business. Thus Vermont avenue, which is approximately three miles from La Brea avenue and Western avenue which is approximately two miles from La Brea avenue, have been zoned to business uses. This was done in order to serve the business needs of the adjacent residential territory. It was therefore but natural and logical in the carrying out of a harmonious plan that the council should zone La Brea avenue for business purposes since it was a main thoroughfare crossing Wilshire boulevard at right angles, and was approximately two miles from Western avenue. There was thus provided at convenient and reasonable intervals adequate and convenient business districts "to serve the reasonable immediate needs of each particular neighborhood." *Ware v. City of Wichita*, supra.

As to the contention that discrimination was shown by the council in placing Pico street in zone C, the findings of the referee show that Pico street is well adapted for

business for the reason that it runs through a lower and less attractive territory than Wilshire boulevard and is served by a double street car line.

It is apparent that the reason for the inclusion of two blocks in Wilshire boulevard where La Brea avenue intersects it in zone C was to avoid a situation which would otherwise have resulted of placing business property and residential property within the same block. In short, it was thus zoned in order that residential uses on Wilshire boulevard would not be forced to abut upon business uses on La Brea avenue. In this situation it may not be said that the ordinance is void for the reason that petitioners' property is zoned for residential uses; whereas business structures are permitted in other localities within the city similarly circumstanced as the property of the petitioners. As was said in *Brown v. City of Los Angeles*, 183 Cal. 783, 192 P. 716:

"The mere fact that outside of the * * * district there was other property similar in nature and character would not justify the court upon ascertaining that fact to substitute its judgment for the legislative judgment. The boundary line of a district must always be more or less arbitrary, for the property on one side of the line cannot, in the nature of things, be very different from that immediately on the other side of that line."

See, also, *Hadacheck v. Los Angeles*, 165 Cal. 416, 132 P. 584, L. R. A. 1916B, 1248.

Thus viewed, the ordinance in the instant case is not an arbitrary attempt of the city authorities to discriminate between the uses of property in one territory and the use of property permitted in another of similar description, but, on the contrary, the districts created by the ordinance and its various amendments appear to be established by a rational general rule.

[5] The fact that the inclusion of the petitioners' property in zone B rather than in zone C depreciates its value is not of controlling significance. Every exercise of the police power is apt to affect adversely the property interest of somebody. *Spector v. Building Inspector of Milton (Mass.)* 145 N. E. 265, 267. The provisions of the enabling act concerning the conservation of property values have reference to the property value in the district as a whole and not to any particular piece of property. It is to be noted in this behalf that the finding of the referee is that the value of other property along Wilshire boulevard which has been restricted against uses for business purposes by deed will be depreciated if the tract of land in which petitioners' property is located be included in zone C.

[6] As to the objection that the ordinance was not retrospective, but permitted the continuance of existing uses, it will suffice to say that for the purpose of zoning it is not

necessary that existing uses shall be removed. *Spector v. Building Inspector of Milton*, supra. The ordinance was enacted with the purpose of directing the present and future development of the city and no attempt was made to remold its past development. To have required, preliminarily to an enactment for future development, that all past development, not in harmony therewith, should be removed, might be impractical. That the council did not attempt such a task has no tendency to show discrimination against property to be developed in the future.

[7] The power of the city council to zone is not limited in our opinion to the protection of established districts. To so hold would be to defeat in a large measure the very purpose of zoning which is to control future development in the best interest of the city. Zoning in its best sense looks, not only backward to protect districts already established, but forward to aid in the development of new districts according to a comprehensive plan having as its basis the welfare of the city as a whole.

[8] With reference to the contention that the class of uses permitted in zone B is based upon no intrinsic, natural, or constitutional distinction, it will suffice to say that there is an obvious distinction between the type of buildings which the ordinance permits to be erected in zone B and a business block which is not permitted in said zone. It is apparent that zone B provides for what may, in a manner of speaking, be called a quasi residential district the character of which is not destroyed by the mere fact that the occupants of the residences permitted therein may keep offices for the transaction of professional business in their homes. Such classification of uses is not inherently discriminatory and the creation of and the necessity for such classification is a matter largely within the legislative judgment of the city council.

Incidentally the point is made in opposition to the writ to the effect that the provisions of the ordinance in question purporting to authorize and empower the city council upon request of a property owner within a given zone to except his property from the operation of the ordinance as applied to that zone is unreasonable, discriminatory, and makes provision for arbitrary action, without laying down any rule for the guidance or determination of the council's action. We do not deem it necessary to decide this question, for the reason that the provision referred to is clearly severable from the other provisions of the general ordinance, and, if that provision should be held to be invalid, such holding would leave the remainder of the ordinance unimpaired.

It is not claimed that the council, in arriving at the result which it did in the enactment of the ordinance in question, acted unfairly or without due deliberation and with-

out notice to all who might be interested in the subject-matter of the ordinance. It will be noted, as previously indicated, that the findings show that, upon the creation of the city planning commission of the city of Los Angeles, a study was undertaken by the commission of the entire city, district by district, for the purpose of the enactment by the city council of a comprehensive zoning ordinance; that the maps of the proposed zones were posted and public hearings had; that such zone maps after due consideration were presented to the city council with the recommendation of the city planning commission; that in the instant case the petitioners were given an opportunity to be heard before the city council; and that the inclusion in zone B of the territory in which petitioners' property is located was made upon the recommendation of the public welfare commission of the city council, to whom the protest of the petitioners had been referred for investigation.

[9] That the zoning plan as adopted was fairly conceived and consummated is not questioned, nor is it claimed that the manner and method of including and excluding certain properties therein and therefrom was arbitrary; and, it not appearing, *prima facie*, from the undisputed and admitted facts that the ordinance in its application and its consequences is unreasonable, we are foreclosed from substituting our judgment for the legislative judgment that the purpose and perfection of the ordinance in question had reasonable relation to the general welfare of the community. *Des Moines v. Manhattan Oil Co.*, 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 23 A. L. R. 1322.

[10, 11] It must be conceded that, where a given situation admittedly presents a proper field for the exercise of the police power, the extent of its invocation and application is a matter which lies very largely in legislative discretion (*Carter v. Harper*, 182 Wis. 148, 196 N. W. 451), and we are well satisfied that the weight of authority dealing with the subject of zoning may now be regarded as establishing that "every intendment is to be made in favor of zoning ordinances, and courts will not, except in clear cases, interfere with exercise of power" thus manifested. See *Building Inspector of Lowell v. Stoklosa* (Mass.) 145 N. E. 262; *Dobbins v. Los Angeles*, 195 U. S. 223, 25 S. Ct. 18, 49 L. Ed. 169. In *Miller v. Board of Public Works*, supra, it was said:

"That courts are loathe to substitute their judgment as to the necessity for a particular enactment for the legislative judgment as to the need of such enactment with reference to the exercise of the police power. A large discretion is vested in the legislative branch of the government with reference to the exercise of the police power. * * * Every intendment is to be indulged by the courts in favor of the validity of its exercise, and, unless the

measure is clearly oppressive, it will be deemed to be within the purview of that power. It is only when it is palpable that the measure in controversy has no real or substantial relation to the public health, safety, morals, or general welfare that it will be nullified by the courts."

It follows from what has been said, based upon the unchallenged and undisputed facts of the instant case, that the ordinance in controversy cannot be held to be an unreasonable and discriminatory exercise of the police power and that it must be held to be a valid enactment.

The writ is denied.

We concur: MYERS, C. J.; LAWLOR, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; WASTE, J.

195 Cal. 516

Ex parte WHITE. (Cr. 2707.)

(Supreme Court of California. Feb. 27, 1925.)

1. Municipal corporations ☞601—Establishment of residential district by zoning plan valid exercise of police power.

The establishment of strictly residential district, pursuant to general comprehensive zoning plan, which has reasonable relation to public health, safety, morals, or general welfare, is a valid exercise of police power.

2. Municipal corporations ☞601 — Zoning must be reasonably necessary and related to public welfare.

Zoning must be reasonably necessary and related to the health, safety, morals, or general welfare of community, and must be either expressly founded on finding by board of trustees, or other governing body of municipality, that such zoning is necessary to general welfare of municipality.

3. Municipal corporations ☞625—Zoning ordinance creating unrestricted district in business district held unreasonable.

Where an ordinance zoned a town into two districts, one residential and the other business, and made provision as to latter, by designating a portion as an "unrestricted district," but such "unrestricted district" was fully occupied by a gasoline station and restaurant, effect was to grant monopoly to business establishments already situated in such unrestricted district, and therefore constituted an unreasonable restriction, rendering ordinance invalid; it not being a proper application of police power.

In Bank.

Application for writ of habeas corpus by G. T. White, directed to the Chief of Police of the City of Atherton, to secure release of petitioner from custody after conviction of violation of zoning ordinance. Petitioner discharged.

John E. Springer, of Palo Alto, for petitioner.

Arthur Redington, of San Francisco, for respondent.

LENNON, J. The petitioner herein seeks his release on habeas corpus after judgment of conviction rendered in the recorder's court of the town of Atherton, county of San Mateo, upon a charge of misdemeanor, to wit, violation of Ordinance 23 of said town.

Succinctly stated, the undisputed facts of the case, shown by the return to the writ and the petition for the writ, employed as a traverse, and the stipulations of the respective parties to the proceedings, are these:

Said Ordinance 23 is a zoning ordinance which divides the town of Atherton into two zones designated as "the residence district" and "the unrestricted district." Section 4 (a) of said ordinance provides that in the unrestricted district "the premises therein and the buildings now or hereafter to be placed thereon may be devoted to any lawful use, but subject to the ordinance of this municipality and to the regulations of its board of health." Section 4 (b) thereof provides that in the residence district "no piece, parcel, lot or premises, and no building thereon, shall be used, and no building shall be constructed or altered thereon which is arranged, intended or designed to be used for any of the following purposes, viz.: Store, shop, retail or wholesale business house, factory, hotel, boarding house, hospital, private school, sanitarium, public garage, undertaking parlor, gasoline or oil station, amusement enterprise for profit, or other structure for the conduct therein of trade or business."

This ordinance was enacted on the 21st day of November, 1923, after proceedings duly and regularly had and taken, under and in pursuance of an act of the Legislature entitled:

"An act to provide for the establishment within municipalities of districts or zones within which the use of property, height of improvements and required open spaces for light and ventilation of such buildings, may be regulated by ordinance." Stats. 1917, p. 1419.

Thereafter, while said ordinance was in operation, the petitioner herein built a small structure to be used as a real estate office in the residence district of the town of Atherton, as said residence district is defined by said ordinance, and proceeded to transact business therein.

The town of Atherton is a municipal corporation of the sixth class, situate in the county of San Mateo. It extends east and west, across the state highway (El Camino Real) for an average distance of about $3\frac{1}{4}$ miles and extends north and south along the highway for an average distance of about 1

mile. It includes within its limits not less than 2,500 acres of land. The zone limited by the ordinance in question as an "unrestricted district" contains less than 1½ acres, which has a street frontage of only 436 feet, and which was at the time of the enactment of the ordinance and now is fully occupied to the exclusion of other business, by a gasoline service station and a restaurant. The building of the petitioner was erected after the passage of the ordinance, and was located upon a lot within the district zoned by said ordinance for residential use upon the west side of and fronting upon the state highway about midway between the north and south boundaries of the town and about 400 feet south of the southerly boundary of the "unrestricted district." Excepting for the territory embraced within the "unrestricted district," as defined by said ordinance, the territory of said town is devoted to residential uses and comprises a suburban community of homes. Between the "unrestricted district" and petitioner's building are located three separate residences, and opposite said building and on the east side of the highway are two large residential tracts upon each of which the owner thereof resides and has his home. About 100 feet south of the petitioner's said building and on the same side of the highway is another large residential tract upon which the owner thereof resides and has his home, and to the west of petitioner's building are other residential lots occupied by people who have their own homes thereon. Outside of the boundaries of said town and in close proximity thereto are locations where business is conducted, with ample space available for additional business houses. Thus, at Menlo Park, which is situated about ¾ of a mile south of petitioner's premises, in unincorporated territory, there is a well-settled business district; and at Five Points, about one mile to the north of petitioner's premises, there is another well-settled business district; and at other places upon the state highway outside of the territorial boundaries of the town of Atherton, but in the vicinity thereof, there are other well-defined business areas where business is now being conducted, and in any of which places space is available for the erection of other business structures for the conduct of business therein. The population of the town of Atherton is variously estimated to be between 600 and 1,000 persons.

Petitioner contends that his imprisonment is unlawful by reason of the fact that the ordinance under which he was convicted is invalid. Petitioner bases his claim of the invalidity of the ordinance upon two grounds: (1) The unconstitutionality of any ordinance establishing strictly residential districts from which all business enterprises are excluded; and (2) the unreasonableness of the provisions of the particular ordinance

in controversy with reference to the unrestricted district.

[1] The decision in the case of *Miller v. Board of Public Works* (Cal. Sup.) 234 P. 381, L. A. No. 8012, wherein it was held that the establishment by a municipality of a strictly residential district pursuant to a general comprehensive zoning plan which had reasonable relation to the public health, safety, morals, or general welfare, is a valid exercise of the police power, and is not in contravention of the fundamental law of the state, renders petitioner's first contention no longer tenable.

We are of the opinion, however, that petitioner is correct in his second contention.

[2] As has been pointed out in the cases of *Miller v. Board of Public Works*, supra, and *Zahn v. Board of Public Works* (Cal. Sup.) 234 P. 388, this day decided, the right to zone may be resorted to upon a proper invocation of the police power, but such zoning must be reasonably necessary and reasonably related to the health, safety, morals, or general welfare of the community. Of course, it goes without saying that such zoning must either expressly or impliedly be founded upon a finding by the board of trustees, or other governing body of the municipality, that such zoning is necessary to the general welfare of the community.

[3] It appears in the instant case that the board of trustees undertook to zone the town into two districts, one of which was devoted to residential uses and the other to business uses. This was in effect a legislative finding that the maintenance of both such districts was necessary to the public welfare. It was the duty, therefore, of the board of trustees when zoning the town to make adequate provision for both such uses. That adequate provision for the business district was not made is at once apparent. It is true that some provision was made for business; that is to say, 1½ acres out of 2,500 acres was designated as an "unrestricted district" in which buildings to be "devoted to any lawful use" might be constructed. But it is apparent from the fact that the "unrestricted district" was already fully occupied by a gasoline station and a restaurant to the exclusion of new business uses that the board of trustees was limiting the "unrestricted district" to business enterprises already established and to the exclusion of any future business development. The ordinance in effect grants a monopoly to the business establishments already situate in the 1½ acres of the "unrestricted district." In other words, under the guise of regulating business and segregating it to a particular district, the ordinance in fact prohibits all business save and except that of the favored two already established.

Of course, we are not called upon here to find and definitely decide what proportion of the territory of the town of Atherton may be

reasonably allocated to business uses; but we are satisfied and do decide that, under the admitted facts of the instant case, the area allotted by the ordinance in question for business purposes in the town of Atherton is so small as to be an unreasonable restriction. Consequently, the ordinance cannot be sustained upon the theory that it is a proper invocation and application of the police power of the state.

Provision is made in the ordinance that, if any section, subsection, sentence, clause, or phrase of the ordinance is for any reason held to be unconstitutional, illegal, or otherwise invalid, such decisions shall not affect the remaining portions of the ordinance. Inasmuch as the vice of the ordinance permeates the entire scheme thereof, it must be held that the entire ordinance is void. The objection to the ordinance may be eradicated by the board of trustees of the town of Atherton, who, when so doing, will, doubtless, "give reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the direction of building development in accord with a well-considered plan." Stats. 1917, p. 1419, § 2.

The ordinance being invalid, it follows that petitioner's conviction and subsequent imprisonment was unlawful, and he must be released from custody.

The petitioner is discharged.

We concur: MYERS, C. J.; RICHARDS, J.; SHENK, J.; WASTE, J.

195 Cal. 548

PEOPLE v. MONTEREY FISH PRODUCTS CO. (S. F. 11376.)

(Supreme Court of California. March 4, 1925.)

1. Fish ⚡9—Statutes ⚡77(3)—Act excluding every one but packers of fish for human consumption from using or selling food fish for use in reduction plant held not invalid.

St. 1919, p. 1204, § 5, as amended by St. 1921, p. 459, § 1, prohibiting use of food fish for reduction purposes, except that those engaged in catching, packing, or preserving fish or fish products for human consumption may use such fish in reduction plant or sell them for that purpose by obtaining permit, held not invalid, as unreasonable and discriminatory as against one operating reduction plant exclusively.

2. Statutes ⚡64(1)—When invalid proviso invalidates statute, stated.

Generally, when proviso in nature of exception to general statute is invalid, general provisions of statute are not invalidated thereby, unless provisions of exception are so intimately and inherently related with general pro-

vision that latter would not have been enacted without former.

3. Constitutional law ⚡48—All presumptions and intendments are in favor of statute attacked as discriminatory.

When act is attacked as discriminatory or unreasonable, all presumptions and intendments are in favor of reasonableness and fairness of legislative action.

4. Constitutional law ⚡48—Legislative decision as to distinctions warranting classification not overthrown unless palpably arbitrary.

Legislative decision as to what is sufficient distinction to warrant classification will not be overthrown by courts, unless it is palpably arbitrary.

5. Fish ⚡12—Public policy of state to protect and conserve food fish.

Public policy of state as declared by St. 1917, p. 1673, and St. 1919, p. 1203, as amended by St. 1921, p. 459, in relation to food fish, is to protect, conserve, and devote them to purposes of human consumption.

6. Constitutional law ⚡62—Act prohibiting use of food fish in reduction plant held not invalid as vesting arbitrary discretion in fish commission.

St. 1919, p. 1203, as amended by St. 1921, p. 459, prohibiting use of food fish in reduction plant, is not invalid as vesting in fish commission arbitrary authority and unguided discretion in designating percentage of excess fish which canners may take, as exercise of discretion is made dependent on hearing and findings.

7. Constitutional law ⚡62—Legislature may confer discretion on administrative body, provided its exercise is controlled.

The Legislature may confer on administrative board or officer a large measure of discretion, provided its exercise is controlled by rules prescribed therefor.

8. Fish ⚡9—Act regulating disposition of food fish held to apply to individual market fishermen.

St. 1919, p. 1203, as amended by St. 1921, p. 459, prohibiting use of food fish in reduction plant except by permission of fish and game commission in certain cases, is not in conflict with St. 1917, p. 1673, and prohibits diversion of fish by individual market fisherman, who is unable to sell his catch, matter not prohibited by earlier statute.

9. Fish ⚡12—"Reduction plant," within act regulating taking of food fish, applies to plant reducing fish into products not for human consumption; "reduce."

Within St. 1919, p. 1203, as amended by St. 1921, p. 459, prohibiting use of food fish in reduction plant except by permission in certain cases, "reduction plant" is any plant engaged in reduction of fish into products not intended to be used, and not in fact used, for human consumption; such as poultry food; "reduce" being to bring to a certain state or condition by grinding, pounding kneading, and rubbing.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reduce.]

10. Fish ☞12—Fishing for reduction plant held "waste" of food fish.

Fishing with direct purpose of delivering catch to reduction plant held "waste" of fish caught, within St. 1919, p. 1203, as amended by St. 1921, p. 459, which includes use of fresh food fish for any purpose other than human consumption.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Waste.]

11. Fish ☞3—Title to fish vested in state.

Title to and property in fish, within state waters, are vested in state, and held by it in trust for the people.

12. Constitutional law ☞70(3)—Question as to measures best adapted to conserve and protect fish is for Legislature.

Subject only to constitutional limitations against discrimination, Legislature, to conserve and protect fish, may pass such laws as to it seem wise, and question what measures are best adapted to that end is for its determination.

13. Fish ☞1—Fish subject only to such qualified private ownership as Legislature permits.

Fish in public waters of state can become subject of private ownership only in such qualified way, to such limited extent, and subject to such conditions and limitations as Legislature may impose.

14. Fish ☞17—Fishermen catching fish in violation of law acquire no title and can convey none.

Where fish are taken in violation of law, those who catch them acquire no title and can convey none in view of St. 1917, p. 1674, § 4.

15. Fish ☞12—Use of food fish by reduction plant held nuisance.

Use of food fish by reduction plant, in violation of St. 1919, p. 1203, § 4, and section 5, as amended by St. 1921, p. 459, § 1, is such obstruction to free use of property in fish as to interfere with comfortable enjoyment thereof by the people and as such constitutes nuisance, and hence finding that such use caused no damage to state suing for injunction was unauthorized.

16. Appeal and error ☞954(3)—Whether remedy at law is adequate at first instance is question of fact for trial court.

Question whether remedy at law is adequate is in first instance for trial court, and remains so if evidence is conflicting or opposing inference may reasonably be drawn therefrom.

17. Injunction ☞89—Injunction proper remedy for illegal use of food fish.

As to relegate state to action for damages for reduction plant's illegal use of food fish would be to defeat pro tanto legislative policy of conserving fish for human consumption, injunction is proper remedy to restrain such use, though such use has not appreciably depleted the supply of such fish.

18. Injunction ☞103—Criminal prosecution for illegal use of food fish not adequate remedy.

Criminal prosecution for violation of St. 1919, p. 1203, as amended by St. 1921, p. 459, by illegal use of food fish in reduction plant, affords no adequate remedy for invasion of state's property right in fish, so as to defeat injunction.

19. Fish ☞12—Finding sardines accepted by reduction plant were unfit for human food held immaterial.

In suit to enjoin reduction plant's illegal use of food fish, finding that sardines accepted and received by defendant were unfit for human food was immaterial, in light of uncontradicted testimony and admission by defendant that it was also engaged in receiving at its plant fish fit for human food.

In Bank.

Appeal from Superior Court, Monterey County; Fred A. Treat, Judge.

Action by the People of the State of California against the Monterey Fish Products Company. Judgment for defendant, and plaintiff appeals. Reversed.

U. S. Webb, Atty. Gen., Robt. W. Harrison, Deputy Atty. Gen., and B. D. Marx Greene, of Berkeley, for appellant.

R. D. Duke, of San Francisco, and C. F. Lacey, of Salinas, for respondent.

MYERS, C. J. This is an appeal by plaintiff from a judgment in favor of defendant in an action to procure an injunction restraining the defendant from causing or permitting preventable waste of fish fit for human consumption by using the same in a reduction plant for the conversion thereof into fish meal and fish oil. It is alleged in the complaint that the defendant is engaged in the business of operating a reduction plant for the manufacture of fish meal and fish oil and fertilizer, and that during the present seasonal run of sardines it has received, is receiving, and threatens in the future to receive from persons without written permission from the fish and game commission sardines fit for human consumption and is using the same for reduction purposes, thereby permitting and causing preventable deterioration and waste thereof; that defendant threatens to continue to so receive and reduce fish fit for human consumption at its reduction plant unless restrained therefrom, and will thereby cause preventable deterioration and waste of food fish caught within the waters of this state and great and irreparable loss and damage to the people of the state; that there is no plain, speedy, and adequate remedy at law; and that the acts of defendant, if permitted to continue, will be such an obstruction to the free use of property as to interfere with the comfortable enjoyment thereof by the people of the state.

The defendant in its answer admits that it is engaged in the business of manufacturing fish meal and fish oil, but denies practically all of the remaining allegations of the complaint. The issues thus framed were narrowed somewhat by the express admissions of counsel for defendant at the commencement of the trial as follows:

"The only issues that are raised by this answer concern the averment in the complaint that the defendant is engaged in operating a reduction plant. We admit that we are manufacturing fish meal and fish oil, but deny that we are operating or manufacturing fertilizer. We admit we have received fish [fit for human consumption] from persons who have no permit from the fish commission, and we intend to continue to do so. We deny we are causing preventable deterioration or waste of fish, and we deny that our use of fish is depleting the supply of sardines, and we also deny that there is no adequate remedy at law. We deny that formal averment in the complaint that there is great and irreparable injury due to these acts. Our claim is that fish meal and fish oil are fit for human consumption. It is not a deterioration or waste of fish as those terms are meant in the statute and it is not a reduction plant within the statute."

The trial court found in favor of the defendant upon these issues. Appellant contends that the findings thus made are contrary to the evidence; that the judgment is against law in that it is not supported by the findings, and particularly that the conclusions of law are in violation of the rules laid down in the recent case of *People v. Stafford Packing Co.* (Cal. Sup.) 227 P. 485. The respondent contends that the findings are in accordance with the evidence and that the judgment is sustained by the findings, but places its principal reliance upon two contentions which were neither discussed nor considered in the *Stafford Packing Company Case*, supra, namely: First, that the statute upon which plaintiff relies is unconstitutional; and, second, that this statute, even if constitutional, is not applicable to the situation involved herein, which is governed by a different statute.

The statute upon which the appellant relies is:

"An act to conserve the fish supply in California by empowering the fish and game commission to regulate and control the handling of fish or other fishery products for the purpose of preventing deterioration or waste. * * * Stats. 1919, p. 1203.

Section 4 thereof provides:

"No person, firm or corporation engaged in the business of catching, buying, selling, canning, packing or preserving fish, shall suffer or permit, or cause any preventable deterioration, or willfully do any act that might cause deterioration or waste of any fish caught or taken within or without the waters of this state and brought into this state, and no person, firm or corporation engaged in the business of catch-

ing, buying, selling, canning, packing or preserving fish or other fishery products shall sell or offer for sale or delivery, or deliver any fish or other fishery products, to any reduction plant or divert fish or other fishery products for reduction purposes without first having written permission from the fish and game commission, and no reduction plant shall accept or receive any fish, other than fish offal, from any person, firm or corporation without such written permission."

Section 5 thereof, as amended (Stats. 1921, p. 459), provides:

"No person, firm or corporation engaged in the business of taking or catching food fish or other fishery food products shall take or catch or kill more fish or other fishery products than the boat or boats owned or operated by said person, firm or corporation can handle and deliver to the fresh fish dealer in a condition fit for human consumption, or to a canner, packer or preserver of fish in a condition fit to be canned or packed or preserved for human consumption. * * * It shall be unlawful for any person, firm or corporation to buy or sell or receive or use any kind or species of fish fit for human consumption for reduction purposes except fish offal; provided, that any person, firm or corporation engaged in taking, catching or dealing in fresh fish or fishery products for human consumption or any person, firm or corporation engaged in the business of canning, packing or preserving fish for human consumption desiring to sell or deliver or use in a reduction plant any fish fit for human consumption shall file an application * * * with the fish and game commission setting forth the kind or species and quantity of fish to be sold, delivered or used in a reduction plant. [Here follow procedural provisions for a hearing thereon.] If after hearing evidence upon said application it shall appear that there is no market for the fish referred to in said application and that the taking or using of said fish in a reduction plant will not tend to impair or deplete said species of fish an order may be made by the board of fish and game commissioners granting the privilege to take, catch or kill and deliver to or use in a reduction plant during a calendar month an amount of said fish not to exceed twenty-five per cent. of the amount any such applicant, person, firm or corporation can can or pack or preserve for human food during a calendar month. Said order shall not be granted for a period longer than a seasonal run of said kind or species of fish mentioned in said order."

[1-4] It is respondent's contention that this act, and particularly section 5 thereof, is unconstitutional, for the reason that it excludes every one except those who are engaged in taking, catching, dealing in, packing, or preserving fish or fish products for human consumption from the privilege of using any such fish in a reduction plant, and at the same time it expressly provides for the granting of such privilege to these favored classes. Respondent argues that there exists no natural, constitutional, or intrinsic basis for this classification and that the same is therefore arbitrary, unreasonable, and

discriminatory and constitutes special legislation, violating the prohibition of both the state and federal Constitutions, citing *Van Harlingen v. Doyle*, 134 Cal. 53, 66 P. 44, 54 L. R. A. 771; *Ex parte Sohneke*, 148 Cal. 267, 82 P. 956, 2 L. R. A. (N. S.) 813, 113 Am. St. Rep. 236, 7 Ann. Cas. 475; *Connolly v. Union S. P. Co.*, 184 U. S. 563, 22 S. Ct. 431, 46 L. Ed. 679; *Bailey v. People*, 190 Ill. 28, 60 N. E. 98, 54 L. R. A. 838, 83 Am. St. Rep. 116; *Schaezlein v. Cabaniss*, 135 Cal. 466, 67 P. 755, 56 L. R. A. 733, 87 Am. St. Rep. 122; *Hewitt v. Board*, 148 Cal. 594, 84 P. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315. It may be doubted that these objections, which apply only to the proviso contained in the statute would, if well founded, be of any avail to respondent herein. The general provisions of the act in question purport to prohibit all persons from using fish fit for human consumption (except fish offal) for reduction purposes. The proviso purports to except to a limited extent certain classes of persons from the operation of the general prohibition, upon the conditions therein specified. It may be argued with much reason that if the exception thus attempted be invalid because of its arbitrary and discriminatory character the result thereof would be to annul the exception, leaving the general prohibitory provisions of the act unimpaired. This result would in no way improve respondent's position. The general rule is that when a proviso in the nature of an exception to a general statute is invalid, the general provisions of the statute are not invalidated thereby, unless it clearly appears that the provisions of the exception are so intimately and inherently related to and connected with the general provisions to which it relates that the Legislature would not have enacted the latter without the former. 5 Cal. Juris. § 655 et seq., and cases cited. Counsel for respondent have advanced no reasons for the adoption of such a conclusion with respect to the statute here under consideration. However, we are not disposed to hold that the exception now under consideration is discriminatory or unreasonable. When a legislative enactment is attacked upon this ground, all presumptions and intendments are in favor of the reasonableness and fairness of the legislative action (5 Cal. Juris. § 628 et seq., and cases cited), and the decision of the Legislature as to what is a sufficient distinction to warrant the classification will not be overturned by the courts unless it is palpably arbitrary (Id. § 832 et seq., and cases cited).

[5-7] The public policy of this state in its relation to the food fish within its waters has been clearly, consistently, and unmistakably manifested throughout the history of its fish and game legislation. It aims at the protection and conservation of food fish for the benefit of the present and future

generations of the people of the state and the devotion of such fish to the purposes of human consumption. In confirmation thereof we need only refer to the provisions of the act of 1919 and the amendment thereof in 1921, supra, and to the provisions of the act of 1917, relied upon by respondent herein (Stats. 1917, p. 1673). It is plain that the purpose and intent of both of these acts is to prohibit preventable waste of food fish, to discourage, and so far as practicable to prevent, the use thereof for any purpose other than human consumption, and to affirmatively encourage the use thereof for this purpose. With this item of public policy in mind, it is apparent that the purpose of the proviso which is here claimed to be unreasonable and discriminatory is to aid and encourage those who are engaged in catching and preparing fish for human consumption, and that no reason exists for the giving of such aid and encouragement to those who are engaged in diverting food fish to other uses. It is to the interest of the people of the state that the packing plants engaged in the packing and preparing of fish for human consumption shall be operated efficiently and economically, so that the price of their product to the consumers thereof may be kept down. A packing plant can be operated most efficiently and economically when it is enabled to operate steadily at a constant rate of output approaching its maximum capacity. But when the fishermen start out to make a catch no one can foretell with exactitude the size of the catch which they will take. Therefore, in order to insure so far as practicable that the catch for each day shall approximate the capacity of the packing plant, the act provides that the fish and game commission may, after a hearing, give the packer a permit which will enable him to engage for the taking of a specified quantity of fish in excess of his packing capacity, and upon occasions when such excess quantity is brought in to use the same for reduction purposes. The purpose of this is to allow the packer a certain leeway or margin of safety to enable him so far as practicable to operate his packing plant regularly and at capacity. There is no reason for allowing to the operator of a reduction plant, who is not packing fish for human consumption, any margin or leeway whatsoever, because he is forbidden to take any fish fit for human consumption for use in his reduction plant. This presents to our minds a reasonable and natural basis for the distinction made in the act between the two classes of operators, and it is not necessary to discuss the other reasons therefor which are suggested by counsel for appellant. There is no merit in the claim of respondent that the effect of this act is to prohibit the legitimate business of conducting a reduction plant by one who is not engaged in

packing fish for human consumption. The act does not prohibit the operation of a reduction plant, nor does it prohibit the use therein of fish not fit for human consumption or of fish offal. It prohibits only the use in such a plant of fish fit for human consumption. If the respondent is in fact engaged in a legitimate business, it is not prohibited by this act from continuing the same. On the other hand, if respondent is engaged in the taking and use in its reduction plant of fish fit for human consumption, it is violating the law and is not engaged in a legitimate business. There is no merit in the contention that the act is invalid for the reason that it purports to vest in the commission arbitrary authority and unguided discretion in that it may allow one canner to take 25 per cent. and another 5 per cent. and another 1 per cent. of excess fish. The act confers discretion upon the commission, it is true, but such discretion is neither unguided nor uncontrolled. Its exercise is made dependent upon the findings of fact after a hearing "that there is no market for the fish referred to in said application and that the taking or using of said fish in a reduction plant will not tend to impair or deplete said species of fish." It is apparent that there may be varying circumstances of time, place, method of catching fish, location where they are to be found with relation to the location of the cannery, etc., which may legitimately justify the allowance of a larger leeway in one case than in another. The Legislature may, without violating any rule or principle of the Constitution, confer upon an administrative board or officer a large measure of discretion, provided the exercise thereof is guided and controlled by rules prescribed therefor. *Tarpey v. McClure*, 190 Cal. 593, 213 P. 983, and cases cited.

[8] Under its second point, *supra*, respondent contends that it is not governed or affected by the act of 1919, which we have been considering herein, but that it is acting pursuant to and by virtue of authority expressly granted to it by the act of 1917, *supra* (Stats. 1917, p. 1673). Section 5 of this act provides that the state market director is authorized to regulate and control the business of buying, selling, and otherwise disposing of fresh food fish, and that such fish may not be bought, sold, or disposed of except in accordance with the provisions of the act. Section 7 thereof makes it unlawful to destroy food fish in excess of 50 pounds per day, or to divert any food fish to any use other than human consumption without the written consent of the market director. This is followed by a proviso that—

"Nothing in this section shall be construed to apply * * * to any individual market fisherman who is unable to sell for human consumption fish he has caught and who within forty-eight hours after the destruction or diversion of said fish shall report to the state market

director the number of pounds and varieties of fish and how disposed of. * * *

Respondent argues that this proviso is in effect an express grant to market fishermen, under the circumstances there mentioned, of the right and authority to destroy or divert the fish caught by them, and that, incidentally and by necessary implication, it is a grant to respondent of the right to use such fish in its reduction plant; that the later act of 1919 does not expressly repeal this act; and that under well-established rules of statutory construction it should not be construed as effecting such repeal by implication. This view of the law was evidently adopted by the trial court, as it made a finding that all of the sardines accepted and received by the defendant were caught by the individual market fishermen who were unable to sell them for human consumption. We are not in accord with this view. There is no conflict between the two acts as to the matter here under consideration. The 1919 act covers a field of legislation not at all covered by the 1917 act. The earlier act contains certain prohibitions against the destruction or diversion of food fish which are by its terms expressly made inapplicable to the individual market fisherman who is unable to sell for human consumption fish he has caught. The later act contains other and broader prohibitions which apply to all persons, firms, or corporations engaged in the business of catching fish. This of necessity includes the individual market fisherman who was excepted from the operation of the earlier act. There is no merit in the claim that the earlier act grants to or confers upon such market fisherman a substantive right to destroy or divert fish caught by him. It does no more than this: It omits to prohibit him from so doing. The earlier act expressly negatives the contention that it is applicable to the situation here in question by the proviso that "nothing in this section shall be construed to apply * * *" thereto. In short, the later statute covers a field not covered by the earlier and there is no conflict in this respect between the two. The diversion of fish by the individual market fisherman who is unable to sell his catch is not prohibited by the earlier statute, but it is prohibited by the later one. We conclude, therefore, that the statute of 1919, as amended in 1921, is the statute which governs the respective rights and obligations of the parties hereto and that it is not invalid by reason of any of the matters which have been suggested herein. This brings us to a consideration of the points upon which appellant relies for a reversal of the judgment.

[9] In findings 1 and 2 the court found that—

"It is not true that the defendant is or ever was engaged in the business of operating a reduction plant for the manufacture of fish

meal, fish oil, and fertilizer, * * * or is now accepting or receiving sardines at any reduction plant, or is, or ever was, using said fish for reduction purposes."

As we have noted, the defendant expressly admitted at the commencement of the trial that it was engaged in the business of operating a plant for the reduction of fish into fish oil and fish meal. It contended, however, that this does not constitute a reduction plant as that expression is used in the statute because of the fact that the resulting products—fish oil and fish meal—were not sold by the defendant to be used, and were not used, as fertilizer, but were sold to be used, and were in fact used, as poultry food. In short, it is defendant's contention that a plant which is engaged in the reduction of fish to fish oil and fish meal is a reduction plant only when those products are used as fertilizer and is not a reduction plant when the products are used as poultry food. The trial court evidently concurred with and adopted this contention, as it is the only theory upon which these findings are explicable. Respondent asserts that—

"To 'the man in the street' the term 'reduction plant' signifies a place where dead animals, garbage, offal and waste material are converted into fertilizer of the soil. * * *"

We are not aware of this fact, if it be a fact. We find no authority, either among the lexicographers or the law-writers or the decided cases, for so narrow and restricted a definition. The verb "reduce" is defined by Webster as follows:

"To bring to a certain state or condition by grinding, pounding, kneading, rubbing, etc.; as, to reduce a substance to powder, or to a pasty mass; to reduce fruit, wood or paper rags to pulp."

The Standard Dictionary gives a substantially similar definition. It is true, as suggested by respondent, that this word has also other and widely variant meanings, but no other approved definition thereof has been suggested as being in any wise appropriate to the context of the statute here in question. This court has defined the word "reduce," when applied to the mining industry, as meaning "to bring to a specified form or condition, as, to reduce a rock to powder, or, to deprive an ore of nonmetallic constituents," and has held that the word "reduction," used in this connection, means the separation of metals from their ores. In *re Martin*, 157 Cal. 60, 106 P. 239. In that case it was also held that the phrase "smelters and other institutions for the reduction or refining of ores or metals," when contained in a penal statute, is sufficiently comprehensive to include a quartz mill in which the operation consisted solely of crushing ore and then washing the same. The process used by de-

fendant herein, briefly described, consists in cooking the fish, separating and removing therefrom the major portion of the oil and water content thereof, and grinding the residue to a meal or powder known as fish meal. Precisely the same process is used in those plants which are operated for the reduction of fish for use as fertilizer, except that in the latter case the meal may be ground to a finer powder than is desirable for poultry food, and except, further, that when the product is to be used as fertilizer fish may be used in such an advanced stage of decomposition as would render the product unfit for poultry food. Having in mind the manifest policy of the act, which is the conservation of fish for the purpose of human consumption, we have no doubt that the expression "reduction plant," as used therein, is at least sufficiently inclusive to apply to any plant engaged in the reduction of fish into other products which are not intended to be used, and are not in fact used, for human consumption. In this view of the law there is no basis in the evidence for the quoted findings numbered 1 and 2, and the same conclusion applies to the first portion of finding No. 4, to the effect that—

"It is not true that the defendant threatens to accept or receive sardines at any reduction plant, or threatens to use such fish for reduction purposes. * * *"

[10-13] Finding 3 and a portion of finding 4 are to the effect that it is not true that the defendant has, or is now permitting or causing, or threatening to permit or cause preventable or other deterioration or waste of fish caught within the waters of this state. It is clear from the terms and provisions of the statute that the term "waste" as there used was designed to include and to apply to the use of fresh food fish for any purpose other than human consumption. There was uncontradicted testimony at the trial from one of defendant's witnesses that two fishermen, named by him, were engaged in fishing with the direct purpose of delivering their catch to the defendant for use in its reduction plant. There was other testimony, uncontradicted, as to the number of tons of fresh fish which had been delivered by these two fishermen to the defendant upon specified dates shortly prior to the trial. This was not only a violation of the prohibitory provisions of the statute, but we think that it constituted preventable waste within the meaning thereof.

The court further found that it is not true that any use made of such fish by the defendant will cause any loss or damage to the people of the state of California, or will be such an obstruction to the free use of property as to interfere with the comfortable enjoyment of property by the people of the state of California, or that the defend-

ant threatens to continue to commit any wrongful act. These findings are apparently predicated upon the conclusion of the learned trial judge that the defendant in using fresh food fish in its reduction plant was exercising a right granted to it by the statute of 1917, supra, and therefore committed no wrong. Of course, if the defendant were in fact acting within its legal rights and committing no wrong, the plaintiff could not in contemplation of law be damaged thereby. But, as we have seen, the statute of 1917 confers no such right. The title to, and property in, the fish within the waters of the state are vested in the state of California and held by it in trust for the people of the state. *Geer v. Connecticut*, 161 U. S. 519, 529, 16 S. Ct. 600, 40 L. Ed. 793; *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 P. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183; *In re Phoebovius*, 177 Cal. 238, 170 P. 412; *People v. Stafford Packing Co.*, supra. The Legislature may dispose thereof as to it may seem best, subject only to constitutional limitations against discrimination. Within those limitations the Legislature, for the purpose of conserving and protecting fish, may pass such laws as to it seem wise, and the question what measures are best adapted to that end is for its determination. *Ex parte Kenneke*, 136 Cal. 527, 69 P. 261, 89 Am. St. Rep. 177; *In re Phoebovius*, supra. Such fish can become the subject of private ownership only in such qualified way, to such limited extent, and subject to such conditions and limitations as the state through its Legislature may see fit to provide and impose. *In re Phoebovius*, supra; *Paladini v. Superior Court*, 178 Cal. 369, 173 P. 588.

"It is, therefore, evident that what the people of the state own they can alienate on such terms as they choose to impose, and that this power of regulation continues so long as such fish or game are the subject of trade or transfer." *Paladini v. Superior Court*, supra.

[14, 15] In section 4 of the act of 1917, supra (Stats. 1917, p. 1674), the Legislature imposed the following limitations:

"No such fish shall be caught, taken or killed in any manner or at any time except that the person so catching, taking or killing or having the same in his possession, irrespective of the manner in which they were obtained, shall by such act or possession thereby consent that the title to such fish shall be and remain in the state of California for the purpose of regulating and controlling the use and disposition of same after such catching, taking or killing, except that the title to such fish legally taken shall vest in the person so taking or possessing them, subject to the restrictions and provisions of law."

It follows that if the fish were taken in violation of law, the fisherman who caught them acquired no title thereto, and even if they were taken lawfully, a sale thereof to

defendant for use in its reduction plant would convey no title thereto, and the title would still remain in the state. The use of fish which was admittedly made by the defendant herein was not merely a violation of prohibitory provisions of a statute, but was also a wrong committed against the property right of the plaintiff. It was such an obstruction to the free use of property as to interfere with the comfortable enjoyment thereof by the people of the state of California and as such constituted a nuisance. *People v. Truckee Lumber Co.*, supra; *People v. Stafford Packing Co.*, supra. Under these circumstances, it cannot be said that such use of fish by the defendant did not or will not cause any loss or damage to the plaintiff, and this finding is therefore contrary to the evidence.

[16] This brings us to the question whether or not the damage and injury so inflicted upon the plaintiff, and which the defendant admittedly threatens to continue to so inflict, is or will be irreparable in such sense as to entitle the plaintiff to injunctive relief. This question is so intimately bound up with the question of the availability of an adequate remedy at law that the two may well be considered together. The court found:

"It is not true that the plaintiff has no plain, speedy, and adequate remedy at law. * * *

As we pointed out in the *Stafford Case*, supra, this is in the first instance a question for the trial court, and if the evidence is conflicting, or if opposing inferences may reasonably be drawn therefrom, it still remains a question of fact for the trial court. There still remains for review upon appeal, however, the question whether there is any substantial evidence to support the finding thereon. The court also found:

"That the supply of sardines in the Bay of Monterey, and generally along the Pacific Coast, is practically inexhaustible, and that the quantity heretofore taken from the Bay of Monterey during the seasonal run of sardines has not appreciably depleted said species of fish, but on the contrary said species is upon the increase."

Appellant vigorously assails this finding as unsupported by, and contrary to, the evidence. But we are inclined to disagree with this contention. There was evidence that the supply of sardines in the vicinity of the Bay of Monterey had not been appreciably depleted up to the time of trial. There was also evidence to the effect that the size of the catch in this vicinity has increased since 1919. There was no evidence that the supply is practically inexhaustible or that the species is on the increase, except as these facts might be inferred from the testimony above adverted to. There was also testimony, not substantially contradicted, to the effect that if unrestricted fishing of sardines

in the coastal waters of this state for the reduction thereof into fertilizer and poultry food is permitted, the supply will not merely be depleted, but will be practically exhausted as a result thereof. But as this was in the nature of opinion evidence and as the facts upon which the opinion was predicated are nowise conclusive, we are not prepared to say that the trial court was bound to accept this testimony at its face value. We conclude that this finding is not unsupported by the evidence, but we do not regard it as determinative of the present question. The only other remedy suggested by respondent as available to appellant herein is an action at law for damages. It is apparent that the amount of damages which would compensate plaintiff for the destruction of its fish and the diversion thereof to uses other than human consumption would be extremely difficult, if not impossible, of ascertainment. This is particularly true in the light of the circumstances that the state owns the fish, not in a private or proprietary capacity, but in its sovereign capacity and as a trustee for the people of the state.

[17-19] It is further apparent that to relegate the state to an action for damages would be to defeat pro tanto the legislative policy of conserving the fish of the state for human consumption. As was suggested in *Hulbert v. California, etc., Cement Co.*, 161 Cal. 239, 118 P. 928, 38 L. R. A. (N. S.) 436, to permit the defendant to continue the taking and destruction of the property of plaintiff even though the defendant be required to pay the full value thereof as damages, would be in effect to allow and to legalize the unauthorized seizure and taking of property for a use other than a public use. The remedy which was suggested in the *Stafford Case*, supra, as an adequate remedy at law, to wit, the revocation of defendant's permit, is inapplicable herein because this defendant has no permit which is subject to revocation. It is operating without a permit and in violation of the law. The circumstance that it may be prosecuted criminally for a violation of the penal provisions of the statute affords no adequate remedy for the civil wrong, which consists of an invasion of plaintiff's property right. *People v. Truckee Lumber Co.*, supra; *People v. Stafford Packing Co.*, supra. We conclude that there is no adequate remedy at law available to the plaintiff herein, and this conclusion renders it unnecessary to consider plaintiff's contention that under subdivision 1 of section 526, Code of Civil Procedure, it is not required to show great or irreparable injury in order to entitle itself to injunctive relief. The finding of the trial court "that large quantities of the sardines which have been accepted and received by the defendant were unfit for hu-

man consumption * * *" is immaterial in the light of the fact that it was proven by uncontradicted testimony and expressly admitted by defendant that it was also engaged in receiving and using in its reduction plant large quantities of fish which were fit for human consumption.

For the reasons above indicated, the judgment is reversed.

We concur: SHENK, J.; SEAWELL, J.; RICHARDS, J.; WASTE, J.; LENNON, J.; LAWLOR, J.

70 Cal. App. 724

NEW YORK OVERSEA CO., Inc., v. WARFIELD-PRATT-HOWELL CO.
(Civ. 5081.)

(District Court of Appeal, First District, Division 2, California. Jan. 24, 1925.)

1. Sales ⚡54—Agreement of parties in contract of sale will be given full effect.

Where contract of sale is simple and unambiguous, agreement of parties will be given full effect.

2. Sales ⚡71(3)—Contract to sell 200 tons, 10 per cent. under or over, held to confer option on seller within limits defined.

Under contract to sell about 200 tons of sugar defining "about" as 10 per cent. under or over, seller held to have option of delivering within quantitative limits expressed, in view of Civ. Code, §§ 1448, 1449.

3. Sales ⚡71(3) — Bad faith not involved, where seller merely insisted on full benefit of contract.

Under contract for 200 tons of sugar, 10 per cent. under or over, insistence of seller on delivering 220 tons, held not to involve element of bad faith, although market value at time of delivery was less than contract price, as seller was merely insisting on full benefit of contract.

4. Sales ⚡71(3)—Seller entitled to recover, where only 200 out of 220 tons offered were accepted.

Under contract for sale of about 200 tons of sugar, "about" being defined in contract as 10 per cent. under or over, seller held entitled to recover, in action for damages for breach, where only 200 out of 220 tons offered were accepted.

5. Appeal and error ⚡842(2)—Conclusion of law, stated as finding of fact, not binding on appellate court.

In action for damages for breach of contract of sale, finding as to amount required to be delivered under contract, though stated as finding of act, is not binding on appellate court; it being merely erroneous conclusion of law.

Appeal from Superior Court, City and County of San Francisco; John L. Hudner, Judge.

Action by the New York Oversea Company, Inc., against the Warfield-Pratt-Howell Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions to render judgment for plaintiff.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant.

Ira S. Lillick and Theo. M. Levy, both of San Francisco, for respondent.

LANDGON, P. J. This is an appeal by the plaintiff from a judgment against it in an action brought to recover something over \$5,000, damages suffered by reason of the failure of defendant to accept and pay for 20 tons of sugar, alleged to have been purchased by said defendant from the plaintiff. The only question presented at the trial and upon appeal is as to whether the quantity of sugar in question was purchased by defendant under the admitted contract between the parties. This contract contained the following provisions pertinent to our inquiry: After naming the buyer and seller, and the commodity sold, it continued:

"Quantity: (About) two hundred (200) tons (each 2,240 pounds)."

The price was then specified and other conditions, immaterial here, after which appears the following:

"It is understood that, where the word 'about' appears in this contract, it shall mean 10 per cent. over or under."

Many of the facts were agreed to by stipulation of the parties. No question is made as to the quality of the sugar nor as to the fulfillment of any of the conditions binding upon the seller, and it is agreed that, upon the arrival of the vessel containing the sugar, the plaintiff tendered to the defendant 220 tons of the same. Two hundred tons were accepted and paid for by the defendant. However, the price of sugar had decreased between the time of the signing of the contract and the arrival of the sugar in San Francisco, and the defendant objected to accepting the maximum amount called for by the contract. It was agreed that the 20 tons of sugar in dispute should be sold at the market price and the defendant's liability for the difference between that amount and the price it had contracted to pay for the sugar should be submitted to the court.

[1] The trial court concluded that the contract provisions hereinbefore quoted obligated the defendant to accept only 200 tons of sugar. Respondent seeks to support this decision by citing cases in which such terms as "about" and "more or less" were used in connection with the specification of an amount of merchandise, but in all of those cases the definition of such terms was not agreed upon by the parties and therefore the contracts presented some ambiguity,

some opportunity for judicial construction. Such cases are not in point here, because, as appellant points out, the parties have exactly defined their terms, and such definition is as binding a part of their contract as any other part. There is no situation presented in the instant case which invites construction of the contract. The contract is simple and unambiguous, and the invariable rule in this and every other jurisdiction, under such circumstances, is to give full effect to the agreement of the parties.

[2] It is appellant's position that the contract in this case gave the seller an option to deliver any amount of sugar between 180 and 220 tons. Reliance is placed upon the following cases: *Wheeler v. New Brunswick & Canada Railroad*, 115 U. S. 29, 5 S. Ct. 1061, 1160, 29 L. Ed. 341, in which it was said:

"We concur with the circuit court in holding that, when *Wheeler & Co.* say we have bought of you (the railroad company) 'from 2 to 600 tons for delivery in New York or New Haven between August 1st and October 1st,' they agreed to accept any amount of old rails between those limits. The company was selling old rails. It knew that by August it would have 1,000 tons. It did not know how much more they would have by October 1st. It intended to secure the sale of what it might have, between 200 and 600 tons. Besides, as it was bound to do the first act in performance of the contract by delivering the iron, the option, if there was one, was with the railroad company."

Another case closely analogous to the present one is *Standard Sugar Refinery v. Castano* (C. C.) 43 F. 279. There the contract was for a sale of 700 to 800 tons of sugar. The seller chartered a vessel which carried more than 800 tons of sugar. When the vessel arrived the price of sugar had risen and the seller tendered the buyer 700 tons of sugar out of the cargo. The buyer claimed that it was entitled to more than 700 tons, but accepted 700 tons and litigated his right to a larger amount. The court said:

"The only question in this case is whether the plaintiff is entitled to recover any damages for breach of the contract which was made. The contract called for a cargo of from 700 to 800 tons of sugar. It appears that 700 tons of sugar were delivered to the plaintiff at the contract price. * * * I am of opinion, as the defendants might have performed their contract by shipping a cargo of 700 tons, that in assessing damages for a breach of the contract they may select that alternative which is the least burdensome to themselves."

In the case of *Pennsylvania Sugar Co. v. Czarnikow-Rionda Co.*, 245 F. 913, 158 C. C. A. 201, the sale was of 25,000 to 30,000 bags of Cuban sugar. In the correspondence between the parties the word "cargo" was used. The seller shipped 32,000 bags from Cuba to Philadelphia. The price of sugar having increased before the arrival of the same,

the buyers claimed that the use of the word "cargo" entitled them to more than 25,000 bags. The court decided against this contention and said:

"And this leads to the question, How much sugar did the Pennsylvania Company buy? If the word 'cargo' were not in the contract, the answer would be plain, namely, from 25,000 to 30,000 bags, at the seller's option."

In the case of *Illinois Glass Co. v. Three States Lumber Co.*, 90 Ill. App. 599, the sale was of 3,000,000 to 4,000,000 feet of lumber. The court there said:

"We can discover no ambiguity in the contract, and it seems to us remarkably clear and free from any fault of that character. Inasmuch, then, as appellant's counsel have argued the case upon the theory that by the terms of the contract appellant had a legal right to call upon appellee to deliver to appellant, free on board of the cars at Alton, as well as at Cairo, 4,000,000 feet of lumber, and upon failure to so make the delivery, appellee became liable to appellant for a breach of the contract, and as appellee's counsel have argued the case upon an exactly opposite theory as to the delivery of the extra 1,000,000 feet over 3,000,000 feet, we feel it may be unjust to the parties not to consider and determine the only question actually raised in the case by them, which is, with which party did the option rest, to complete the sale of the 1,000,000 feet of lumber above 3,000,000 feet? It is well-settled law, that parties may make contracts binding only on one side at the time when entered into, but which may thereafter become binding on both sides at the option of one of the parties to it, and the contract sued on in this case is of that character; but the option to make the contract complete was not given to either party in express terms, and assuming for the present that, from anything appearing in the contract, it was not given by implication, it remains only for the law to declare with whom the option rests. On this question there seems to be scarcely any disagreement among the authorities, as substantially all hold to a rule that would give the option to appellee, since it would have to do the first act to make the contract complete, by delivering the lumber"—citing many authorities.

It seems well settled by the foregoing authorities that, where parties make a contract for the purchase and sale of merchandise between certain limits, the option is with the seller to determine the amount to be delivered by him within those limits. Upon the same principle, when parties have used the word "about" in their contract, and have exactly defined such term, the option is with the seller to deliver within the quantitative limits expressed by the definition of such term. It is said in *Williston on Sales*, § 464:

"The addition of the qualifying words 'about,' 'more or less' and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight. If, however, the qualifying words are supplemented by other stipulations or

conditions which give them a broader scope or a more extensive significance, then the contract is to be governed by such added stipulations or conditions."

And now coming to our own state, appellant cites the case of *Jacobson Reimers Co. v. Tozai Co.*, 42 Cal. App. 178, 183 P. 466. There the contract was for the purchase and sale of choice dressed turkeys "numbering from 200 head up to 1,200." No turkeys were delivered and action was brought for damages for breach of contract. The court said:

"What then, is the rule governing alternative obligations? Counsel seem to have explored the cases and the text-books with diligence for light, and the written opinion of the learned trial judge shows that he examined with much care the authorities upon the question. The provisions of our Civil Code seem to have been overlooked, although they apparently state the rule applicable to the present case:

"If an obligation requires the performance of one of two acts, in the alternative, the party required to perform has the right of selection, unless it is otherwise provided by the terms of the obligation." Civ. Code, § 1448.

"If the party having the right of selection between alternative acts does not give notice of his selection to the other party within the time, if any, fixed by the obligation for that purpose, or, if none is so fixed, before the time at which the obligation ought to be performed, the right of selection passes to the other party." * * * Id. § 1449.

"Referring to the number of turkeys to be delivered, the language of the obligation is, 'numbering from 200 head up to 1,200,' and, as to the time of delivery, the obligation is 'between now (its date) and Thanksgiving' (November 29th). Plainly, the statute gave defendants the right to deliver any number of turkeys from 200 to 1,200 'between' the date of the obligation and November 29th. Defendants, admittedly, neither offered to nor did deliver any number of turkeys 'between now and Thanksgiving,' or at all, but, as the court found, refused to deliver any. In such case, by the terms of the statute, 'the right of selection passes to the other party.'"

There is no claim that the election as to the quantity of sugar ever passed to the buyer in the instant case, for it was stipulated that, upon the arrival of the sugar at San Francisco, the seller tendered to the buyer 220 tons.

It would seem that the citation of further authority is unnecessary, but it is interesting in considering the question before us to find our position sustained by an English case closely analogous to the instant case. In *re Thornett and Fehr, etc.*, [1921] 1 King's Bench, 219. There the contract was for the sale of "200 tons, 5 per cent. more or less" of tallow. The court said:

"The third question is whether, as a matter of law, the arbitrators ought to treat the contract as being a contract for 200 tons, or whether they are at liberty at their discretion to treat it as a contract for 190 tons or 210 tons or any

number of tons falling between those limits. The answer to that question is that the contract is for the number of tons specified in the document; that is, for '200 tons, 5 per cent. more or less.' That means that the sellers would be performing their obligation under the contract if they delivered 5 per cent. less than the 200 tons or 5 per cent. more than the 200 tons. It is a provision which is inserted into the contract for the sellers' protection, and it gives them a margin within which to deliver, so that they are not bound to deliver exactly 200 tons, but within 5 per cent. of the quantity, whether more or less. Their legal obligation under the contract was to deliver at least 190 tons, and if they had delivered 190 tons, they would have performed the contract; that is to say, they would have delivered the quantity which could be enforced against them under the contract. In my opinion the damages which can be claimed against the sellers in this case are not damages for nondelivery of 39 tons, the balance between 161 and 200 tons, but for nondelivery of 29 tons allowing for the 5 per cent. less than the 200 tons. Although one is naturally much impressed by the view of the board of appeal who are familiar with contracts of this kind, I do not think we can give effect to their view that the phrase '5 per cent. more or less' operates only to cover incidental or unimportant variations from the quantity stated in the contract. There could not be an inquiry if the sellers had delivered within 5 per cent. more or less of the 200 tons as to whether the delivery of the 5 per cent. more or less was occasioned by accident or inadvertence or whether it was a deliberate act. The truth is that it was intended by the contract to give the sellers an option of delivering either 5 per cent. more or 5 per cent. less than the 200 tons, or any quantity between those limits."

[3] The contention of the respondent in the case before us that the tender of the maximum amount of sugar after the price had decreased was evidence of bad faith is without legal force. The most that can be said of this aspect of the case is that it indicated a lack of generosity; but we cannot charge a seller with bad faith in a legal sense because he insists upon the full benefit of a contract which he has made. Such procedure is the usual course of business and the buyer must have known when he signed the contract that the seller would probably elect to furnish the minimum or maximum amounts called for thereunder according to whether the price of sugar increased or declined. There is no element of either good or bad faith involved in the transaction, since the seller is merely insisting upon the express and unambiguous provisions of his contract with the defendant.

[4, 5] The findings of fact are such as to warrant the entry of a judgment thereon for the appellant herein, the plaintiff in the trial court. They follow, for the most part, the stipulation of the parties as to the matters therein recited, including the making of the contract, its terms, the tender of 220 tons

of sugar and payment for 200 tons, the difference of \$5,095.94 between the contract price of 20 tons of sugar and its selling price in the open market after the refusal of the defendant to accept the same. The finding that 2,009 bags of sugar containing approximately 200 tons were marked with certain letters, while the remaining 20 tons tendered to defendant were marked with different letters is immaterial. Respondent urges this circumstance upon our attention as an evidence of bad faith; but, as we have stated, we do not consider such an issue involved in the case. The statement in the findings that the sale between the parties provided for by the terms of the contract was for 200 tons of sugar is a conclusion of law. We are of the opinion that no judicial construction of this contract was permissible since its terms are clear and unambiguous, and it is also true that any conclusion as to its legal effect is not binding upon this court as a finding of fact.

The findings of fact binding upon appeal demand a judgment for the appellant for \$5,095.94. The judgment is reversed, with directions to the trial court to enter a judgment for plaintiff in accordance with the views herein expressed.

We concur: STURTEVANT, J.;
NOURSE, J.

70 Cal. App. 767

CALIFORNIA LAW & ADJUSTMENT CO.
v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (Civ. 4996.)

(District Court of Appeal, Second District,
Division 1, California. Jan. 28, 1925.)

1. Justices of the peace $\S$ 167(3)—Statute held to authorize dismissal of appeal from justice court, and not of action.

Code Civ. Proc. $\S$ 981a, relating to dismissal, where party appealing from justice court fails to bring appeal to trial within one year, refers to a dismissal of the appeal, and not of the action, notwithstanding actual words of act.

2. Justices of the peace $\S$ 166(3)—Petitioner held estopped from demanding dismissal of appeal from justice court, not brought to trial within required time.

Petitioner held estopped from demanding under mandatory provisions of Code Civ. Proc. $\S$ 981a, a dismissal of an appeal from justice court, not brought to trial as required, within one year from date of filing of appeal, where petitioner himself before the expiration of the year caused the case to be set after such expiration.

Original application for writ of mandate by the California Law & Adjustment Company against the Superior Court of the County of Los Angeles and Elliot Craig as Judge

thereof. Writ denied, and proceeding dismissed.

Earle P. Thompson, of Los Angeles, for petitioner.

CONREY, P. J. On petition for writ of mandamus to compel the dismissal of an appeal from a justice's court.

[1] According to section 981a of the Code of Civil Procedure, added to that code by the Legislature at its 1923 session, it becomes the duty of a superior court to dismiss any appeal from a justice's court, "where the appealing party fails to bring such appeal to trial within one year from the date of filing such appeal in said superior court, unless such time be otherwise extended by a written stipulation by the parties to the action filed with the clerk of the superior court to which the appeal is taken." The actual wording of the section is that all such actions must be dismissed; but it is settled by decision, based upon a consideration of the context and of the purposes of the enactment, that the dismissal referred to and intended is a dismissal of the appeal and not of the action. *Meier v. Superior Court* (Cal. App.) 227 P. 490, 493.

[2] The petitioner here shows that in September, 1923, in a justice's court of Los Angeles township, it obtained judgment against one Hiro Kakiuchi in the sum of \$210.22; that the defendant appealed from said judgment on questions of both law and fact; that the appeal papers were filed in the superior court on October 17, 1923; "that on the 3d day of December, 1923, the attorney for petitioner caused said case to be set for trial in the respondent court on the 4th day of December, 1924." Petitioner further alleges that on December 4, 1924, when the case was called for trial, petitioner moved for dismissal of the appeal upon the ground that the defendant had failed to bring the appeal to trial within one year from the date upon which the appeal had been filed; that respondent court denied said motion, and the trial of said action then proceeded, and judgment was given in favor of the defendant.

Petitioner says that the appealing party failed to bring the appeal to trial within the required time limited by the statute, and that the time for trial was not otherwise extended by any written stipulation by the parties to the action filed with the clerk of the superior court. Upon these facts petitioner claims that he is entitled to a writ of mandate requiring that respondent court vacate its judgment rendered at the trial in the superior court, and dismiss the appeal from the justice's court.

It must be conceded that the section 981a is mandatory in its requirement of dismissal of an appeal under the conditions stated therein, and that to bring an appeal to trial is more than merely to cause it to be set for trial. *Boyd v. Southern Pacific R. R. Co.*

185 Cal. 344, 346, 197 P. 58. Nevertheless we think that the writ ought not to issue. It was the petitioner himself who, at a time prior to the expiration of the year named in the statute, caused the case to be set for trial on December 4, 1924, which was after the expiration of the year. If such action on the part of the plaintiff, shown by the record of the court, and now admitted by him in his petition, is not the legal equivalent of a written stipulation on his part duly filed with the clerk, then at least petitioner should be estopped to take advantage of the defect.

It appearing to us that the petition does not show a right to the demanded relief, it is ordered that the said petition be denied, and the proceeding is dismissed.

We concur: HOUSER, J.; CURTIS, J.

70 Cal. App. 732

BROWN et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 4806.)

(District Court of Appeal, Second District, Division 2, California. Jan. 26, 1925.)

1. Certiorari $\hookrightarrow$ 70(1)—Final "judgment" rendered, when announced by court and entered on minutes.

In certiorari proceeding where no issue of fact was tendered, final judgment *held* rendered, where court ordered that writ "be and is hereby denied," as this completely disposed of proceeding; "judgment" being not what is entered, but what is ordered and considered, and being defined under Code Civ. Proc. § 577, as "the final determination of the rights of the parties in an action or proceeding."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judgment (In Law).]

2. Judgment $\hookrightarrow$ 270—Judgment has full force and effect on rendition, irrespective of entry.

Judgment has full force and effect as final judgment on rendition, irrespective of entry in judgment book, which is mere ministerial act of clerk.

3. Judgment $\hookrightarrow$ 282 — Judgment need not be signed by judge.

Signature of judge gives no additional validity to judgment, being merely to afford clerk a sure means of correctly entering what court has adjudged which is not necessary, where judgment as pronounced and spread upon minutes is in itself a sufficient guide to enable clerk to enter correctly in judgment book.

4. Judgment $\hookrightarrow$ 271—Clerk held to have duty to enter final judgment.

In certiorari proceeding where court rendered final judgment, denying the writ, clerk *held* to have duty of entering same in judgment book, as such judgment is not in that class mentioned in Code Civ. Proc. § 581.

5. Mandamus ☞ 14(1)—Clerk cannot be compelled to enter judgment, where no demand was made.

Where court had rendered final judgment, but clerk had not entered it in judgment book, he could not be compelled to do so by writ of mandate, where it did not appear that any demand had ever been made upon him, or that he had refused.

6. Mandamus ☞ 152—Clerk cannot be compelled to enter judgment in proceeding against judge alone.

In proceeding for writ of mandate to compel judge to enter judgment which he had rendered in judgment book, which was duty of clerk, latter could not be compelled, where he was not party to proceeding.

7. Evidence ☞ 82—Presumption is that court will do what law demands of it.

Presumption is that court will do what law demands of it, as and when the occasion arises.

Application by A. C. Brown and others for a writ of mandate against the Superior Court of California in and for the County of Los Angeles and another. Denied.

Bauer, Wright & Macdonald, Alexander Macdonald, and Henry R. Schultheis, all of Los Angeles, for petitioners.

Bruce Mason and Denio & Hart, all of Long Beach, for respondents.

FINLAYSON, P. J. This is an original application to this court for a writ of mandate to compel the superior court for Los Angeles county, and the Hon. C. W. Guerin as judge thereof, to cause a formal judgment to be signed and entered in a certiorari proceeding wherein it was sought to review the action of the city council of the city of Long Beach in an annexation matter.

The application for the writ of mandate discloses the following: The petitioners here were the petitioners in the certiorari proceeding. On the day when they filed their application in the superior court for the writ of certiorari that court made an order, directed to the city council of the city of Long Beach, ordering that body to show cause why the writ of certiorari should not issue. A hearing on the order to show cause was had, the question whether the writ should issue was argued and submitted, and on May 29, 1924, the court caused an order to be entered on its minutes as follows:

"Petition for writ of certiorari, heretofore submitted, in Department 25, Hon. C. W. Guerin then presiding, it is now ordered that the Writ of Certiorari be and the same is hereby denied."

Thereafter, petitioners, on notice duly served and filed by them, moved the superior court to sign and to cause to be filed and entered a formal judgment denying their ap-

plication for the writ of certiorari. This the court refused to do. The clerk of the superior court has not been made a party to the present proceeding. It does not appear that any demand was ever made upon the clerk to make entry in his judgment book of the judgment which was announced by the court and spread upon its minutes; nor does it appear that he has ever refused to make such entry.

[1-3] Petitioners contend that the order which the superior court caused to be spread upon its minutes denying the writ of certiorari is not a final judgment, and that they are entitled to have such final disposition made of the proceeding, by way of a formal judgment, as will enable them to take an appeal. Respondents, on the other hand, contend that the order which the court made and caused to be entered in its minutes is a final judgment, and that its entry in the judgment book is not a duty which the law imposes upon the court or the judge thereof, but is a ministerial act which the law specially enjoins upon the clerk as a duty resulting from his office.

We think that a final judgment was made by the court, i. e., was "rendered," when the order of May 29, 1924, was announced and entered in the minutes. "A judgment is the final determination of the rights of the parties in an action or proceeding." Code Civ. Proc. § 577. No answer was filed in the certiorari proceeding, and no issue of fact was tendered. Consequently no findings were required, and therefore the judgment was "rendered" when the decision was announced by the court and spread upon its minutes. *Crime v. Kessing*, 89 Cal. 478, 488, 26 P. 1074, 23 Am. St. Rep. 491; *Brownell v. Superior Court*, 157 Cal. 703, 706, 707, 109 P. 91; *Smith v. Ross*, 57 Cal. App. 191, 207 P. 55. Its entry in the judgment book is not essential to its effectiveness.

The Code recognizes that the "rendition" of a judgment and its "entry" are different stages which operate as initial points from which other acts may be begun or other rights acquired. *Gray v. Palmer*, 28 Cal. 419, 420. Thus the right to issue execution attaches from the time of the entry of the judgment (Code Civ. Proc. § 681); but an appeal is effective if taken at any time after the rendition of the judgment, but not later than 60 days after its entry. (Section 939, Code Civ. Proc., as amended in 1915 [St. 1915, p. 205]). A like provision is contained in section 1715. See *Estate of Stone*, 173 Cal. 675, 161 P. 258. Though the statute makes the entry of the judgment the initial point for the commencement of some acts or for the acquirement of some rights, and its rendition the initial point for the commencement of other acts or the acquirement of oth-

er rights, the judgment has full force and effect as a judgment, regardless of the mere ministerial act of entering it in the judgment book. Mr. Freeman, in his work on Judgments, declares (vol. 1, § 38) that—

“A judgment is not what is entered, but what is ordered and considered.”

The judgment is the judicial act of the court; its entry in the judgment book, which affords the highest record evidence of its existence, is but the ministerial act of the clerk. That which the court performs judicially, or orders to be performed, is not to be avoided by the action or want of action of the court's ministerial officers; and, if the judgment as rendered finally determines the rights of the parties to the action or proceeding, it is as complete when it is pronounced by the court as when it is entered and recorded by the clerk as required by the statute. In *re Cook*, 77 Cal. 220, 17 P. 923, 19 P. 431, 1 L. R. A. 567, 11 Am. St. Rep. 267; *Id.*, 83 Cal. 415, 23 P. 392; *Otto v. Long*, 144 Cal. 144, 146, 77 P. 885; In *re Clarke*, 125 Cal. 388, 395, 58 P. 22; *Fresno Estate Co. v. Fiske*, 172 Cal. 583, 597, 598, 157 P. 1127. Nor is it necessary that the judgment be signed by the judge. The judge's signature gives it no additional validity. 14 Cal. Jur. p. 914; *Crim v. Kessing*, *supra*. The principal object of the judge's signature is to afford the clerk a surer means of correctly entering what the court has adjudged. But that was not necessary in the instant case, for here the judgment as pronounced by the court and as spread upon its minutes was in itself a sufficient guide to the clerk to enable that officer to perform his ministerial duty to enter the correct judgment in the judgment book. This is all that was necessary. *Broder v. Conklin*, 98 Cal. 364, 33 P. 211.

Since neither signing by the judge nor entry by the clerk is an essential prerequisite to the validity of a judgment, and since an appeal is not ineffective merely because it is taken before the entry of the judgment, it follows that the order which was spread upon the minutes of the court in the certiorari proceeding must be held to be a final judgment if its language amounts to a final determination by the superior court of the rights of all parties to the proceeding. The order contains all the effective words of a judgment. It declares that—

“It is now ordered that the writ of certiorari be and the same is hereby denied.”

Such language is in its nature and essence that of a final judgment. The order finally and entirely disposes of the whole case. It clearly shows that the court had determined the rights of the parties to the proceeding by declaring that the writ of certiorari be and

that it is denied. It completely disposes of the proceeding in which it was made, so far as the court which made it is concerned. As was said by Mr. Justice Shaw in *Dollenmayr v. Pryor*, 150 Cal. 3, 87 P. 616:

“The most verbose statement could not state the determination more accurately or effectually.”

Nothing whatever remained to be done except to enter the judgment in the judgment book. But that was a ministerial duty of the clerk, and no further judicial action was left for the court.

[4] If the clerk has not already entered the judgment which was rendered by the court in the certiorari proceeding, it is his duty to do so. That judgment is not a judgment of dismissal. It is not of the class of judgments mentioned in section 581 of the Code of Civil Procedure. As we have stated, no answer was filed by the defendants in the certiorari proceeding, and therefore no issue of fact was joined. At the hearing on the order to show cause, the superior court was called upon to try an issue of law. It determined that issue, with the result that it rendered a judgment to the effect that its writ of review do not issue. The situation is somewhat analogous to that which exists when the court renders a judgment for the defendant after having made its order sustaining a demurrer to the complaint without leave to amend. Such a judgment is not one of dismissal within the meaning of section 581.

[5, 6] But, though we think it the duty of the clerk to enter in his judgment book the judgment as pronounced by the court and entered in its minutes, we cannot compel that officer to make such entry—assuming that he has not already done so—and this for two reasons: First, it does not appear that any demand was ever made upon the clerk to enter the judgment, or that he has ever refused to make such entry; second, he is not a party to this proceeding. The person upon whom the duty is enjoined by the statute is a necessary party to the proceeding. *Peck v. Board of Supervisors*, 90 Cal. 384, 27 P. 301. A refusal by the clerk to enter the judgment would be in no sense a refusal by the court. *State ex rel. v. District Court*, 125 Minn. 522, 146 N. W. 480.

[7] It doubtless is true that, whenever the clerk refuses to enter the judgment as rendered, the superior court, whose officer he is, should order him to make the entry. If there were anything here to show that the superior court had refused to perform its duty to coerce a recalcitrant clerk, it is quite possible that we could compel that court to perform such duty by issuing our mandate directing it to order its clerk to enter the judgment. *Havens v. Stewart*, 7 Idaho, 298, 62 P. 682. See, also, the dissenting opinion

of Mr. Justice Harrison in *People v. Superior Court*, 114 Cal. 479, 46 P. 383. But until the clerk refuses to enter the judgment in the book kept by him for that purpose, no duty rests upon the superior court to take coercive measures with respect to that officer. The presumption is that the superior court will do what the law demands of it, as and when the occasion arises.

Our conclusion is that the application for the writ of mandate fails to show that either of these respondents has ever refused to perform any act which the law specially enjoins upon the court, or upon Judge Guerin as a duty resulting from his office as judge.

The alternative writ of mandate is discharged and the application for the peremptory writ of mandate is denied.

We concur: WORKS, J.; CRAIG, J.

70 Cal. App. 680

MYERS v. HARRINGTON et al.
(Civ. 2864.)

(District Court of Appeal, Third District, California. Jan. 22, 1925.)

1. Bastards ⚡16—No legal obligation on father to support illegitimate child prior to adoption of statute to that effect.

Prior to adoption of Civ. Code, § 196a, relating to action against father for maintenance of illegitimate child, there was no legal obligation resting on father of an illegitimate child to furnish it support, or give it an education.

2. Bastards ⚡54—To enforce obligation of father to support illegitimate child, parentage must be established.

To enforce obligation of father, under Civ. Code, § 196a, to maintain an illegitimate child, fact of parentage must be established.

3. Bastards ⚡69—Parentage, necessity of, and ability to support may all be determined in action against father for maintenance of illegitimate child.

In action against father, under Civ. Code, § 196a, to compel maintenance of illegitimate child, fact of parentage and question of necessity of support and ability to support may all be inquired into and determined in one proceeding.

4. Divorce ⚡310—Decree in divorce suit for maintenance of minor child a continuing one, and does not abate at death of parent against whose estate maintenance is made charge.

Where a decree has been entered in a divorce proceeding, pursuant to Civ. Code, § 138-140, providing for maintenance during minority, such decree is a continuing one and does not abate by death of parent against whose estate maintenance is made a charge.

5. Divorce ⚡293—To charge estate of father with maintenance of child, there must have been action for divorce and entry of final judgment therein.

The right to compel a father to support minor infant under Civ. Code, §§ 138-140, and remedies afforded thereby, are dependent upon an action for divorce and final judgment therein, and do not exist and cannot be enforced if by death of one of parents divorce proceedings abate prior to entry of judgment.

6. Descent and distribution ⚡1—Duty to public precedes enjoyment of bounty by devisees or heirs.

Duty to public precedes mere enjoyment of a bounty by devisees or heirs.

7. Descent and distribution ⚡1—Succession and transmission of property matter of legislative grant and not natural right.

The succession or transmission of property is a matter of legislative grant and not merely a natural right, and any property so taken may be charged by Legislature with any burden it may impose.

8. Executors and administrators ⚡429—Statutes giving right to sue estate of father for maintenance of child held not to be incorporated in statute relating to suit against father for maintenance of illegitimate child.

In view of Civ. Code, § 1428, and Code Civ. Proc. §§ 26 and 1493, right to sue an administrator or executor of an estate, as provided in Civ. Code, § 205, and Code Civ. Proc. §§ 1582, 1584, is a privilege extended by Legislature, and necessarily excludes all actions not mentioned, and hence, even though a correct construction of such statutes gives counties right to subject parent's estate to support and maintenance of minor child when he is about to become a public charge, it does not permit reading into Civ. Code, § 196a, relating to suit against father for maintenance of illegitimate child, similar grant of authority, as language of section 196a contains no provisions affecting estate of deceased person.

9. Bastards ⚡19—Proceedings relating to illegitimate children and their support legal and not equitable in nature.

Proceedings under Civ. Code, § 196a, relating to support of illegitimate children by putative father, are legal and not equitable in character.

10. Bastards ⚡31—At common law proceeding against father for maintenance of illegitimate child abated at death of father.

Under the common law, proceedings against putative father to compel maintenance of illegitimate child abated upon the death of putative father.

11. Bastards ⚡31—Common-law rule that action against father for maintenance of illegitimate child abates at father's death has not been changed.

The common-law rule that proceedings against putative father to require maintenance of illegitimate child abate on death of putative father has not been changed, and hence a

proceeding under Civ. Code, § 196a, abates at death of father.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by Jack Myers, by May Vaughn, guardian ad litem, against Tennent Harrington, administrator of the estate of Edward B. Myers, deceased, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Fred C. Peterson, of San Francisco (Alfred J. Hennessy, of San Francisco, of counsel), for appellant.

Atran & Sheets, of Colusa, for respondents.

PLUMMER, J. This action is based upon section 196a of the Civil Code, and is prosecuted for the purpose of securing a judgment or decree providing for the maintenance of an illegitimate minor child out of the estate left by its putative father. A demurrer filed by the defendants to the plaintiff's complaint was sustained without leave to amend, and from the judgment entered, following the sustaining of the demurrer, the plaintiff appeals.

The allegations of the complaint are to the effect that the plaintiff, Jack Myers, is an illegitimate child of Edward B. Myers and one Norine Vaughn; that the said Edward B. Myers died testate prior to the birth of the plaintiff herein; that, by the last will and testament of said Edward B. Myers, all of his estate, both real and personal, was devised to the defendant Jake Myers; that the mother of the plaintiff, Norine Vaughn, is without means to furnish the plaintiff adequate support, maintenance, and education suitable to his station in life, and that the sum of \$100 per month is necessary for said purpose, and that a charge should be placed upon the estate of the said Edward B. Myers, payable out of the same, until the said minor shall have reached the age of majority. A detailed description of the real estate left by the said Edward B. Myers at the time of his death is set forth in the complaint.

While the argument of counsel in this case has been both learned and interesting, a decision of the questions involved rests almost entirely upon the provisions of the Codes. Section 196a, Civil Code, relating to the support of an illegitimate child, reads:

"The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor illegitimate child, by his mother or guardian, and in such action the court shall have power to order and enforce performance thereof, the same as under sections 138, 139 and 140 of the Civil Code, in a suit for divorce by a wife."

Section 138 of the Civil Code, referred to in section 196a, empowers the court, during

the pendency of an action for divorce, or at the final hearing thereof, or at any time thereafter during the minority of the child of the marriage, to make such order for the custody, care, education, maintenance, and support of such minor child as may seem necessary or proper, and may at any time modify or vacate the same. Section 139 is similar in purport as to the power of the court to provide for maintenance. Section 140, Civil Code, relates to procedure, and also to the remedies which may be adopted to enforce the judgment or decree of the court by providing for the giving of security, the appointment of a receiver, or by other remedy applicable to the case. Section 205 of the Civil Code has for its purpose the enforcing of maintenance of minor children. It reads:

"If a parent chargeable with the support of a child dies, leaving it chargeable to the county, and leaving an estate sufficient for its support, the supervisors of the county may claim provision for its support from the parent's estate by civil action, and for this purpose may have the same remedies as any creditors against that estate, and against the heirs, devisees, and next of kin of the parent."

[1-3] Section 200 of the Civil Code is also called to our attention, but the fact that the mother of an illegitimate, unmarried minor is entitled to its custody, services, and earnings does not, we think, have any particular bearing upon the obligation imposed by section 196a, Civil Code. Prior to the adoption of this last-mentioned section there was no legal obligation resting upon the father of an illegitimate child to furnish it support or give it an education. In 1913, however, the Legislature of this state added this section to the Code and thenceforth it became the mutual obligation of both the father and mother. In the enforcing of the obligation, it is, of course, necessary to establish the fact of parentage. The section fixing this obligation upon the father of an illegitimate child does not, in and of itself, presuppose that a judgment decreeing the fact of parentage must first be had and obtained before any suit may be maintained for maintenance or support. There appears to be no valid reason why the fact of parentage and the question of the necessity of support and, also, of the ability to support may not all be litigated and determined in one proceeding. In other words, if the action can be maintained provided for under the terms of section 196a, all the facts and circumstances necessary to support a judgment or decree for maintenance and support may be inquired into and determined, and the enforcement thereafter of the judgment depends entirely upon the rights and interests which the illegitimate minor has acquired in and to the property of his putative father, and the liens or charges upon and against the property of the putative

father that may have been adjudged and decreed.

In divorce proceedings and the remedies there provided which are made applicable to actions seeking maintenance for illegitimate children, it has frequently been held that the power of the court is a continuing one until the minor child of which the court has jurisdiction requires no further aid or payment out of a parent's property, and it seems that this power does not necessarily terminate with the death of the parent whose property has been charged with such support. In *Stone v. Bayley*, 75 Wash. 184, 134 P. 820, 48 L. R. A. (N. S.) 429, the Supreme Court of Washington, in considering the statute of that state, which authorizes courts in divorce proceedings to make provisions for minor children, thus expresses its views:

"This statute clearly recognizes the power of the court to burden the property for the benefit of children. Under this statute we have repeatedly held that jurisdiction of the court was a continuing one 'so long as there is a minor child whose maintenance and welfare are provided for in the decree.' *Poland v. Poland*, 63 Wash. 597, 116 P. 2; *Fickett v. Fickett*, 39 Wash. 38, 80 P. 1134; *Dyer v. Dyer*, 65 Wash. 535, 118 P. 634. The power of the court is not confined to the imposition of a mere personal claim. *King v. Miller*, 10 Wash. 274, 38 P. 1020. In the absence of statutory inhibition, it is the general rule that such provisions for support do not necessarily terminate upon the father's death. 'A decree directing a father to provide for the support of his minor children until the further order of the court is not necessarily discharged by his death.'"

[4] The opinion of the Supreme Court of Washington is a learned and comprehensive one, fully supported by the authorities stated, and clearly establishes the rule that, when a decree has been entered providing for maintenance during minority, it is a continuing one and does not abate simply by the death of the parent against whose estate such maintenance is made a charge. The very terms of section 140 of the Civil Code include the idea of making provision for a continuing period by the requirement of the giving of security, or the appointment of a receiver, or by other remedy applicable. To the same effect is the rule laid down in section 309, *Ruling Case Law*, page 484, where it is stated:

"There is no sound reason why the estate of a father should not be charged with the obligation to provide support for his minor children after his death," etc.

[5] These remedies, however, are attendant upon the prosecution of an action for divorce and the entry of final judgment therein. "It is well settled that an action for divorce does not survive the death of either party." 1 Cal. Jur. p. 74, § 44. In such event, other provisions of the Code must be relied upon when-

ever maintenance is sought for minor children. The various provisions of the Code of Civil Procedure relating to the maintenance of the widow and minor children, or of the minor children, are the only ones which are peculiarly and particularly enforceable by and on the part of those directly interested, and for whose support and maintenance allowances or money payments are sought.

Our attention has been called to another section of the Civil Code, which, under certain contingencies, gives certain public authorities the right to prosecute actions for support of minor children. We refer to section 205 of the Civil Code, *supra*. It would seem that this section can only be invoked when the minor has become, or is about to become, a public charge, and has been left unprovided for by a deceased parent chargeable with its support. In this particular, we do not find that the Code makes any distinction between a legitimate and an illegitimate minor child, because, as we have seen, the first section of 196a charges the father as well as the mother with such support. The language is:

"The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances."

[6, 7] The word "must" is obligatory in its meaning and fixes the duty definitely, and under section 205, it would seem that unless the right is otherwise barred when such child has become, or is about to become, a public charge, the property of either one of the parents may be proceeded against for the purpose of reimbursing the public on account of the circumstances attendant on the support of such minor child. The section itself purports to reach out and give authority to take the estate of the deceased parent from the heirs, devisees, or next of kin. In other words, the duty to the public precedes the mere enjoyment of a bounty by devisees or heirs. It has been frequently held that succession or the transmission of property is a matter of legislative grant, and not merely a natural right, and hence it would follow that any property so taken may be charged by the Legislature with any burden that the wisdom of the Legislature may impose. The section with which we are dealing, however, is limited in its terms as to who may prosecute such an action. It will be observed that this right or privilege is given to the supervisors of the county and not to any one coming under the terms and provisions of section 196a of the Civil Code. Section 196a does not purport to reach out and charge any decedent's estate in its operation and effect. This is given by sections 138, 139, and 140 of the Civil Code, which are made applicable to the enforcement of section 196a, and, therefore, to the extent that they limit and circumscribe the power of the court, the power of the court

coming under section 196a is likewise limited and circumscribed. These sections, as we have seen, and by the authorities which we have cited, make the rights dependent upon, and the enforcement of such rights dependent upon the entry of a decree of final divorce, and do not exist and cannot be enforced if, by the death of one of the parents, the divorce proceedings abate prior to the entry of judgment.

[8] With these considerations in view, we come next to section 1582 of the Code of Civil Procedure relating to suits against executors and personal representatives. That section reads:

"Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates."

Section 1584, Code of Civil Procedure, also permits any person or his personal representative to maintain an action against the executor or administrator of any one, who, in his lifetime, has wasted, destroyed, taken or carried away or converted to his own use the goods or chattels of any person, or committed any trespass on real estate of such person.

Section 1493 of the Code of Civil Procedure specifies that all claims arising upon contract, whether due or contingent, etc., must be presented for allowance. These sections of the Code of Civil Procedure are the only ones authorizing persons or their personal representatives to maintain actions against executors or administrators. If the action does not arise upon contract, and is not one for waste or trespass, then it must have for its basis the enforcement of some specific lien or charge against the property of the deceased which is not cut off or released by the death of the person whose estate it is sought to make liable for the satisfaction of such lien or charge. If such lien or charge does not exist, these sections of the Code do not provide for their creation and subsequent enforcement. Section 196a, Civ. Code, declares a duty and then provides for the enforcement of the obligation. Section 1428 of the Civil Code divides obligations into two classes: (1) One arising upon the contract of the parties; and (2) one arising by operation of law. Either of these obligations are enforceable by civil action. Section 26 of the Code of Civil Procedure, in relation to obligations, reads: "An obligation is a legal duty, by which one person is bound to do or not to do a certain thing, and arises from: 1 Contract; or, 2. Operation of law." In limiting the kind of actions on obligations which may be prosecuted against executors or

administrators, the right to sue is awarded only upon actions founded upon contracts, and nothing is said in relation to allowing such actions which arise only by operation of law. The granting of a right to sue an administrator or executor is a privilege extended by the Legislature and we think that when the Legislature sets forth what actions may be prosecuted, it necessarily excludes all those not mentioned.

The fact that section 205 of the Civil Code and section 1582 of the Code of Civil Procedure became the law of this state at the time the Codes were adopted, and therefore are to be read together in ascertaining the intent of the Legislature and the powers granted, do not in any wise add to the provisions of section 196a of the Civil Code. That section gives a substantive right, and at the same time incorporates three sections of the same Code in providing remedies, or the manner of enforcing the granted rights. Thus, even though the correct construction of section 205, Civil Code, and section 1582, Code of Civil Procedure, gives to the counties acting through boards of supervisors the right to subject a parent's estate to the support and maintenance of a minor child when he is about to become a public charge, or has become a public charge, it does not permit the reading into section 196a, Civil Code, of a similar grant of authority, when the language of that section contains no provisions affecting the estate of a deceased person similar to those found in section 205, Civil Code. There are certain cases decided by the Supreme Court of Indiana which uphold the right of an illegitimate child to maintain an action similar to the instant case after the death of the putative father, but these decisions are all founded upon section 22 of the act of 1852 of that state (2 Rev. St. 1852, p. 490), which reads:

"In case of the death of the putative father of such child, either before or after the commencement of prosecution, * * * the right of action shall survive and may be prosecuted against the personal representative of the deceased with like effect as if such father were living."

Our attention has been called to the cases of *Major v. Walker*, 23 Cal. App. 465, 138 P. 360, and *Lininger v. Bostford*, 32 Cal. App. 386, 163 P. 63, where the actions were held maintainable against the stockholders in a corporation for and on account of liabilities incurred through torts committed by the corporation. These cases, however, hold that the liability is in the nature of a contract; that the Constitution of the state and the acts of the Legislature relating to the liability of stockholders constitute a part of the contract entered into by the stockholder whenever he purchases certificates of stock in a corporation, and, being in the nature of actions *ex contractu* do not abate and may be prosecuted under the express terms of sec-

tion 1582, Code of Civil Procedure, and the estates of deceased stockholders held liable for their proportionate share of the liability of the corporation of which they were members, even though the liability arises out of the tort committed by the corporation. In *Clark v. Goodwin*, 170 Cal. 527, 150 P. 357, L. R. A. 1915A, 1142, the court considered the question of whether an action could be maintained which sounded in tort after the death of the wrongdoer, the action being founded upon section 377, Code of Civil Procedure, and it was there held that upon the death of the wrongdoer the action abated, and also that section 385, Code of Civil Procedure, relating to the survival of actions, did not change the common-law rule as to the survival of causes of action and that where the cause dies with the death of the wrongdoer, there is no survival, unless expressly so provided by statute.

[9] It has been strongly argued that the proceeding relating to illegitimate children and the requiring of support thereof by the putative father are equitable in character by reason of the powers which the court having to do with such cases may exercise. But the real gravamen of the charge is a pure legal question. The fact of parentage and then the obligation for the support of the child, after this fact is established, is also a pure legal provision of the Civil Code, as found in section 196a. It is true that, after all the legal facts have been established and found, the court, in the enforcement of the judgment reached, after the entry of such judgment, exercises certain equitable powers, does not, in our opinion, change the purely statutory character of the action and of the obligation imposed.

[10] The proceeding under our Civil Code is a modified form of the bastardy proceedings which were punitive in character and subsisted prior to the creation of the civil remedies which we have been here considering. Under the common law, all such proceedings abate upon the death of the putative father. Considering this subject, we find in 1 *Ruling Case Law*, p. 40, § 37, the rule of the common law set forth as follows:

"Such proceedings will not survive against the personal representatives of the alleged father who dies pending the proceeding, in the absence of a statute to the contrary. The proposition finds no favor at the common law, and there is no fitness in the proceeding which would adapt itself to the principle of survivorship, it being criminal in form and an extraordinary means to compel a father to assist in the support of his illegitimate child or suf-

fer imprisonment as a penalty for his neglect to do so."

Other objections are set forth including the questionable policy of permitting a living woman to swear the paternity of her illegitimate offspring upon a person whose lips are closed in death.

An early case on this subject of abatement is that of *McKenzie v. Lombard*, 85 Me. 224, 27 A. 110. The Supreme Court of Maine there said:

"The question here is whether a bastardy proceeding survives against the personal representatives of a respondent who has died during the pendency of the proceeding in court before a trial has been had. We feel strongly assured that it cannot survive. The proposition finds no favor in the common law, and there is no statutory provision authorizing it. * * * The process, though held to be a civil proceeding, is criminal in form, and is an extraordinary means to compel a father to assist in the support of his illegitimate child, or suffer imprisonment as a penalty for his neglect to do so."

It is true the court also there said that no judgment was sought for or was obtainable against property, which is not the case under our Codes, but the nature of the action is the same, and differs only in the remedies provided. This case was followed by the Supreme Court of Michigan in *People v. Kemppainen*, 163 Mich. 186, 128 N. W. 183, 30 L. R. A. (N. S.) 1166. In the notes appended to this case we find that the North Carolina Supreme Court, the only other state where the precise question seems to have been presented, follows the same rule. Where the rule of the common law in relation to the abatement of such proceedings is not followed so far as we have been able to ascertain, it is because the statutes of the states have provided for survival of such actions and the prosecution thereof against personal representatives for the purpose of subjecting the estate of the deceased to the support of the illegitimate child.

[11] We find nothing in the acts of the Legislature of this state which leads us to the conclusion that the common-law rule as to the abatement of such proceedings upon the death of the putative father has been changed. It is for the Legislature and not the court to modify the harshness of the common law in this particular. The judgment of the trial court is hereby affirmed.

We concur: FINCH, P. J.; HART, J.

70 Cal. App. 708

WARD-LEWIS LUMBER CO. v. MAHONY.
(Civ. 4590.)

(District Court of Appeal, First District, Division 1, California. Jan. 23, 1925. Hearing Denied by Supreme Court March 24, 1925.)

1. Carriers ⇐56—Mere indorsement of non-negotiable bill of lading does not give transferee additional right.

Mere indorsement of nonnegotiable bill of lading does not give transferee additional right, in view of Civ. Code, § 2129b, and sections 2127a, 2127b.

2. Sales ⇐161—Shipment under unindorsed nonnegotiable bill of lading, consigned to shipper, held not delivery to buyer.

In action for breach of contract to purchase lath ordered for March delivery and shipped during such month, under a straight, unindorsed, nonnegotiable bill of lading, consigned to shipper and reaching destination April 6, *held* that there was no delivery in March or at all, title not passing to the buyer under such bill of lading but remaining in the shipper, in view of Civ. Code, § 2129b.

3. Sales ⇐176(3)—Buyer's right to object to nontransference of bills of lading held not waived by refusal to accept goods on other grounds.

Where buyer of lath refused to accept them because not shipped in time, he did not thereby waive his right to object that the bills of lading had not been transferred so as to enable him to obtain possession of the goods, Civ. Code, § 1501, and Code Civ. Proc. § 2076, not applying, question not being one of mode of performance but of total failure to deliver.

4. Sales ⇐378—Defense of nondelivery held sufficiently pleaded.

In seller's action for breach of contract to purchase lath, answer *held* sufficiently to plead defense of nondelivery where it denied that plaintiff delivered any lath in the state of the seller's domicile or elsewhere during the month set for delivery, or at all.

5. Sales ⇐161—"Delivery" of consigned goods requires transfer of possession so as to entitle buyer to demand goods from carrier.

"Delivery" to buyer of consigned goods must be such a transfer of the possession as will remove the goods from the dominion of the seller and entitle the buyer to demand the same from the carrier.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Deliver—Delivery.]

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by the Ward-Lewis Lumber Company against Andrew F. Mahony, doing business as the Andrew F. Mahony Lumber Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Samuel T. Bush, of San Francisco, for appellant.

Thacher & Wright and Harrison A. Jones, all of San Francisco (Thomas A. Thacher, of San Francisco, of counsel), for respondent.

KNIGHT, J. Plaintiff brought this action to recover damages for the alleged breach of a contract, wherein the defendant refused to accept and pay for two carloads of laths which, it is claimed, he agreed to purchase from plaintiff. The trial was had before the court sitting with a jury. At the conclusion of the evidence the jury, under the direction of the court, returned a verdict in favor of defendant, and judgment was entered accordingly. Plaintiff has appealed.

The respondent seeks to sustain said verdict and judgment upon two principal grounds, namely, the alleged failure of appellant to prove a delivery of the laths within the period of time fixed by the agreement, or at all, and that no valid contract was established.

At the time this transaction took place the corporation appellant, Ward-Lewis Lumber Company, was engaged in the wholesale lumber business at Portland, Oregon. The respondent Andrew F. Mahony, was sole proprietor of the Andrew F. Mahony Lumber Company, and was doing business under that fictitious name. J. C. McCabe and F. J. Heaphey were originally made parties defendant herein upon the assumption that they also were members of the firm of Andrew F. Mahony Lumber Company, but as against them the action was subsequently dismissed. Gritzmacher and Johnson of San Francisco, were lumber jobbers, operating through a representative in Portland, Oregon, named F. W. McCoy. On February 1, 1920, McCoy delivered to appellant in Portland an order from Gritzmacher and Johnson for three carloads of laths, calling for "March delivery. * * * Price f. o. b. cars del'd. on 25c rate. * * * Price: \$16.25 delivered by rail on 25c rate." The shipping directions were: "Ship to Andrew F. Mahony Lumber Co. Sacramento, Calif. Notify same Fife Bldg., San Francisco. Send invoice to Same. Address Fife Bldg., San Francisco, Calif. Make shipment March delivery." A carbon copy of said order was sent to respondent by Gritzmacher and Johnson. On February 3, 1920, appellant sent an acknowledgment of said order by mail to respondent as follows:

"Acknowledgment of Order.

"Ward-Lewis Lumber Co. Wholesale Lumber, Northwestern Bank Building, Portland, Oregon.

"February 3, 1920.

"Our order 269.

"Salesman G. & J., by F. W. McCoy.

"Invoice to Andrew F. Mahony Lumber Co., San Francisco, Calif.

"Freight rate, 25c.

"Consign to same, Sacramento, Calif.

"Terms regular.

"Route S. P. F. o. b. cars, 25c rate.

"We are entering your order as follows: Please check same carefully and if not correct notify us immediately.

"3 cars 1½" No. 1 fir lath.

"Price: \$16.25.

"For March delivery."

Stamped: "It is expressly agreed that any advance in freight rates for government tax on freight to be paid by consignee. Ward-Lewis Lumber Co., by A. G. L."

On February 25th Gritzmacher and Johnson, with the consent of respondent, modified said order as to the shipment of one carload of said laths, their letter to appellant in this respect stating:

"Will you please ship first car on this order and as early as possible to the San Leandro Mill & Lumber Company, San Leandro, Cal., invoicing same to us instead of to Andrew F. Mahony Lumber Company, as we have arranged with them to handle the car."

They also urged appellant to advance the shipping date of all three cars if possible, saying:

"We would be very glad to get them off our hands while the market here is in good shape, as we are somewhat fearful of a drop."

On February 28th Gritzmacher and Johnson again wrote to appellant giving directions as to the shipment of the remaining two cars, as follows:

"Please ship the other two cars to J. P. Muller, Sacramento, California, for diversion, invoicing same to Andrew F. Mahony Lumber Company as originally instructed."

Appellant, in a letter dated March 3, acknowledged receipt of the two letters last mentioned, stating they would make the corrections in the order as requested. On March 11, respondent telegraphed appellant as follows:

"Our customer cancels lath order with us so do not ship more than sixty thousand pieces to each car."

To which appellant replied, by letter, dated March 12th, saying:

"Will endeavor to ship you as small cars as possible on each of the cars of lath, which we have going out to you some time this month."

On March 31st respondent telegraphed appellant as follows:

"Gritzmacher advises two cars lath shipped third car being shipped to-day our order accepted for March delivery not March shipment will not accept lath now."

Answering appellant sent respondent the following telegram:

"Replying your wire thirty first car C & E I shipped March twenty seventh Car C & S one three three two five shipped thirtieth both to

apply or order two six nine Both shipments with bills of lading endorsed over to your customer which constitutes delivery. Will not accept cancellation."

On April 2, 1920, respondent received by mail the bills of lading for the two carloads of laths and immediately thereupon telegraphed appellant, saying:

"Replying your wire April first Refuse to accept lath shipped in car C & E I shipped March twenty seventh car C and S one three three two five shipped thirtieth ordered for March delivery and not March shipment. Returning bill lading to you by mail."

[1, 2] Appellant telegraphed in reply that it had referred the matter to Pacific Coast shippers' association and that if it, appellant, was within its rights it would expect respondent to take the laths; otherwise it would make other disposition of them. Both carloads of laths arrived in Sacramento on April 6, 1920, and were later disposed of to other parties under the direction of appellant for prices much lower than those fixed in the Mahony contract. The evidence further shows, however, that the laths were not shipped to respondent, nor to his order, but were consigned to appellant, Ward-Lewis Lumber Company, Sacramento, Cal., under straight nonnegotiable bills of lading, approved standard form of the interstate commerce commission, and there is no evidence whatever in the record to show that either bill of lading was ever transferred, or indorsed in any manner, by appellant to respondent. It would therefore appear that said laths were never released from appellant's possession or control; and therein we think, lies the fatal weakness of appellant's case.

Section 2127a of the Civil Code provides that a carrier is justified in delivering goods to one who is lawfully entitled to the possession of the same, or to the consignee named in a nonnegotiable bill for the goods, or to a person in possession of a negotiable bill, under the terms of which the goods are deliverable to his order, or which has been indorsed to him, or in blank by the consignee, etc. The section following, 2127b, fixes the liability of the carrier for a misdelivery. Section 2129b of the same code provides that a bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill, or to the goods represented thereby; but that a nonnegotiable bill cannot be negotiated, and the indorsement of such a bill gives the transferee no additional right. The only method, therefore, by which respondent might have obtained possession of the laths, was by proper transfer of the bills of lading by appellant, as required by said section 2129b of the Civil Code, and as already stated, no transfer or indorsement of any kind was ever made. It is true the telegram from appellant to respondent, dated April 1, 1920,

stated, " * * * Both shipments with bills of lading indorsed over to your customer which constitutes delivery * * *;" but the statements contained in that telegram cannot be accepted as proof of the fact of indorsement and if they were, mere indorsement of a nonnegotiable bill of lading would be ineffectual, and would confer upon the transferee no additional right. Section 2129b, Civ. Code, supra.

It is also true that the record discloses that the original bills of lading could not be produced at the trial, because the same were surrendered to the railroad company by appellant at the time the laths were finally taken from the cars and sold to other parties, and that in order to prove the contents thereof appellant accepted copies made and produced by respondent. Nevertheless, those copies wholly failed to show a transfer or any indorsement, and proof aliunde was not offered upon the subject. Under those circumstances, respondent was not entitled to nor could he have obtained the possession of said laths from the railroad company upon the arrival of the cars in Sacramento on April 6, 1920. For the reasons stated, we are of the opinion that appellant failed to establish a valid tender or delivery of said laths to respondent, either within the period of time fixed by the contract, or at all, and that the directed verdict and the judgment must be sustained upon that ground.

[3] Regarding this same point, further contention is made by appellant that respondent waived his right to object to the nontransfer of said bills of lading because his refusal to accept said laths was placed upon other grounds and that consequently appellant was given no opportunity to consummate the transfer (Civ. Code, § 1501; Code Civ. Proc., § 2076); also, that no such defense was pleaded. We believe the rule contended for by appellant is not applicable here for the reason that the question presented here is not one of the "mode of performance" of the contract, such as is mentioned in code sections cited, but one of a total failure to make delivery of goods sold; moreover, it would have been unavailing to appellant even if it had been granted further time to consummate the transfer of said bills, because when said bills were received by respondent, on April 2, 1920, the time fixed by the contract within which to make delivery had already expired.

[4] The defense of nondelivery was sufficiently pleaded, the answer, in this respect, having denied that appellant delivered two or any carloads of laths to defendant in Oregon, or elsewhere during March, 1920, or at all. The case of *Briggs & Turivas v. Pacific Trading Co.* (Cal. Sup.) 223 P. 949, cited by appellant, is clearly distinguishable from the one before us. There the vendor was holding the goods at the request of the ven-

dee, subject to the receipt of further shipping instructions, which, the court held, excused delivery within the period of time fixed by the contract. In the case at bar, although respondent's telegram of March 11, 1920, stated that his customer had canceled his order, it did not indicate that appellant should await further shipping instructions, the only request therein made being that small carloads be shipped. Appellant doubtless so understood the telegram, because it immediately telegraphed in reply:

"Will endeavor to ship you as small cars as possible on each of the three cars of lath which we have going out to you some time this month."

The parties are also disagreed as to whether the contract called for March delivery in Portland, or March delivery in Sacramento. The determination of that question would seem to be immaterial, however, for the reason that under either construction a delivery is not shown. If March delivery in Portland was required by the contract, the laths at that point were in the exclusive possession and under the absolute control of appellant, the same having been deposited with the railroad company under nonnegotiable bills of lading consigned to appellant; and if March delivery in Sacramento was contemplated, the evidence shows that the laths arrived there on April 6, 1920, not only too late for March delivery, but at that point they were still in the possession and under the control of appellant under said nonnegotiable bills of lading.

[5] By virtue of section 2129e of said code (Civ. Code) the transferee of a nonnegotiable bill, after notice of transfer to the carrier, becomes the direct obligee of whatever obligations the carrier owed to the transferor immediately before such notification; but prior to the notification the title to the goods, and the right to acquire the obligation of the carrier, may be defeated by garnishment, attachment or execution upon the goods by a creditor of the transferor, or by notice of a subsequent sale. Applying the provisions of said code section to the circumstances under which the laths in question were consigned, and bearing in mind the principle of law that delivery to the buyer must be such a transfer of the possession as will remove the goods from the dominion of the seller and entitle the purchaser to demand the same from the carrier (35 Cyc. 195), it becomes manifest that at no time was there a valid tender or delivery of said laths.

Inasmuch as the verdict and the judgment must be sustained upon the ground of nondelivery, it becomes unnecessary to discuss the question of the validity of the contract.

The judgment is affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

71 Cal. App. 64

**FIRST NAT. BANK OF SAN PEDRO et al.
v. SUPERIOR COURT OF CALIFORNIA
IN AND FOR LOS ANGELES COUNTY
et al. (Civ. 4772.)**

(District Court of Appeal, Second District,
Division 2, California. Jan. 30, 1925.)

**1. Jury ⇨13(18) — Cross-complaint in law,
setting up equitable matters of affirmative de-
fense, changes action to suit in equity.**

Where, in an action at law, equitable matters are alleged by defendant which are not merely defensive, but are matters of affirmative attack, controversy is thereby changed from an action at law to a suit in equity, and issue thereon is triable by court and not by jury.

**2. Mandamus ⇨4(3)—Mandamus will not lie
to compel trial court to limit retrial in con-
formity with remittitur of Supreme Court.**

Assuming that action of lower court in permitting defendant, in action at law, to file amended pleadings setting up affirmative equitable defense, and determining issues as in an equitable action, would be in violation of terms of remittitur on prior appeal, they are but errors which the trial court could commit and under Code Civ. Proc. § 1085, plaintiffs are not entitled to writ of mandamus, since there is an adequate remedy by appeal.

Application for writ of mandate by the First National Bank of San Pedro and another to be directed to the Superior Court of California in and for the County of Los Angeles and Walton J. Wood, a Judge thereof, to compel respondents to proceed with trial of a certain cause. Denied.

Richard C. Goodspeed and Goodspeed & Pendell, all of Los Angeles, for petitioners. Fredericks & Hanna and Kenton A. Miller, all of Los Angeles, for respondents.

WORKS, J. There is pending in respondent court, before respondent judge, a certain cause entitled First National Bank of San Pedro v. Stansbury. This case will in this opinion be referred to as the action and the plaintiff therein will be referred to as the bank. The trial of the action was commenced before a jury, the fees of the jury having been paid by the bank, when, upon motion of Stansbury, respondent judge discharged the jury and appointed a referee to ascertain certain facts involved in the action, and to make report thereof to the court. Thereupon the bank and one John Balch, whose interest in the action will later appear, presented to this court their petition for a writ of mandate in the present proceeding. The petition prays that respondents be commanded to proceed with the trial of the action before a jury and to vacate the order of reference. An alternative writ issued and we are now to determine whether a peremptory writ shall

go forth. The only question presented is as to the sufficiency of the petition for the writ, as the only return made by respondents is by demurrer.

The complaint in the action, composed of two counts, seeks to recover upon that number of promissory notes, each dated December 16, 1916, a cause of action upon the respective notes being alleged in the respective counts. The pleading is in the ordinary form which is characteristic of complaints in such actions. It is alleged particularly, however, that Stansbury made and executed the notes to Balch and that the latter indorsed them to the bank. Stansbury, after disposition was made of his original responses to the complaint in the action, filed an amended answer thereto and an amended cross-complaint. We proceed to state some of the allegations of these pleadings, omitting from each certain portions thereof which were eliminated upon demurrer thereto presented to respondent court. The amended answer denies that the note set up in the first count of the complaint was by Balch indorsed to the bank. It is also denied that Stansbury owes the amount of the note or any part thereof, and denial is also made of the allegations of the complaint upon which the bank asks for judgment for attorneys' fees for being compelled to sue upon the note. Denials similar to all of these are interposed as to the allegations of the complaint concerning the second note sued on. The amended answer also contains extensive statements of affirmative defense to the allegations of both counts of the complaint. It is alleged that some time prior to 1911 Balch and one Radich were partners in the cement contracting business; that, being financially involved and desiring to secure financial assistance, they made an arrangement with Stansbury whereby he was admitted into the partnership upon terms which were advantageous to all, Stansbury being particularly charged with the duty of collecting certain amounts due from various persons to Balch and Radich under their earlier operations; that, also, the new partnership was to carry on a business under new contracts similar to that formerly conducted by the original partnership; that the new, or three-way, partnership did thereafter complete work under certain new contracts; that an adjustment and settlement was made between them with the result that it was determined that Stansbury was indebted to Balch in a certain sum; that during 1911, or a short time prior to "the closing up of the aforesaid partnerships," Balch solicited Stansbury to join him in a new partnership without Radich for the purpose of conducting a more extensive business than that conducted by the three-way partnership; that pursuant to that solicitation Stansbury advanced money with

which to make a settlement with Radich and entered into a partnership with Balch alone; that this last-mentioned partnership completed many contracts aggregating in contract price about \$200,000 or more; that Stansbury advanced various large sums of money with which to conduct the operations of the partnership existing between Balch and him; that Balch "kept the time book of labor and pay roll of the partnership and purchased much material and many of the accounts were handled by him alone"; that at no time during the existence of the partnership was any accounting taken nor was there any settlement of the partnership affairs between Balch and Stansbury; that at all times during the existence of the partnership there were outstanding large amounts of indebtedness owing by the partnership and large amounts were due and owing to the partnership; "that all accounts as to the cost of the various contracts were largely kept by the said Balch"; that contracting jobs would often overlap each other and it was therefore difficult from time to time to strike a balance between the partners, or to make an accurate audit of the accounts of the partnership; and that on or about August 28, 1915, and during extensive existing operations of the partnership, Stansbury having insufficient accounts of its operations, Balch applied to Stansbury "and requested that they make an estimate of the state of their affairs." Various allegations then appear which tend to show the inability of Stansbury, on account of the lack of data in his hands, to arrive at a correct estimate of the partnership affairs, and the inability of both Balch and Stansbury, without the aid of accountants, to come to an understanding of their financial relations and situation.

It is next alleged that "it was then agreed between said partners that any accounting then taken or statement made was to be regarded only as an estimate and tentative, and not to be considered in any manner as accurate or definite, but solely and only as a general estimate of the profits or losses and of how the affairs of said partnership were progressing" and "that thereafter an accurate accounting would be taken of all of their business affairs by a proper accountant"; that upon that understanding "the said partners made a general statement of their estimated profits, which said estimate statement on said date showed a sum of \$21,724.44," and was given by Balch to Stansbury, but was based upon insufficient and erroneous data and was erroneously made, "was unreliable, freighted with gross errors, mistakes and miscalculations on each job, which tainted the entire account, all of which mistakes were mutual and were not known to the parties and not considered or taken into account in said statement"; that Balch there-

after fraudulently and in violation of the understanding between them sought to urge the statement thus made between them as final and conclusive, having secretly intended at the time of the making of the statement so to do. Specific facts are alleged which tend to exhibit the fraudulent intent of Balch in the respects just stated. It is then alleged that, pending an illness of Stansbury after the alleged "settlement," Balch represented to him that, in connection with certain uncompleted "jobs" under contracts held by the partnership, he (Balch) "could use said Stansbury's notes at" the bank, "and that if said Stansbury would execute and deliver to him four promissory notes covering the balance of said estimated profits of August 28, 1915, * * * said tentative balance would be regarded as no different than as theretofore, but that he, said Balch, could secure money from the said bank * * * and use the said notes so to be executed by said Stansbury as collateral security therefor * * *"; and "that pursuant to said request it was agreed between the partners to, and said Stansbury did, execute said notes herein sued on, with the understanding and agreement at said time that said notes should not be treated in any manner different from said estimated statement, or in any manner to be asserted by said Balch against said Stansbury. * * *"

Many and voluminous other allegations are contained in the amended answer, including an allegation that the notes sued on are held by the bank solely for the purpose of collection for the benefit of Balch, but it is unnecessary here to set them forth, as enough has been shown to exhibit the nature of the defense made by Stansbury to the complaint. The prayer of the amended answer is that the notes sued on be canceled; that an accounting be taken of the affairs of the partnership existing between Balch and Stansbury; that the partnership be terminated and settled and judgment be decreed for any indebtedness found due from one partner to the other; that Stansbury have his costs; and that he have any further relief to which he may be entitled. The matters alleged in the amended answer are in substance repeated in the cross-complaint and the prayer of the latter pleading is in substance the same as that of the other.

Upon the showing of the record, which is thus far disclosed, there appears to be no question that the bank was not entitled to a jury trial of the action. In its inception there is no doubt that the cause was a simple action at law upon promissory notes, the right to a jury trial if the controversy had maintained that form being equally undoubted. But observe the change in the situation which arose upon the filing of Stansbury's amended pleadings. The litigation was then transmuted into a suit in equity

for a partnership accounting and for the termination of the partnership relation. From that moment the controversy over the notes, launched by the filing of the complaint, became a mere incident in the larger controversy brought forward by the amended pleadings of Stansbury. Of that larger controversy the question of the very integrity of the notes became a part. The question whether the bank, the mere agent of Balch in bringing the action, shall have judgment on the notes is swallowed by the broader question of accounting and partnership termination. The controversy as to the notes becomes but an item in the question of accounting. In thus stating the effect of the filing of Stansbury's amended pleadings we assume that it is proper practice for him to press the allegations presented in both the answer and the cross-complaint, for the petitioners make no point that it is not.

[1] The estimate which we have placed upon the situation created by the filing of Stansbury's pleadings is well justified by the authorities. It is possible that when, in an action at law, equitable matters are set up in an answer purely as a defense, that is, with no demand for affirmative relief, the controversy is not thereby changed from an action at law to a suit in equity. 35 C. J. 174. And as bearing somewhat upon the principle announced, see *Lewis v. Tobias*, 10 Cal. 574; *Smith v. Sparrow*, 13 Cal. 596; *Shain v. Belvin*, 79 Cal. 262, 21 P. 747. Where, however, the equitable matters alleged by the defendant are not merely defensive, but are matters of affirmative attack, the situation is quite different. It is said in a standard law publication that "if the answer contains not merely a technical defense but an independent equitable cause of action constituting a cross-demand in favor of defendant, the effect of which, if established, would extinguish plaintiff's cause of action, the issue taken thereon is triable by the court and not of right by a jury." 35 C. J. 175. This rule, apparently prevailing everywhere, has found adequate expression in the opinions of our own courts. It was said in a cause in which a cross-complaint praying equitable relief had been interposed in opposition to a complaint at law:

"Being an action cognizable in equity and distinct from the legal action, it was the duty of the court below to first determine the issues involved under the cross-complaint, for the reason that if the defendants succeeded on these issues it would defeat the right of plaintiffs to recover in their action at law, however perfect their legal right." *Fish v. Benson*, 71 Cal. 428, 12 P. 454.

And see, also, *Swasey v. Adair*, 88 Cal. 179, 25 P. 1119. We have no doubt that, under the conditions thus far considered, petitioners are not entitled to a jury trial of the ac-

tion, except, perhaps, under the case last cited, in the event that the equitable relief prayed by Stansbury should be denied, the right to a jury trial thereafter may exist upon the few issues arising from the meager denials in the amended answer of allegations of the complaint. There is nothing in *Kearney v. Bell*, 160 Cal. 661, 117 P. 925, or in other cases relied upon by petitioners, which disturb our view upon the question.

[2] Are there other circumstances of the case which nullify the views above expressed? The action has been once tried and from the judgment entered pursuant to the trial an appeal was taken. The opinion rendered upon the appeal is to be found in the reported case, *First National Bank v. Stansbury*, 62 Cal. App. 336, 217 P. 91. Pursuant to this opinion a remittitur was sent down which reads, in part:

"That a new trial be had of the issues presented with relation to credits claimed by respondent [Stansbury] by reason of errors or omissions in the settlement of the said partnership affairs [between Balch and Stansbury] whereby respondent claims the amount of said notes should be reduced."

The amended pleadings filed by Stansbury, and which have been the subject of comment above, were filed, by leave of respondent court, after the remittitur went down, and the trial which was lately in progress before a jury and which it is the object of this proceeding to cause to be completed was the new trial mentioned in the remittitur. It is the contention of petitioners that we may in the present proceeding limit the new trial to the scope contemplated by the remittitur, granting for the moment that the issues framed by Stansbury's amended pleadings are beyond the lines thus set. It is said that if the new trial were to proceed within the lines laid by the remittitur Stansbury could present no more than matter defensive to the complaint, that such matter could not change the aspect of the action as one at law, and that therefore the bank is entitled to a jury trial. We cannot accede to these various views. The writ of mandate will issue only to compel "the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station." Code Civ. Proc. § 1085. The law does not, within the contemplation of this provision, specially enjoin respondents to proceed with the trial of the action in conformity with the directions of the remittitur, granting again that its terms were violated by the permission given to Stansbury to file his amended pleadings and that a further violation is threatened by an attempt to try the issues raised by them. Upon these assumptions the steps already taken, or which are threatened to be taken by respondents, are but errors which respondents have jurisdiction to commit and which

cannot be corrected by the writ of mandate. In an action in which a trial court had denied a motion to enter a judgment of dismissal and in which it was sought to compel the court by the writ of mandate to enter such a judgment, it was said:

The alternative writ of mandate is vacated, and a peremptory writ is denied.

We concur: FINLAYSON, P. J.; CRAIG, J.

70 Cal. App. 772

STOOPS v. PISTACHIO et al. (Civ. 4977.)

(District Court of Appeal, First District, Division 1, California. Jan. 29, 1925. Hearing Denied by Supreme Court March 30, 1925.)

1. Pleading $\hookrightarrow$ 258(3)—Permitting amendment during trial setting up limitations held within court's discretion and not erroneous.

In suit to enjoin operation of irrigation ditch across plaintiff's land, where answer contained special denial and cross-complaint alleging adverse user for over five years, and praying that defendants' rights be quieted, *held* not erroneous to permit amendment during trial setting up statute of limitations; matter being within court's sound discretion, and evident purpose of amendment being to more effectively plead defenses already relied on and to conform to evidence.

2. Waters and water courses $\hookrightarrow$ 263—Evidence held not to sustain finding damage from ditch had not increased during five-year period.

In suit to enjoin operation of irrigation ditch across plaintiff's land, evidence *held* not to sustain finding that damage suffered had not increased during past five years, nor further finding that defendants had thereby gained prescriptive right to maintain ditch in present condition.

3. Action $\hookrightarrow$ 53(2)—Successive causes of action arise from continuing or recurring injury.

Where continuing or recurring injury results from wrongful act or from condition wrongfully created and maintained, separate and successive causes of actions arise when wrong is committed and when such damages are from time to time sustained.

4. Waters and water courses $\hookrightarrow$ 263—Injunction lies to prevent injury by water escaping from irrigation ditch.

Where property owner brings water upon his lands for purposes of irrigation and allows portion to escape so as to injure land of adjoining owner, he is not only liable in damages, but injunction will lie to prevent continuation of such injury.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Suit by Emma Stoops against T. Pistachio and others to enjoin maintenance and operation of ditch and for damages. From a judgment for defendants, plaintiff appeals. Reversed.

Geo. G. Graham, of Fresno, for appellant. Stanley Moffatt, of Fresno, for respondents.

"We do not think a mandamus will lie in this case. The real and substantial question presented for the decision of the court by the motion to dismiss was whether the defendant had set up a counterclaim against the plaintiffs upon which he was seeking affirmative relief. If he had not, the plaintiffs were undoubtedly entitled to the judgment which they asked, otherwise not. The solution of that question depended upon the judicial reading and construction of the defendant's answer and the stipulation between the parties, and the effect of the latter upon the former. It was claimed on the part of the plaintiffs, first, that the counterclaim made in the answer could not be legally made in the action; and, second, that the counterclaim had been withdrawn by the force and effect of the stipulation. Both of these propositions were denied by the defendant, and in deciding them the judge acted judicially, not ministerially; and, having decided them according to the best of his ability, a mandamus does not lie to compel him to reverse his decision and render a different one. (*Chase v. Blackstone Canal Company*, 10 Pick. 244; *The People ex rel. Doughty v. Judges of Dutchess County*, 20 Wend. 658.) This writ lies to compel a subordinate judicial tribunal to proceed and exercise its functions when it has neglected or refused to do so; but when the act to be done is judicial or discretionary the writ cannot direct what decision or judgment shall be rendered, nor can it be granted, after the inferior tribunal has acted, for the purpose of reviewing its decision. *The People v. Sexton*, 24 Cal. 79. If the court has committed an error in denying the plaintiffs' motion the same can be reviewed on appeal, which is a speedy and adequate remedy in the ordinary course of law within the meaning of the four hundred and sixty-eighth section of the Practice Act. To review errors is not the office of the writ of mandamus." *People v. Pratt*, 28 Cal. 166, 87 Am. Dec. 110.

In view of the portion of this language relating to the adequacy of the remedy by appeal, it may be remarked that it is possible that in the strict sense the remedy of petitioners here by appeal is inadequate. It is, however, adequate in the sense that it is the only remedy allowable, and it is plain that it was in that sense that the language concerning the right of appeal in the cited opinion was used. Surely, the court there says that in such a case as the one with which it dealt there is no remedy by mandate, and the case exactly fits the present proceeding. The rule of *People v. Pratt*, supra, has been carried into other cases, the latest of which, apparently, is *Ewell v. Superior Court* (Cal. App.) 232 P. 153.

TYLER, P. J. Action to enjoin the maintenance and operation of a certain ditch across the land of plaintiff in such a manner as to cause injury thereto. Damages were also claimed in the sum of \$500.

Plaintiff is the owner of a 20-acre vineyard, being part of a certain colony tract situated in Fresno county. Defendants are the owners of other parcels in the same colony which are situated to the south of and contiguous to plaintiff's holding. Defendants' lands are irrigated by means of an open ditch of the usual construction, some 12 feet in width, which carries the water from a main irrigation canal about a mile north of plaintiff's land and discharges it on the lands of defendants. In order to accomplish this it is necessary to carry the water across the westerly side of plaintiff's land. Some 16 years prior to the commencement of this action, this distributing ditch was constructed, and since its establishment it has been maintained by the defendants along and across the west end of plaintiff's property. The complaint charges that defendants have so negligently operated the ditch as to cause it to overflow, and also that they have maintained the water therein at such a depth for continuous periods that it caused a seepage through and under plaintiff's land to a great distance. This overflow and seepage brings down tules and certain other grasses and noxious weeds and discharges them on the lands of plaintiff, and the water also causes minerals, such as alkali, to rise to or near the surface of the ground, from the effects of which the vines and trees on plaintiff's land have died, and the land has become useless. It is further alleged that this condition is partially due to the porous character of the soil of which the ditch is constructed, and the neglect of defendants to remove rubbish and growing grasses from the ditch. In their answer the defendants admit that they have maintained the ditch for a period of 16 years across the westerly side of plaintiff's land, but deny the damage, and claim a prescriptive right to flow water through the ditch for irrigation purposes. They also deny that they have negligently and carelessly permitted water to escape by percolation or seepage or overflow onto plaintiff's land, with the consequent deposit thereon of seeds and noxious weeds.

By way of cross-complaint they allege that defendants are joint owners of said irrigation ditch, which is the only means by which they can secure water for their respective parcels of land, and that it is absolutely necessary to the existence of plant life thereon; that if said flow of water be interrupted as prayed for by plaintiff, their vineyards and orchards will be utterly ruined and destroyed and great and irreparable injury done to defendants. They further allege that each year they have cleaned and repaired the ditch in the proportion required of them by agreement among

all the parties using said ditch, and in accordance with the regulations of the irrigation district, and that they have at all times during the irrigating season been kept in a fit and proper condition for the flow of water, and that if any damage has been done to plaintiff's land by percolation or otherwise, such damage has not been caused by negligence on the part of any of said defendants, but is attributable to plaintiff's negligence in not properly filling in her land along the line of the ditch. They pray that plaintiff take nothing by her complaint, and that the court enter its decree to the effect that said defendants own an easement and a right of way for an irrigating ditch and for the flowing of water through the same across and upon the westerly side of plaintiff's land, and that their title to said right of way be quieted and confirmed against plaintiff; that a permanent injunction be entered preventing plaintiff and others from interfering in any manner with the rights or user by said defendants, and for general relief.

To this cross-complaint plaintiff filed an answer alleging that it failed to state a cause of action. She also denied that the cross-complainants have properly repaired and maintained said irrigation ditch in accordance with the irrigation district regulations, or that the ditch is in a fit and proper condition for the flowing of water, and alleged that the damage complained of is due to the failure of defendants to properly cement said ditch and stop the overflow and percolation and seepage of the water. She further alleges her willingness to pay her proportion of the cost of installing a cement pipe to prevent further damage. At the trial the respondents were permitted to amend their answer so as to plead the statute of limitations. After the trial they filed another amendment pleading a prescriptive right to seepage and percolation.

The trial court found that the ditch did seep and percolate and caused one-half an acre of appellant's land to become damp and soggy and unfit for the growing of trees and vines thereon; that for approximately 8 years prior to the filing of this suit the respondents adversely, peaceably, continuously, uninterruptedly, openly, and notoriously, and under a claim of right caused water to flow through said ditch and percolate and seep through the walls and sides thereof and on and into the appellant's land, but also found that this percolation and seepage had not materially increased from the time the water was first caused to flow through the ditch, and that in the last 5 years prior to the filing of this action the percolation and seepage had been and remained approximately the same. Further findings are to the effect that the injury or damage caused to said strip of appellant's land and the vines and trees growing thereon by the respondents' flowing water through said ditch and the percolation

and seepage therefrom was first brought to the attention of the appellant more than 5 years prior to the filing of the complaint in this action, and that she, during such period, had actual knowledge of the seeping and percolating qualities of the ditch, and the damp and soggy condition of said strip of land adjacent thereto, and of the resulting damage to the land and the vines and trees growing thereon from such percolation and seepage.

The court thereupon found as a conclusion of law (1) that the appellant's cause of action is barred by the statute of limitations; and (2) that the respondents have acquired a prescriptive right of way over and across the westerly side of appellant's land for said irrigation ditch and a prescriptive right to maintain the same. No finding was made upon the question of the alleged damage due to overflow.

The appeal is by the plaintiff, and she first claims as ground for reversal that the court erred in permitting the pleas of prescriptive right and the statute of limitations to be filed during and after the trial.

[1, 2] We see no merit in this contention. The original answer contained a special denial and also a cross-complaint alleging adverse user of the irrigation ditch for more than 5 years prior to the filing of plaintiff's complaint, and praying that defendants' rights thereunder be quieted. The answer thereto of appellant did not deny such adverse user, but, on the contrary, she admitted defendants' right to the flow. The amendment setting up the plea of the statute of limitations as against her right of action for damages caused by percolation and seepage was offered during the trial. The whole theory of the defense was the bar of the statute of limitations and defendants' prescriptive right. The amendment was for the evident purpose of more effectively pleading these defenses, and to conform to the evidence adduced. The granting or refusal of leave to amend an answer by pleading the statute is committed to the sound discretion of the trial court. *Trower v. City and County of San Francisco*, 157 Cal. 762, 109 P. 617. The trial court has the same discretion in such matters as it has to allow the pleading of any other meritorious defense. *St. Paul Title & Trust Co. v. Stensgaard*, 162 Cal. 178, 121 P. 731, 39 L. R. A. (N. S.) 741. The fact that the amendments were allowed after the close of the case can avail appellant nothing. *Hibernia Sav. & Loan Soc. v. Jones*, 89 Cal. 507, 26 P. 1089. The power given to the court to allow amendments in the interest of justice is in its sound discretion, and the appellate court will not disturb the action of the trial court thereon, even after the submission of the cause, when no abuse of discretion appears. *Lee v. Murphy*, 119 Cal. 364, 51 P. 549, 955. Aside from this, the ap-

pellant made no attempt to set aside the submission of the cause in order to offer further pleading or proof. Under such circumstances she is in no position to complain. *Gartlan v. Hooper Co.*, 177 Cal. 422, 170 P. 1115; *Wardrobe v. Miller*, 53 Cal. App. 370, 200 P. 77.

It is also contended that the evidence does not support the finding that the damage was relatively the same during the last five years and that it had not increased during said period, nor does it support the further finding that respondents have acquired a prescriptive right to maintain the ditch in its present condition and to damage appellant's land by the seepage. Error is also claimed by reason of the failure to make any finding on the negligence of respondents in overflowing the banks of the ditch whereby they damaged and flooded plaintiff's land.

[3, 4] As appellant contends, there is no evidence in the record to sustain the finding that the damage suffered by plaintiff was relatively the same during the past five years and had not increased during said period. On the contrary, the only evidence upon the subject shows affirmatively that the damage had increased by reason of the constant overflow during irrigation seasons, and that its continuance will cause other vines now growing upon appellant's land to be destroyed. The main purpose of plaintiff's suit was to abate the continuance of this injury. Where continuing or recurring injury results from a wrongful act, or from a condition wrongfully created and maintained, separate and successive causes of action arise when the wrong is committed and when such damages are from time to time sustained. *Kafka v. Bozio*, 191 Cal. 746, 218 P. 753, 29 A. L. R. 833. It is admitted by defendants that an overflow does occur during the irrigation periods. Where a property owner by artificial means brings water upon his lands for purposes of irrigation, and allows a portion of such water to escape so as to injure the land of the adjoining owner, he is not only liable in damages for the injury caused, but an injunction will lie to prevent the continuation of such injury. *Bacon v. Kerney Vineyard Co.*, 1 Cal. App. 276, 82 P. 84; *Kall v. Carruthers*, 59 Cal. App. 555, 211 P. 43. As said in the case last cited, to permit defendants to make their land profitable though it result in the utter destruction of the usefulness of plaintiff's land, would violate every principle of natural right and justice, and cannot be supported by judicial authority. If the injury here complained of be, as plaintiff contends, a continuous one, she is entitled to the relief here sought.

The judgment is reversed.

We concur: KNIGHT, J.; ST. SURE, J.

70 Cal. App. 752

COEN v. CITY OF LOS ANGELES.
(Civ. 4621.)

(District Court of Appeal, Second District, Division 1, California. Jan. 28, 1925. Hearing Denied by Supreme Court March 26, 1925.)

1. Municipal corporations ⇨1021, 1022—Presentation of demand prerequisite to suit.

Presentation of demand in manner required by Los Angeles City Charter, § 222g, is necessary prerequisite to maintenance of suit against city for recovery of money or damages.

2. Evidence ⇨31—Contents of city charter of Los Angeles require no proof.

Contents of city charter, like that of city of Los Angeles, require no proof; they are subject of judicial cognizance.

3. Municipal corporations ⇨1021, 1022—Document presenting claim by sublessee of tidelands held not to present claim based on eviction.

Document presented by sublessee of tidelands prior to commencement of action against city, held not to be for claim based on his eviction from the lands; it disclosing that sublessee was tenant in possession, and that claim was not only for damages because of acts of the city, but for what he understood city might do when its officers should determine what they were going to do.

4. Landlord and tenant ⇨171(3)—Surrender of premises is necessary element of constructive eviction.

There can be no constructive eviction if tenant continues in possession of premises however much he may be disturbed in beneficial enjoyment.

5. Municipal corporations ⇨1021, 1022—Sublessee of tidelands not entitled to maintain action on money claim not contained in demand.

In view of Los Angeles City Charter, § 222g, sublessee of tidelands was not entitled to maintain action for money claim or demand against city not contained in statement of his claim made to city.

6. Municipal corporations ⇨1021, 1022—Not every variation in amount of demand and complaint, will deprive plaintiff of right to maintain action.

It is not every variation, from strict identity in amount of demand as shown in statement of claim against city as compared with subsequent complaint, that will deprive plaintiff of right to maintain action.

Appeal from Superior Court, Los Angeles County; George H. Cabaniss, Judge.

Action by Garnet W. Coen, also known as G. W. Coen, against the City of Los Angeles. Judgment for plaintiff, and defendant appeals. Reversed.

Jess E. Stephens, City Atty., Clyde M. Leach, Asst. City Atty., and Kenneth A.

Carey, Deputy City Atty., all of Los Angeles, for appellant.

D. H. Nelson and J. M. Chatterson, both of Los Angeles, for respondent.

CONREY, P. J. This is an action brought against the city of Los Angeles by a sublessee of certain tidelands owned by the city at Los Angeles harbor. In the case of *People v. Banning Co.*, 166 Cal. 635, 138 P. 101, involving these same and other tidelands, it was determined that the title was vested in the Banning Company, subject to the right of the public to use the land for purposes in aid of or in connection with navigation or fishery when at any time they might be so required. On the 24th day of July, 1917, the city of Los Angeles and the Banning Company and Hancock Banning entered into an agreement, which provided for the conveyance in fee by the Banning Company to the city of all its title to the lands in question. These tide and submerged lands are known as Mormon Island, and are a portion of tideland location 152. In return therefor the city gave to the company a 30-year lease to all of the land lying behind a line 204 feet shoreward from and parallel to the pierhead line. The leased land was called parcel No. 1. The 204-foot strip along the water front was divided into several parcels, but the only portion of it involved in this action is parcel No. 5. The 1917 agreement shows that the purpose and effect of the agreement and conveyance was that, until the 204-foot strip should be required by the city for public water front improvements, the Banning Company and Hancock Banning were given permits to use the same under the restrictions and limitations contained in the agreement. Subsequently these lands were subdivided into lots and roadways by the Banning Company and Hancock Banning, and said lots and roadways were transferred to the various successors in interest of the Banning Company and Hancock Banning. Thereafter, J. B. Banning, one of the successors in interest of the Banning Company and Hancock Banning in and to lot 8 of the above-mentioned subdivision, leased a portion of said lot 8 to respondent's assignors. Respondent's lease by its terms was expressly made subject to all conditions and restrictions of the 1917 agreement. One of these restrictions and conditions provided that the use of all or any part of the lands lying within a line parallel to and distant 204 feet from the U. S. pierhead line was subject to revocation and cancellation by the city of Los Angeles at any time upon certain terms as to notice and compensation which are hereinafter stated.

Early in 1922 the board of harbor commissioners of the city determined to improve a considerable portion of the frontage on Mormon Island peninsula with public wharves,

but it was found that more land would be required than the 204-foot strip which it had a right to take under the 1917 agreement. Accordingly, negotiations with the Banning interests resulted in a release to the city of a considerably greater area than the 204-foot strip, and as a result an agreement known as the Katherine S. Banning agreement, dated September 29, 1922, released to the city, in addition to other lands, all of the lands included in respondent's lease; subject, of course, to whatever rights the sublessee had therein.

On or about July 27, 1922, prior to the construction of the wharves, transit sheds and rail facilities agreed upon, and in the vicinity of respondent's leasehold, and upon certain other lands released by and in pursuance of an agreement of June 30, 1922, between the city and Hancock Banning, the city commenced the work of improvement by raising the grade of these lands to the necessary level by pumping upon them the soil dredged from adjacent harbor channels. In order to prevent the dredgings from flowing upon and doing any damage to the improvements (an electric smelter) upon respondent's leasehold, the city built a dirt embankment immediately outside of and around respondent's leasehold, the effect of which was to prevent vehicular access by land to the leasehold until the fill had sufficiently dried out—a matter of several months. Since March, 1921, and up to the commencement of and during the dredging and filling, respondent's smelting plant had not been in operation and had been completely closed down.

Respondent commenced this action on the 20th day of November, 1922. Thereafter, on the 23d day of November, 1922, appellant caused to be served upon respondent a six months' notice of cancellation and revocation of that portion of respondent's leasehold lying within the 204-foot strip; said six months' notice to expire June 1, 1923. During January, 1923, in pursuance of the provisions of the 1917 agreement and the said agreements of June 30 and September 29, 1922, and of the general uses for which the city held title to the lands in question, the work of development and water front improvement was further prosecuted. In connection therewith a railroad was built by the city along the area laid out as a way or street within the above-mentioned subdivision, which street passed by the westerly end of respondent's leasehold.

Respondent's complaint alleged an entry by appellant and the ejectment of respondent, and an unlawful withholding of possession, and during such withholding the commission of waste upon the premises by causing certain dredgings to be thrown around and upon said property, and by the building of an embankment around respondent's leasehold, and by dredging and filling the surrounding lands, and that thereby respondent

suffered total loss of the improvements upon the premises. By his complaint respondent prayed for possession and damages and for general relief. By supplemental complaint filed on the 3d day of March, 1923, the respondent alleged further trespass and eviction of respondent, and further breach of "the covenant of quiet enjoyment of the lease to plaintiff," by the building of a railroad on adjacent land, and prayed for an injunction against the further building of the railroad, and mandatory relief for its removal and the restitution of the premises to the same status existing at the time of the filing of the complaint. In the proceedings had upon the application for injunction, the relief prayed for by respondent was denied, but appellant was ordered to construct a roadway across the railroad and other lands to enable respondent to go to and from his leasehold.

Appellant's amended answer to the complaint and supplemental complaint contains matter of denial, and further sets forth the acts done by and rights claimed by appellant in the improvement of lands adjacent to and surrounding respondent's leasehold.

At the trial it was stipulated that the plaintiff at the time of the institution of this action was entitled to the peaceable possession of the lands and premises described in the complaint, as assignee of a lawfully executed lease granted by J. B. Banning (one of the successors in interest of the Banning Company and Hancock Banning), to E. Riveroll, on September 1, 1919, for a period of five years, in accordance with the authority contained in and subject to the conditions of the said agreement of July 24, 1917, and that, subject to said conditions, said lease to Riveroll was renewable at the option of the lessee for a further period to expire July 23, 1947. It was further stipulated that the leasehold described in the complaint was improved by plaintiff and his immediate assignor and associates for a steel plant, being occupied by buildings and furnaces, which are on the leasehold but which have not been operated since about the month of March, 1921; that the only permit or authority of record obtained from the board of harbor commissioners of the city for the construction of said buildings, furnaces and other structures and improvements placed upon said leasehold is the approval by said board on August 27, 1919, of an application submitted by A. E. Davidson for a permit to construct a foundry building on Mormon Island peninsula, the building permit describing a structure approximately 42x84 feet, at an estimated cost of \$5,000. It was further stipulated that in the latter part of the month of July, 1922, or thereabouts, the city began filling in the land surrounding plaintiff's leasehold with material dredged adjacent to and abutting the harbor of the plaintiff, and caused an embankment to be

thrown up outside of and near the fence surrounding the said improvements upon plaintiff's leasehold, which embankment was for the purpose of preventing the dredgings from running over and upon the leasehold; and continued so dredging and filling until the adjacent land had been raised (the height of the embankment being by the stipulation left for determination by the evidence); that plaintiff's leasehold prior to the throwing up of said embankment and said filling was practically on the level of the surface of all of the surrounding adjacent lands.

The 1917 agreement, to the conditions of which respondent's lease is by its terms made subject, identified the lands covered thereby as lands shown upon an attached map numbered 4392, which lands were declared to be a portion of tideland location 152, all situate in the county of Los Angeles. The 1917 agreement referred particularly to parcel No. 5, as designated on said map 4392, and provided that certain described frontage to a depth of 204 feet from the United States pierhead line around said parcel No. 5, "shall be and is hereby reserved to the city to be improved with public wharves, transit sheds, roadways, railroads and other public improvements in aid of commerce, navigation, and fisheries, as necessity may require, for the accommodation of the public, including the Banning Company and its sublessees and licensees." The parcel No. 5 is the same land mentioned in said lease as the 204-foot strip, and approximately one-half of respondent's leasehold lies within said parcel No. 5.

The 1917 agreement further provided "that until all or any portion of said parcel No. 5 is required or improved by the city for public purposes, during the continuation of the lease herein, the said Hancock Banning is hereby granted by the city a prior and preferential permit to use said parcel No. 5 for any and all lawful private purposes, under the same terms and conditions above set out with reference to parcels Nos. 3 and 4."

The said terms and conditions relative to parcels Nos. 3 and 4 included the following:

"Provided, however, that the city may at any time revoke said permits, or either thereof, as to any and all of said space covered by parcels Nos. 3 and 4 upon which public wharves, warehouses, streets, approaches, railways, or other public uses for navigation, commerce, and fishery, as hereinafter defined in paragraph 8 of this agreement, may be required by the city; but prior to the termination of such permits upon any portion of said space, six months' notice must be given by said board of harbor commissioners to the Banning Company, describing the space so required for such uses, and upon the expiration of said notice, possession of the premises described in the notice shall at once be delivered by the Banning Company, or its successors, to the city.

"That upon any such termination the city shall, within 60 days after the determination

of such value, pay to the Banning Company the reasonable value of any and all wharves or other structures or improvements left upon the premises affected by such revocation, which have been constructed in accordance with the requirements of, and with the approval of the board of harbor commissioners. * * *

"That upon such termination of said permit, as herein provided, the Banning Company shall not be entitled to any payment, nor shall an allowance be made for the value of said permit or for the unexpired term thereof, nor for any value derived from the permit, nor on account of good will, going concern, earning power, increased cost of reproduction, or increased value of any property owned or operated by the Banning Company under said permit, or in connection therewith. * * *

"That the right of the city, upon any such revocation, to immediate possession and use of any of the said space so canceled shall not be postponed because for any reason said arbitrators have not made their award, or payment has not been made within the prescribed time for any such improvements so left upon any space so canceled. * * *

Appellant contends that the acts done by it did not amount to an eviction; also that the amount of damages awarded is not justified by the evidence, either as the result of an eviction or other dispossession, or for loss sustained by respondent by reason of any interference with his leasehold in the nature of a trespass thereon. Appellant further contends that respondent is without right to maintain this action, because respondent failed to present to appellant or its board of harbor commissioners a claim and demand for money or damages, which presentation, according to the provisions of the charter of the city of Los Angeles, is a condition precedent to the right to maintain an action for the recovery of such money or damages.

The first cause of action (stated in the first count of the complaint) was "discontinued," on motion of the plaintiff. The judgment rests upon the second cause of action as stated in the plaintiff's complaint and amendments thereto and his supplemental complaint and amendments thereto. The court found that all of the allegations contained therein are true, "except as to the amount of damages, which is true in part." In the second count of the complaint it is alleged that on or about September 8, 1922, the defendant entered upon and ousted and ejected the plaintiff from the described property and thereafter continued to withhold possession thereof from the plaintiff; that during the time of said unlawful withholding of said property, the defendants committed waste thereon by means of the acts described in the complaint as hereinbefore stated; that by reason of said acts, sundry described improvements of the plaintiff which had cost him more than \$37,000 were a total loss to the plaintiff; that plaintiff's right to possession of said premises "and ap-

proaches" was at the time of defendant's entry of the value of \$100,000, all of which was rendered valueless by the said acts of the defendants; "that the plaintiff has heretofore submitted his claim of damage herein alleged in writing to the defendants for acceptance or rejection, and the same has been by it and them rejected." Plaintiff prayed judgment (besides the demand based upon the first count of the complaint) for possession of the described premises; for damages in the sum of \$137,000 for waste committed and loss sustained by loss of plaintiff's property and possessory rights; for costs, etc. The defendant, among other issues raised by the answer, denied that the plaintiff at any time had submitted his claim of damage or any claim of damage to the defendants for acceptance or rejection or at all. Plaintiff's first and only reference (in his pleadings) to his lease is in the supplemental complaint. The facts concerning plaintiff's leasehold were brought into the record by the defendant's amended answer to complaint and supplemental complaint.

In addition to the general finding above mentioned the court found that on September 29, 1922, the lease in which the Bannings were lessors was transferred to the city and that thereafter the plaintiff paid the rentals named in said lease, to wit, \$100 per month, to the city of Los Angeles to and including May, 1923; that after July 24, 1922, the defendant city under its contract of that date with the Bannings proceeded to fill in the lands surrounding the plaintiff's leasehold and continued in that work until January, 1923, at which date the city began to build a steam railroad over a certain right of way adjoining plaintiff's leasehold and thereby obstruct plaintiff's ingress to and egress from the leased premises; that the plaintiff had placed on said premises sundry improvements, the values of which are stated in the findings; "that the defendant continued in the occupation of, and the said improvement of, the surrounding lands and the right of way along plaintiff's said leasehold without regard for the rights of the plaintiff, and continued to disturb the peaceable possession of the plaintiff, and to obstruct his ingress and egress to said property from the said 29th day of September, 1922, continuously down to the time of trial"; that prior to the commencement of this action, the plaintiff had presented his verified petition, claim, and demand for damages to the defendant, which claim and demand was by the defendant rejected. The court further found:

"That the plaintiff's lease was executed on the 1st day of September, 1919, for a period of five (5) years, with an extension clause for a further term to July 23, 1947, and the court finds that the value of said lease was at the time of the acts complained of, and ever since has been and now is, the sum of sixty thou-

sand (\$60,000.00) dollars, this after deducting the rentals and charges reserved therein."

Plaintiff's theory of his action, as stated by his counsel at the beginning of the trial, was as follows:

"We will contend in this action there has been an eviction of the tenant, and that the property, so far as it was leased to the lessee, he has been evicted from it, and that the damages are the entire value of the leasehold and the expenses that he has been put to in preparing that land for the special occupation that it was leased for, and these will be the issues that the evidence will be directed to."

The court in its decision followed this theory, and determined that the acts complained of and found to have been done were unlawfully and oppressively done by the defendant without regard for the legal rights of the plaintiff, "and constituted a disturbance of the quiet enjoyment and possession of said leasehold and amounted to an eviction of the plaintiff from the whole thereof." The court further determined that the damages to which the plaintiff is entitled "is the value of said leasehold as found, to wit, the sum of \$60,000"; and that the plaintiff should be awarded the further sum of \$1,000 as a recovery of rents paid by him after such eviction; and that the claim of the plaintiff for improvements and preparing the premises of the leasehold for the manufacture of steel, for which the same was leased, cannot be allowed. Judgment accordingly was entered in favor of plaintiff in the sum of \$61,000 and costs. No other relief was granted by the judgment.

The defendant appeals from the judgment. The plaintiff also appealed "from that part, only, of said judgment which does not award to the said plaintiff as a part of his damages" the value of his improvements, and the amount of a reasonable attorney fee to the plaintiff, and exemplary damages, to which plaintiff claims that he is entitled under the findings of the court.

[1] The charter of the city of Los Angeles requires that claims and demands against the city (with exceptions not important here) shall be paid only on demands presented to the appropriate officers of the city and that (section 222g) "no suit shall be brought on any claim for money or damages against the city of Los Angeles * * * or any officer or board or commission of the city until a demand for the same has been presented as herein provided, and rejected in whole or in part. * * *". The presentation of a demand in the manner required by the charter is a necessary prerequisite to the maintenance of a suit against the city for the recovery of "money or damages." *Farmers', etc., Bank v. City of Los Angeles*, 151 Cal. 655, 91 P. 795; *Spencer v. City of Los Angeles*, 180 Cal. 103, 119, 179 P. 163. The

cause of action, according to these decisions, does not accrue until such presentation takes place.

[2] The only attempt by the plaintiff to prove compliance with these requirements of the charter was made by offering in evidence a document filed by plaintiff with the board of harbor commissioners on or about the 17th day of September, 1922. Counsel for defendant, being called upon to stipulate the facts concerning this claim, admitted that the document offered was a carbon copy of the claim filed by plaintiff with said defendant, and that the claim that was filed was rejected, "but whether that claim is a part of the facts for a foundation for this action, we will not stipulate." This then occurred between the court and counsel:

"The Court: You make the formal objection?"

"Mr. Carey: Yes.

"The Court: Well, I will overrule it, without knowing whether I am doing so advisedly. You understand I want all of these documents in, so at this time, purely in a formal way, I will overrule the objection."

We quote this part of the record in reply to the contention of counsel for respondent that appellant did not make this defense while the case was on trial in the court below, and did not support such defense "by the provisions of its city charter and other necessary evidence which appellant has always had available." The contents of a city charter like that of the city of Los Angeles require no proof. They are the subject of judicial cognizance. *Spaulding v. Desmond*, 188 Cal. 783, 789, 207 P. 896.

[3] It is therefore necessary to examine the document which was received in evidence in the manner above stated, and consider whether or not it constituted a claim presented in manner and form sufficient to comply with said requirements of the city charter. The document in question was addressed to the city and the appropriate officers thereof and was entitled "Petition and Claim for Damages for Confiscation of Property at Harbor." It then refers to the several agreements, conveyances and leases leading to and including the Riveroll lease which had become the property of the claimant Coen. It then sets out the expenditure by the claimant Coen of the sum of \$100,000 for the purpose of preparing iron ore for the market, which iron ore the claimant had expected and intended to bring from certain mining properties in Mexico, for crushing and smelting on said leased premises, and states that a part of said expenditure was made for the purpose of building concrete furnaces and other improvements on said leased premises, and that for said improvements the claimant expended in actual money the sum of \$35,714.61; and that said improvements would be a total loss in the event

that they should be torn down and dismantled.

The claimant then stated on his information and belief that the city intended to take for its own use certain lands, including said land leased to the claimant:

"That for such purpose the said city of Los Angeles has already thrown a 5-foot embankment entirely surrounding the property leased by your petitioner and claimant thereby barring egress and ingress to your petitioner; that your petitioner sold the ore now on the said premises but when his buyer called with trucks to take the same away he found it impossible to enter the said premises by reason of said embankment and your petitioner has lost the said sale; that your petitioner and claimant is informed and believes and therefore alleges, that the city of Los Angeles can only take for its own use approximately two hundred and four (204) feet from the water front on said property but that the city is undecided whether it will take all of the property or only sixty (60) feet in addition to the said two hundred and four feet; that as to the said two hundred and four (204) feet, approximately, the city may take for its own use, it must, before so taking it, give the tenants thereon six months' notice thereof and in addition thereto pay to the tenants the amount of the cost of their improvements."

Said statement of claim purports to contain four claims. In the first claim, after making the statements to which we have referred, the claimant made certain further statements with regard to his activities in relation to his lease and the business which he was endeavoring to establish thereon, and then made his demand conditionally as follows:

"That if the plan of the city of Los Angeles is to take all of the said property of your petitioner and claimant and desires to give to your petitioner and claimant another piece of water front property with a lease for thirty (30) years, that in that event your petitioner and claimant will be damaged to the extent of an actual expenditure of \$35,714.61."

The "second claim," after adopting the statement of facts contained in the first claim, makes its alternative statement as follows:

"That if the plan of the city of Los Angeles is to take for its use only sixty (60) feet beyond the said two hundred and four (204) feet from the water front, and allows your petitioner and claimant to keep the balance of said property under the said lease for the balance of said term of thirty (30) years, and which your petitioner is willing to accept, that then and in that event your petitioner is damaged to the extent of \$35,714.61 and in addition thereto the sum of ten thousand (\$10,000.00) for the loss of said sixty (60) foot strip, making a total of \$45,714.61 therefor."

The "third claim," after adopting the statement of facts contained in the first claim, makes its demand as follows:

"That if the plan of the city of Los Angeles is to take for its use all of the said property and not permit your petitioner and claimant to have another piece of water front property nor any portion of said property without cost at all, then and in that event your petitioner and claimant claims damages to the extent of \$35,714.61 for money actually spent in buildings, furnaces, and improvements as aforesaid and \$62,285.91 for the confiscation of the balance of the property, which the city of Los Angeles is not permitted to take beyond said approximately two hundred and four feet from the water front, said sum of \$100,000 being the actual cost to your petitioner and claimant."

The "fourth claim" adopts the statement of facts contained in the first division; states that the claimant is further damaged to the extent of 10 per cent. of the amount of damages allowed him by the city for his attorney fees incurred by bringing this petition and claim in addition to the actual damages which the city will allow him.

Based upon the foregoing four statements of claim, the document in question closed with an alternative demand of payment as follows:

"(1) For the leasing for the balance of a thirty (30) year period under the present lease, without cost or expense, of a suitable parcel of water front property, and the payment to petitioner and claimant of the sum of \$35,714.61 under the first claim herein; or (2) for the leasing for the balance of a thirty (30) year period under the present lease, without cost or expense, of that portion of the present property beyond 264 feet from the water front which the city of Los Angeles will not take for its use, and the payment to petitioner and claimant of the sum of \$45,714.61 under the second claim herein; or (3) for the sum of \$100,000.00 under the third claim herein; and (4) for 10 per cent. of the amount of damages awarded him by the city of Los Angeles in addition to said damages, to compensate him for attorneys' fees incurred by this petition; and (5) for such other and further cost, expense, disbursement and damage herein incurred by him."

[4] It at once becomes clear that the claim presented by respondent prior to the commencement of the action was not based upon an eviction. It shows throughout that it was being presented by a tenant in possession. It contains the direct statement by the claimant that the lease had been assigned to him and that "he is now and ever since said assignment * * * has been the sole owner and holder of said lease." The entire theory of his claim was that he was then in possession as tenant, and that he desired a settlement of his claim in view not only of the damages which had been suffered by him by reason of what the city had done, but also on account of what he understood that the city might do when its officers should make up their minds and determine what they were going to do. In view of the fact that the only theory of eviction relied upon by re-

spondent is that of constructive eviction, the law governing the rights of a tenant after such eviction becomes applicable.

"The general rule, however, relating to a constructive eviction is that any disturbance of the tenant's possession by the landlord whereby the premises are rendered unfit or unsuitable for occupancy in whole or in substantial part for the purposes for which they were leased amounts to a constructive eviction, if the tenant so elects and surrenders his possession (16 R. C. L., p. 686). There can be no constructive eviction if the tenant continues in the possession of the whole, however much he may be disturbed in the beneficial enjoyment." *Veysey v. Moriyama*, 184 Cal. 802, 805, 195 P. 662, 663 (20 A. L. R. 1363).

[5, 6] And further, in view of the provisions of the city charter to which we have referred, we are of the opinion that respondent is not entitled to maintain this action for any money claim or demand not contained in the statement of his claim which he made to the city. We concede that it is not every variation from strict identity in the amount of the demand, as shown in the statement of claim as compared with the subsequent complaint, that will deprive a plaintiff of the right to maintain his action. In so far as a claim sued upon is substantially the claim first presented to the city, the charter requirement should be deemed to have been met by the plaintiff. Construed under this rule, it may be that the claim, thus presented, established a sufficient foundation on which damages might have been recovered as for a trespass on the leasehold property; but the amount of the judgment which could be awarded in such action would necessarily be limited to the acts which had been done by the city at the time when the claim was presented, and the damages resulting therefrom, or arising out of the continued operation thereof.

The fact that the plaintiff had not been ousted from the leased premises, and did not claim an eviction even during the pendency of this action, until the time of the trial, is further shown by his supplemental complaint, under which he sought an injunction to compel the removal of alleged obstructions "around plaintiff's property," which interfered with his facilities for ingress into said property and egress therefrom. And as we have seen, the court actually ordered the construction by defendant of a roadway to enable the plaintiff to go to and from those premises.

As the judgment did not award possession to the plaintiff, it is clear that the plaintiff was not awarded any relief on the theory of an action in ejectment. The judgment was planted squarely upon the proposition that the plaintiff had been evicted by his landlord, the defendant, and that therefore he was entitled to recover the value of the leasehold as damages for such eviction. We

have stated the sufficient reasons which effectually show that a cause of action for such damages cannot be maintained herein.

Finally, if it were contended that the findings establish facts constituting trespass, and state the amount of damages incurred thereby, the answer must be that the court below plainly did not intend to segregate and assess damages as for a trespass. The fact found, that "the value of the improvements left on the property leased at the time of the commission of the acts complained of, is found to be the sum of \$25,000, after deducting the depreciation shown by the evidence," does not establish the amount of damage to those improvements caused by those acts.

For the reasons above stated, the judgment is reversed.

We concur: HOUSER, J.; CURTIS, J.

71 Cal. App. 97

FINKLE et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR SAN BERNARDINO COUNTY et al.
(Civ. 4911.)

(District Court of Appeal, Second District, Division 2, California. Jan. 31, 1925. Hearing Denied by Supreme Court March 30, 1925.)

1. New trial §113—Order granting new trial is judicial act and cannot be made by judge out of court.

Under Code Civ. Proc. §§ 166, 660, determination of motion for new trial is judicial act, which must be performed by court and cannot be made by judge in chambers, and an order signed by judge while in another county and mailed to county clerk was invalid and invalidity could not be waived; section 1004 not being applicable.

2. Courts §1—"Court" defined.

A court is a tribunal presided over by one or more judges for the exercise of such judicial power as has been conferred on it by law; it is a place where justice is judicially administered.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Court (of Justice).]

3. Appeal and error §110—Order purporting to grant new trial in equitable action not appealable.

Trial by jury not being matter of right in equitable action, order purporting to grant new trial therein is not appealable, under Code Civ. Proc. § 963.

4. Prohibition §1—Writ issues only to restrain future act, and not to undo act already performed.

Writ of prohibition issues only to restrain future act, and not to undo act already performed.

5. Prohibition §3(3)—Granted to prevent new trial under void order.

Where order granting new trial was void, and court was about to go forward with new

trial, there was no plain, speedy, and adequate remedy at law, and relief would be granted by writ of prohibition, in view of Code Civ. Proc. §§ 1089-1091, 1105.

Application for writ of prohibition by Roy B. Finkle and another, executors of the last will and testament of Sophia A. Finkle, deceased, against the Superior Court of the State of California in and for the County of San Bernardino, and Jesse Olney and another, judges of said court. Peremptory writ granted.

John L. Campbell and Charles L. Allison, both of San Bernardino, for petitioners.

Walter E. Byrne, of San Bernardino, for respondents.

FINLAYSON, P. J. This is a proceeding in prohibition to prevent the superior court for San Bernardino county from proceeding with the retrial of an action after an order granting defendant's motion for a new trial.

The action in which the new trial was granted is one in equity brought in the superior court for San Bernardino county by Sophia A. Finkle against F. C. Finkle to cancel an agreement for the conveyance of real property. It was tried in that court before a jury on October 16, 1923, the honorable J. A. Smith, judge of the superior court for Calaveras county, presiding. A verdict for the plaintiff was returned by the jury. The verdict, though advisory only—the case being of equitable cognizance—was evidently adopted by the court, for it is shown by the petition that on February 29, 1924, a judgment in accordance with the verdict was entered in favor of the plaintiff in the action. On March 5, 1924, notice of the entry of the judgment was served upon the defendant, who, within due time and on notice given by him as required by law, moved the court, Judge Smith presiding, to grant a new trial of the cause. The motion was taken under submission, and on May 5, 1924, the last day allowed by the statute for acting upon the motion, Judge Smith, at Calaveras county, signed a written order in the case, which, after reciting the submission of the motion, reads as follows: "It is ordered that the motion for a new trial be and the same is hereby granted." This order was mailed by Judge Smith to the county clerk of San Bernardino county, by whom it was received and filed at San Bernardino on May 7, 1924. Thereafter the petitioners here, as executors of the last will and testament of Sophia A. Finkle (they having been substituted as parties plaintiff for their testatrix, who had died in the meantime), moved these respondents to vacate the order granting the new trial. The motion was denied, and respondents are about to go forward with the retrial

of the case. It is to prevent such retrial that this proceeding was brought.

Petitioners contend that the order of Judge Smith granting the motion for a new trial is a nullity, for the reason that it was not made by the court within two months after notice of the entry of the judgment, and that under section 660 of the Code of Civil Procedure such failure on the part of the court to act within the statutory period is tantamount to a denial of the motion.

[1, 2] An order passing upon a motion for new trial is not one which a judge of the superior court has the right to make at chambers. The powers of a judge at chambers are enumerated in section 166 of the Code of Civil Procedure, and the authority to pass upon a motion for new trial is not one of them. The determination of such a motion is a judicial act which, to be legal, must be performed by the court, and not by a judge outside of the court. Code Civ. Proc. § 660; *Shepherd v. Superior Court*, 54 Cal. App. 673, 202 P. 466. See, also, *Campbell v. Genshlea*, 180 Cal. 217, 180 P. 336.

A court, as defined in *Von Schmidt v. Widber*, 99 Cal. 512, 34 P. 110, is "a tribunal presided over by one or more judges, for the exercise of such judicial power as has been conferred upon it by law." Blackstone defines it as "a place where justice is judicially administered"; and in *Von Schmidt v. Widber*, supra, it is said that it is essential "that the person or persons authorized to administer justice be at that place for the purpose of administering justice." The order signed by Judge Smith at Calaveras county on May 5, 1924, was not an order made by the superior court for San Bernardino county. It was not a judicial act at the place designated by law as that where justice is required to be judicially administered by the court.

The cases cited by respondents to the effect that a written order signed by the judge is valid when signed are not in point, for here the order was not one which the judge could make out of court. Section 1004 of the Code of Civil Procedure declares that "orders made out of court may be made by the judge of the court in any part of the state." Obviously, this provision is applicable only to such orders as a judge may make at chambers, or elsewhere out of court. It can have no application to an order which only the court can make, such, for example, as an order passing upon a motion for a new trial. If the power to pass upon the motion for new trial were one which could have been exercised by Judge Smith at chambers, it doubtless would have been operative when signed, and its filing in the clerk's office within the prescribed time would not have been essential to its validity. *Swift v. Canovan*, 47 Cal. 86. Or, if the order had been rendered by Judge Smith in open court, a failure of the clerk to enter it in his minutes before the expiration of May 5th would not have defeated its op-

eration as a court order, since the validity of an order made by the court does not depend upon the date of its entry. *Von Schmidt v. Widber*, supra. But that is not this case.

Respondents cite us to *Comstock*, etc., Co. v. Superior Court, 57 Cal. 625; *Walter v. Merced Academy Ass'n*, 126 Cal. 582, 59 P. 136; and *Estudillo v. Security*, etc., Co., 158 Cal. 66, 109 P. 884—cases which hold that if the judge who presided at the trial of a case in the superior court for a certain county subsequently goes into another county, where he prepares and signs his findings of fact and an order directing the entry of judgment, and sends such findings and order to the clerk of the county where the case was tried, and the clerk files them, the proceedings are not void for want of jurisdiction. We fail to see how the doctrine of these cases can possibly aid respondents. It is, of course, axiomatic that a case which has been tried and submitted for decision can be determined only by the court and not by the judge apart from the tribunal in which he presided during the trial. It is probably the theory of the decisions to which we have just adverted that, when the findings of fact are filed and the clerk is ordered to enter a particular judgment thereon, the court, as a court, has acted. In *Comstock*, etc., Co. v. Superior Court, supra, it is said that:

"The cause was not determined until the findings and order for judgment were filed with the clerk of the superior court."

In *Walter v. Merced Academy Ass'n*, supra, the court says that:

"Until the decision and decree were filed by the clerk in Merced county [the county where the case was tried], they were not in force."

According to the doctrine of these cases the order signed by Judge Smith could have no force or effect as a court order until it was received and filed by the clerk at San Bernardino. But that filing, which occurred on May 7, 1924, or two days after the expiration of the period during which the court possessed the power to grant a new trial, came too late to be effective as an order of the court. It is clear, therefore, that the motion for a new trial was denied by operation of law, and that the superior court is without jurisdiction to retry the case.

There is no merit in the claim that the order was but a mere irregularity which was waived by petitioner's failure to call it to the attention of the defendant in the action until after the time within which he might appeal from the judgment. The order was an absolute nullity, and ineffective for any purpose. *Shepherd v. Superior Court*, supra.

[3-5] Petitioners have no plain, speedy, and adequate remedy in the ordinary course of law. The case of *Finkle v. Finkle* was an equitable action. A trial by jury was therefore not a matter of right, and hence no ap-

peal lies from the order purporting to grant a new trial. Code Civ. Proc. § 963.

The case is one which calls for the issuance of the writ of prohibition. It is true, as respondents very properly say, that the remedy afforded by prohibition is prohibitive rather than corrective, and the writ will only issue to restrain the commission of a future act, and not simply to undo an act already performed. But here respondents, by persisting in their determination to go on with the retrial of the case of *Finkle v. Finkle*, are about to take proceedings in the action which are in excess of their jurisdiction. Petitioners therefore are entitled to a writ of prohibition restraining respondents from proceeding with the trial. See *Robson v. Superior Court*, 171 Cal. 588, 154 P. 8, and *Shepherd v. Superior Court*, supra.

Likening the order for a new trial to a final judgment respondents earnestly insist that the writ of prohibition will not lie, because it does not appear upon the face of the order that it was made out of court. In support of this contention we are referred to *Clendaniel v. Conrad*, 3 Boyce (Del.) 549, 83 A. 1036, Ann. Cas. 1915B, 968, and *Ex parte Cooper*, 143 U. S. 472, 12 S. Ct. 453, 36 L. Ed. 232. It is true that in the last-mentioned case the United States Supreme Court does say that prohibition will not lie after judgment or sentence, unless the want of jurisdiction which furnishes the basis for the writ be apparent upon the face of the proceeding sought to be prohibited. But an analysis of that decision discloses that the doctrine upon which it rests is none other than the generally recognized one that, if the existence or nonexistence of jurisdiction depends upon controverted facts which the lower court is competent to inquire into, prohibition will not lie if that court shall have determined the fact in favor of its jurisdiction. "When an inferior court has power to determine a jurisdictional fact, its determination cannot be collaterally attacked upon an application for a writ of prohibition." *Murphy v. Superior Court*, 84 Cal. 592, 24 P. 310. (We quote from the syllabus.) That this is the doctrine which governed the decision of the federal Supreme Court in *Ex parte Cooper* is made manifest by the following: There the court was asked to pass upon the jurisdiction of the United States District Court for the District of Alaska, sitting in admiralty. The Alaska court's jurisdiction depended upon whether the seizure of a libeled vessel and the offense committed by its crew—taking fur seals in violation of the federal statute—occurred in waters within the territorial jurisdiction of the United States. In the course of its opinion the United States Supreme Court said:

"Upon the face of the libel and findings, if the jurisdiction did not extend beyond three miles from the shore, the legal inference is that

the offense and seizure were within that limit [citing authorities]. *The court had power to inquire into the fact upon which jurisdiction depended and its maintenance of jurisdiction involved the conclusion necessary to sustain it.*" (Italics ours.)

In the instant case the jurisdiction of the superior court to act upon the motion for a new trial did not depend upon any controverted fact which that court was called upon to decide before it could pass upon the question whether a new trial should or should not be granted. The superior court had lost whatever jurisdiction it possessed when it failed to act within the time provided by the statute. In the other case cited by respondents (*Clendaniel v. Conrad*, supra) the Delaware Supreme Court held that on a petition for prohibition it could not consider issues of fact dehors the record, for the reason that it has no machinery for the determination of such issues. The ground for its decision on this branch of the case is stated by the court substantially as follows: The writ of prohibition is a common-law writ. The common-law procedure includes a method, and also the means, of determining issues of fact dehors the record in prohibition cases. But the court of last resort in England did not have original jurisdiction to issue writ of prohibition, and as a consequence that court had no common-law practice or procedure for determining issues of fact dehors the record in such proceedings. Therefore the Delaware Supreme Court, corresponding to the court of last resort in England, has no common-law rule of practice or procedure to govern it in the exercise of its jurisdiction to issue writs of prohibition, and, in the absence of a procedure established by statute, it has no means of determining issues of fact dehors the record. In the course of its opinion the Delaware court used this language:

"While this court is given by the Constitution the right to make all orders, rules, and processes proper to give effect to its writs of prohibition, it is not thereby given the power or means of trying issues of fact dehors the record. It can have no jury, neither has it the authority to appoint commissioners, masters, or other officers or agents to take testimony, examine questions of fact and report their findings to the court. In other words, this court has no machinery for the determination of issues of fact outside the record."

This reasoning is wholly inapplicable to the statutory system of procedure which obtains in this state. Our statute makes specific provision for the determination of issues of fact in all prohibition proceedings, irrespective of whether the facts put in issue arise dehors the record in the lower tribunal or appear upon the face of its proceedings. It is expressly provided by our Code that the respondent in a prohibition proceeding may file an answer to the petition; that the is-

sues of fact raised thereby may be tried before a jury; and that the petitioner may countervail the answer by proof either in direct denial or by way of avoidance. Code Civ. Proc. §§ 1105, 1089-1091. The mode of procedure thus sanctioned by our statute is entirely incompatible with the notion that this court has no machinery for the determination of issues of fact dehors the record of the tribunal whose jurisdiction is in question.

Let a peremptory writ of prohibition issue in accordance with the views herein expressed.

We concur: WORKS, J.; CRAIG, J.

70 Cal. App. 778

POWERS v. BARTON et al. (Civ. 5032.)

(District Court of Appeal, First District, Division 2, California. Jan. 29, 1925. Rehearing Denied Feb. 26, 1925. Hearing Denied by Supreme Court March 30, 1925.)

1. Sales ⚡447—Finding of warranty, which was not pleaded, cannot support claim of breach of warranty.

Where in action for price of rooted grapevines, buyers counterclaimed for breach of warranty, finding of court that contract called for vines of "No. 1 quality" is nugatory, where no such warranty was pleaded.

2. Sales ⚡447—Warranty of grapevines held not breached in view of finding.

Seller's warranty that rooted grapevines were alive and in good condition and fit for planting, and when properly planted would grow, *held* not breached in view of finding that seller shipped live grapevines fit to be planted and which would grow.

3. Sales ⚡447 — Finding held to show no breach of warranty implied because of inaccessibility of goods for examination.

Where buyers contended that seller agreed to sell merchandise inaccessible for examination at time of sale and thereby warranted merchandise as sound and merchantable, finding that seller shipped live grapevines fit to be planted, and which would grow, *held* to recite full compliance with alleged warranty.

4. Appeal and error ⚡179(1)—Issue of improper packing of goods by seller held not raised.

Contention of buyers on appeal from judgment for seller for purchase price of grapevines, that latter undertook to pack vines and improperly packed them, cannot be considered, where pleadings do not raise issue, and where findings as to how vines were packed do not advise court as to whether method of packing adopted was reasonably proper under circumstances.

5. Sales ⚡441(3)—Evidence held to support judgment for seller, where record fails to disclose cause of unfit condition of goods.

In action by seller for price of grapevines, wherein buyers counterclaimed for breach of

warranty, evidence that vines when shipped were alive and in good condition, but that on arriving all but 10 per cent. were unfit to plant, *held* to support judgment for seller, where record does not disclose whether change was due to improper packing, delay in transportation, outside cause, or natural result of keeping plants out of ground too long.

6. Trial ⚡396(1)—Findings held nugatory where issues not made by pleadings.

Findings made on issue not made by pleadings *held* nugatory.

On Petition for Rehearing.

7. Sales ⚡447—Unpleaded warranties provable because of seller's common count are affirmed or negated by finding on count.

Though express and implied warranties may be proved by buyer, where seller in action for price pleaded common count, trial court must make findings on issues made by pleadings, and its finding affirming or negating common count affirms or negatives all issues of fact coming within purview thereof.

8. Sales ⚡447—Finding held complete on issue whether seller complied with warranty.

Finding that seller shipped live grapevines which were fit to be planted and which would grow *held* complete without finding that vines when delivered were in good condition.

9. Trial ⚡397(3)—Court need not find on issue not made by pleadings.

Refusal to make a finding concerning effect of telephone conversation between parties to action *held* not improper, where it was not an issue made by pleadings, but was merely evidence offered at trial.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by E. Powers against C. M. Barton and another, partners doing business under the name of Barton & Colomb, for the purchase price of goods sold and delivered, wherein defendants counterclaimed for breach of warranty. From a judgment for plaintiff, defendants appeal. Affirmed.

Hearing denied; RICHARDS, J., dissenting.

W. H. Spaulding, of San Francisco, for appellants.

Nutter, Hancock & Rutherford, of Stockton, and C. J. Goodell, of San Francisco, for respondent.

STURTEVANT, J. This is an appeal from a judgment rendered for the purchase price of rooted grapevines sold and delivered by the plaintiff to the defendants.

In the trial court an issue was made to the effect that the plaintiff had violated the state regulations enacted to prevent the spread of the disease known as phylloxera. That issue soon fell out of the case. A purported delivery was made in violation of the

statute. The goods were intercepted, returned to the shipper, and thereafter a second delivery was made which wholly conformed to the statute. That subject-matter became immaterial, except in so far as the period of time is material which lapsed between the date that the plaintiff dug the grapevines, and the date on which the defendants attempted to reset the grapevines. There is still present in the case a dispute as to whether the plaintiff sold his vines under an express or implied warranty, and whether he complied therewith and was entitled to judgment.

[1] The appellants claim that certain warranties were breached. We shall take up each of those claims separately. Commencing in the middle of finding No. 2, the appellants quote: "In this connection the court finds that in the month of December, 1922, at Manteca, Cal., the defendants made and entered into a contract with the plaintiff wherein and whereby the plaintiff agreed to sell to said defendants and they agreed to buy from him 18,000 Alicante rooted grapevines of No. 1 quality at the price of \$35 per thousand, free on board cars Manteca, Cal., and wherein and whereby they agreed to pay plaintiff the sum of \$1 per thousand additional for the work and labor of packing of the vines; that subsequent thereto and in the month of January, 1923, said defendants made a further and separate contract with plaintiff wherein and whereby said plaintiff agreed to sell to defendants and they agreed to buy from him 1900 Zinfandel rooted grapevines of No. 1 quality at the price of \$35 per thousand, free on board cars Manteca, Cal., and wherein and whereby said defendants further agreed to pay plaintiff an additional sum of \$1 per thousand for the work and labor of packing said Zinfandel vines." Thereupon they base the statement that the vines were warranted No. 1 quality. An examination of the pleadings discloses that no such warranty was pleaded, and that the finding which we have quoted is without the issues made by the pleadings. Such a finding cannot, therefore, support the claim of the appellants.

[2] Again the appellants contended that the vines were warranted as "rooted grapevines that were alive and in good condition and fit for planting and which, when properly planted, would grow." This warranty was alleged by the defendants, it was admitted by the plaintiff, and the court found, "that plaintiff shipped live grapevines which were fit to be planted and which would grow." It is therefore apparent that the warranty contended for was not breached.

[3] The appellants also contended that the seller agreed to sell merchandise which was inaccessible for examination by the buyer at the time of the sale, and that the seller thereby warranted that the merchandise was sound and merchantable. The pleadings al-

leged, the evidence proved, and the court found that the vines were to be delivered f. o. b. cars Manteca, Cal. As contended by the appellants, the findings also recited that the vines were inaccessible to them and each of them and were never seen by them or either of them until the arrival of the vines at Hollister on the 8th day of February, 1923, but it also appears in the findings, "that the plaintiff shipped live grapevines which were fit to be planted and which would grow." It appears to us that the finding last quoted recites a full compliance with the alleged warranty. The appellants have not attempted to show wherein the language of the finding of performance varies in substance from the warranty as claimed.

[4] In this court the appellants call attention to the fact that the seller undertook to pack the merchandise, and thereupon they assert that the goods were improperly packed. As to whether the merchandise was in fact properly or improperly packed no issue was made by the pleadings. True it is that some evidence was introduced in the trial court as to whether the merchandise was properly or improperly packed. The trial court made no finding on the subject except as follows: "That said vines when so shipped by plaintiff at Manteca on January 31, 1923, were packed solely in burlap and without straw or other packing for shipment to defendants at said Hollister. * * *" Whether the method of packing so delineated is a proper or improper method, we are not advised. Neither are we advised by either the pleadings or the findings as to whether the method of packing adopted by the respondent was reasonably proper for this particular shipment.

[5] There is evidence in the record that the vines were a fine lot and in good condition when they first arrived at Hollister. The respondent was the only witness who testified as to the condition of the vines when they were shipped from Manteca on January 31, 1923. He testified that the vines were at that time alive and in good condition. On the other hand, the evidence introduced by the appellants sustained the finding of the trial court that when the vines arrived at Hollister on February 8, 1923, all of said vines except about 10 per cent. thereof were in bad condition and not fit to plant. However, the record is silent as to whether the change in the condition of the vines between the time they left Manteca and arrived at Hollister was caused by improper packing, delay in transportation, some outside cause, or the natural result of keeping the plants out of the ground too long.

[6] The trial court made some findings which we have numbered (a), (b), (c), and (d).

(a) "The court further finds that when said vines were so planted the defendants well knew the condition of said vines, as hereinabove described."

(b) "The court further finds that after receiving, unloading, examining, and inspecting said vines, defendants took no steps to reject any of them, or notify plaintiff of their condition until most of said 14,700 vines had been planted, but proceeded as aforesaid, to plant said 14,700 vines and permitted the remainder thereof to remain on their land."

(c) "That before said planting was entirely finished defendants did complain to said plaintiff about the said unsuitable and unfit condition of said vines."

(d) "The court finds that the acts and conduct of defendants constituted and was an acceptance of said vines, and all thereof."

The appellants claim that each of those findings was immaterial and that neither one nor all would support a judgment for the respondent. Be that as it may, it is patent that each of said findings was without any issue made by the pleadings and that each is nugatory; but the other findings fully supported the judgment for the respondent.

We find no error in the record.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

On Petition for Rehearing.

PER CURIAM. The defendants and appellants have petitioned for a rehearing. They complain that in the opinion heretofore filed this court has committed certain errors. In that behalf they point to the passage in which we stated that the finding "No. 1 quality" was not within the issues. Thereupon they assert that it was one of the terms of the contract and therefore was material. However, it was not one of the alleged terms of the contract, and was not one of the allegations contained in the pleadings of the plaintiff or the pleadings of the defendants.

[7] As the plaintiff pleaded a common count, the appellants claim that the express warranties and implied warranties could be proved. We have never held to the contrary. But when it came to preparing findings the trial court was entitled to and required to make its findings on the issues made by the pleadings. When, after the trial, it made a finding which affirmed or negated the common count, that finding affirmed or negated such issues of fact as came within the purview of that common count.

Appellants argue that the pleadings were treated at the time as being sufficient, and that on appeal the parties may not take a different position, nor should this court. Nothing contained in the former opinion of this court, nor in this opinion, is at variance with that rule in any respect whatsoever. The appellants also complain of our statement that the issue to the effect that on January 17, 1923, the plaintiff had not complied with the state regulations and qualified as a vendor of trees and vines, "soon fell out of the case," and thereupon they proceed to ar-

gue that the evidence of and concerning that issue brought out the facts that the vines were taken out of the ground and kept out from January 17 until February 8, and that such evidence strongly argued that the vines were therefore in bad condition when they arrived at Hollister on February 8. As all of evidence was introduced without any limitation thereon and was not stricken out, it is patent that the evidence could have been, and doubtlessly was, used by the trial court for the purpose as stated by the appellants. In our former opinion we said nothing to the contrary and do not now.

The appellants quote our language in which we stated that this court was not advised "either by the pleadings or the findings as to whether the method of packing * * * was reasonably proper." We repeat it. There was evidence introduced as to what is, and what is not, proper packing, but there was neither allegation nor finding on the subject. As there was no allegation on the subject, no finding was necessary. However, when the court did make a finding, "they were packed solely in burlap and without straw or other packing," such finding was immaterial and moreover, as stated in our former opinion, we have nothing to compare it with so that we can draw a conclusion whether the method of packing was proper or improper.

On the trial of the case, the respondent introduced evidence to the effect that he dug, dipped, packed, and shipped at Manteca to the appellants the vines which he had agreed to sell, and that the vines were at that time in good condition. The respondent at the trial took the position that thereupon he had made all of the proof that he was called upon to make. In this court he took the same position. Of course the appellants took the contrary position. However, they introduced no evidence to the effect that the vines were not in good condition when they left Manteca on January 31, or did they introduce any evidence as to what caused the change in the condition of the vines, and why the vines did not grow. On this application they seem to contend that the burden of making that proof rested on the respondent, and they cite and rely on *Barrios v. Pacific States Trading Co.*, 41 Cal. App. 637, 183 P. 236. A most cursory reading of that opinion shows a very different condition of the evidence.

In our former opinion, we stated that "the appellants have not attempted to show wherein the language of the finding of performance varies in substance from the warranty as claimed." The appellants assert that the warranty alleged by the plaintiff in one of his pleadings was "when properly planted would grow and plaintiff alleges in this connection that the rooted grapevines so shipped to defendants * * * if properly cared for by defendants and properly planted in

suitable soil in proper condition, that said grapevines would in fact have grown." Then appellants assert that the trial court should have found that the vines "would grow not only when shipped at Manteca, but also when planted by defendants at Hollister, if properly cared for by defendants and properly planted in suitable soil in proper condition." To this contention there are two answers. One answer is that under the appellants' contention the trial court would have gone beyond the language used in the pleadings. The second answer is that the trial court did find that the "plaintiff knew at all times that such delivery to said defendants was for planting * * * in San Benito county," and "that it is not true that there was any failure of the plaintiff to ship or deliver to defendants live grapevines fit to be planted and which would grow, but on the contrary, it is true that plaintiff shipped live grapevines which were fit to be planted and which would grow." These findings substantially comply with the language of the warranty.

[8] Again the appellants contend that the trial court did not find that the vines delivered were or were not "in good condition." The first reply is that the point is new, and this is the first time that the point has been made on this appeal. The next reply is that the appellants stated in their pleading called a counterclaim "that said plaintiff agreed with said defendants to sell and to ship to said defendants rooted grapevines that were alive and in good condition and fit for planting, and which when properly planted would grow. * * *" Answering that allegation, the respondent alleged that "he agreed with defendants to sell f. o. b. Manteca, San Joaquin county, Cal., and to ship to defendants rooted grapevines that were alive and in good condition, and fit for planting, and which, when properly planted, would grow, and plaintiff alleges in this connection that the rooted grapevines so shipped to defendants were in fact alive and in good condition, and were fit for planting, and if properly cared for by defendants and properly planted in suitable soil in proper condition that said grapevines would in fact have grown." Replying to the issue so made by the pleadings, the trial court made the last finding contained in its decision. While that paragraph does not use the exact words used in the pleadings, we think it is a finding that is full, fair, and complete on this issue.

Again the appellants assert that the trial court did not find that the vines shipped were in "No. 1 quality." What we have said above as to "No. 1 quality" applies here.

[9] In this same connection, the appellants make another point for the first time. They call attention to a telephone conversation which was held between the plaintiff and the defendants at the time the vines were re-

jected by the horticultural commissioner at Hollister. Thereupon the appellants complain, because the trial court made no finding in response to the language used by the appellants in holding that telephone conversation. Of course, the answer is that we are talking about findings and not about a bill of exceptions. The language used in the telephone conversation was not an issue made by the pleadings. It was merely evidence offered at the trial.

The petition is denied.

71 Cal. App. 2

PEOPLE v. NORCROSS et al. SAME v. NORCROSS. SAME v. CLARK.
(Cr. 1096-1098.)

(District Court of Appeal, Second District, Division 2, California. Jan. 29, 1925.)

1. Criminal law $\S$ 970(5) — Complaints of form of information made on motion in arrest are too late.

Complaint that information charging violations of Wright Act does not substantially comply with Pen. Code, §§ 950-952, being aimed at formal defects in information, comes too late when first made on motion in arrest of judgment.

2. Intoxicating liquors $\S$ 202—Information, charging liquor law violation, need not allege liquor was for beverage purposes.

In view of provisions of Volstead Act (U. S. Comp. St. Ann. Supp. 1923, § 10138¼ et seq.), penal provisions of which Wright Act expressly adopts, pursuant to Const. U. S. Amend. 18, that phrase "intoxicating liquor" shall include alcohol, etc., "fit for * * * beverage purposes," and that possession is prima facie evidence of unlawful purpose, information under latter act need not allege that liquor was for beverage purposes.

3. Statutes $\S$ 226—Interpretation by courts of state, from which statute adopted, will be followed.

In construing statute adopted from another state, decisions of courts of such other state are entitled to great consideration, and their interpretation of statute will be followed, and same rule applies to federal statute on which action is based.

4. Intoxicating liquors $\S$ 219 — Information, charging sale, need not name purchasers.

Information, charging sale of intoxicating liquor in violation of Wright Act, need not name alleged purchasers.

5. Criminal law $\S$ 37—Purchase of liquor with money furnished by district attorney held not entrapment.

That persons who purchased liquor from defendants were operatives in employ of district attorney who furnished money for that purpose does not constitute entrapment, where evidence does not show importunity or deceit, or that defendants did not hold themselves out

as ready and able to sell, and defense was denial only.

6. Criminal law §772(6)—Instructions as to entrapment held sufficient.

Where state admittedly employed and furnished money to operatives to buy liquor, refusal to instruct further as to entrapment, after instructing that jury should acquit unless defendants were ready, able, and willing to sell and intended to violate law, and were not induced solely by operatives, *held proper*.

7. Indictment and information §110(31)—Allegations of alcoholic content and fitness as beverage held unnecessary, where information follows statute.

Where offenses are charged substantially in language of penal provisions of Volstead Act (U. S. Comp. St. Ann. Supp. 1923, § 10138½ et seq.), allegations as to alcoholic content of liquor and its fitness as beverage *held unnecessary*, in view of declaration of section 3 of title 2 (section 10138½aa) that "no person shall * * * manufacture, sell," etc., "intoxicating liquor except as authorized in this act."

8. Intoxicating liquors §222 — Information need not negative exceptions named in act.

In view of declaration of Volstead Act, tit. 2, § 3 (U. S. Comp. St. Ann. Supp. 1923, § 10138½aa), that "no person shall * * * manufacture," etc., "any intoxicating liquor except as authorized in this act," it is not necessary in charging offense under act to negative any of exceptions, since language defining offenses is separable from exceptions.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Louise Norcross and William S. Clark were convicted of conspiracy to sell and deliver intoxicating liquor, and each of them was convicted of selling intoxicating liquor and maintaining a nuisance, and they appeal. *Affirmed*.

James P. Hogan, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

CRAIG, J. The appellants were charged by information with having conspired, combined, and confederated and agreed together to sell, transport, furnish, and deliver, and to have and possess intoxicating liquor, with intent so to do, in violation of the state statute known as the Wright Act; and as overt acts in furtherance of such conspiracy it was alleged that they did on or about the 3d day of December, 1923, in the county of Los Angeles, sell, furnish, deliver, have, and possess intoxicating liquor, and that the same was willful, felonious, and unlawful. Each of said defendants was also separately charged by another information with having willfully, unlawfully, and feloniously sold intoxicating liquor, contrary to the provisions

of said act, and with having maintained a nuisance by keeping a place where such traffic was conducted by them. The three cases were tried together, and the jury found the defendants guilty upon each of said charges.

It is contended that the informations do not contain sufficient facts to constitute offenses, in that it is not alleged that the intoxicating liquor charged to have been sold was for beverage purposes; also that the informations do not substantially conform to sections 950, 951, and 952 of the Penal Code, and especially that they are not direct and certain in stating facts and circumstances necessary to enable a person of common understanding to know what is intended to be charged. Appellants also assert that the evidence was insufficient to justify the verdict, and that the trial court committed errors in giving certain instructions to the jury, and in refusing to give others which were requested.

[1] Complaint concerning defects in the form of the information upon the grounds urged comes too late, since it was first made upon a motion in arrest of judgment. *People v. Feilen*, 58 Cal. 218, 41 Am. Rep. 258.

The evidence disclosed that appellant Norcross leased and maintained the Antler Hotel, at Venice, in Los Angeles county, and that Clark was in her employ and residing at the same place; that complaint had been made to the lessor of people drinking in the hotel and being intoxicated about the premises; that he had also seen drunken men leaving the place on many occasions. The lessor notified the district attorney, who placed one Irving and his wife in the house to watch for any possible violations of the law, and paid them for their services and furnished them with money to purchase liquor if they should find that it was obtainable from persons in charge of or living at the Antler Hotel. Irving and his wife both smelled liquor about the room occupied by Clark, and saw people entering his room and drinking from glasses. Irving asked Clark for a bottle of "medicine," and a bottle of whisky was brought to Irving's room, for which he paid Clark three dollars, and he subsequently and on various dates purchased other bottles of whisky from Clark, and on one occasion the latter filled an empty bottle, which Irving furnished, with the same substance. Mrs. Irving also bought whisky from the defendants when they were together, for which she paid Mrs. Norcross, who sent Clark into a room for it, and he delivered the liquor to Mrs. Irving. It was testified that each of the appellants cautioned these witnesses to hide the bottles and let no one see them; that "whisky" was not mentioned, but that "medicine," and "a bottle," were requested; and that whisky was promptly furnished and paid for. A search by of-

ficers resulted in the discovery and confiscation of a pint bottle and a gallon jug, each partly full, and a gallon jug full, of whisky in the room designated by the witnesses. Clark did not testify, but Mrs. Norcross denied that she or Clark had sold any liquor, and stated that on one occasion Mrs. Irving was ill, and that she demanded some whisky. This the latter positively denied.

[2] Appellants first assert that, although the information alleged the liquor as being intoxicating, it contained no allegation that it was for beverage purposes; that the only object of the Wright Act was to prohibit traffic in such liquors for beverage purposes; and that the people therefore failed to allege or establish the commission of any offense.

It was alleged that appellants conspired to, and did, willfully, unlawfully, and feloniously, sell, furnish, deliver, have, and possess intoxicating liquor, and the evidence tended to show that they sold, delivered, furnished, had, and possessed whisky which was intoxicating. Chapter 80 of the Laws of 1921 (page 79), known as the Wright Act, expressly adopts the penal provisions of the Volstead or National Prohibition Act (U. S. Comp. St. Ann. Supp. 1923, § 10138 $\frac{1}{4}$ et seq.) and recognizes the requirements of the Eighteenth Amendment to the Constitution of the United States, providing for concurrent enforcement of prohibition by the individual states. Section 2 of the same chapter declares that—

"All acts or omissions prohibited or declared unlawful by the Eighteenth Amendment to the Constitution of the United States or by the Volstead Act are hereby prohibited and declared unlawful; and violations thereof are subject to the penalties provided in the Volstead Act."

The latter act provides that the "phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whisky * * * fit for * * * beverage purposes." (U. S. Comp. St. Ann. Supp. 1923, § 10138 $\frac{1}{2}$), and that—

"No person shall * * * manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented." U. S. Comp. St. Ann. Supp. 1923, § 10138 $\frac{1}{2}$ aa.

It is further provided that—

"The possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title." U. S. Comp. St. Ann. Supp. 1923, § 10138 $\frac{1}{2}$ t.

It has been held in Minnesota that, where a statute so defines intoxicating liquor, an

indictment need not contain a more definite specification than that before us, in that it is not necessary to charge that such liquor, is potable as a beverage. *State v. Brown*, 151 Minn. 340, 186 N. W. 946; *State v. Hosmer*, 144 Minn. 342, 175 N. W. 683.

[3] It has been a uniform rule of long standing in California that, in construing a statute adopted from another state, the decisions of the courts of such other state are entitled to great consideration, and their interpretation of the statute will be followed. *Havemeyer v. Superior Court*, 84 Cal. 324, 24 P. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; *Osborne v. Home Life Ins. Co.*, 123 Cal. 610, 56 P. 616; *In re Seaman's Estate*, 146 Cal. 455, 80 P. 700, 106 Am. St. Rep. 53, 2 Ann. Cas. 726. And the same rule applies in construing a federal statute upon which an action is based and is being tried in the courts of this state. *Werner v. Southern Pacific Co.*, 44 Cal. App. 76, 185 P. 1016; *Southern Pacific Co. v. Superior Court*, 27 Cal. App. 240, 150 P. 397, 404.

In *Herine v. United States*, 276 F. 806, the United States Circuit Court of Appeals for the Ninth Circuit, in passing upon an appeal from a conviction in California under the National Prohibition Act, said:

"The allegation that defendant willfully and unlawfully and knowingly did keep on the premises certain described intoxicating liquor, as alleged, was sufficient to comply with the statute. Section 21, tit. 2, National Prohibition Act. Under the provisions of section 32 of title 2 of the act, it was unnecessary in the indictment to include more."

In *Cabiale et al. v. United States*, 276 F. 769, the same court held that an allegation of the sale of intoxicating liquor which was then and there prohibited and unlawful and in violation of section 3 of the act was sufficient, and that it necessarily excluded the idea that the liquor was sold for a legitimate purpose. It was further held in *United States v. Everson (D. C.)* 280 F. 126, that an information charging an "unlawful" possession was sufficient to place upon the defendant the onus of proving that it was lawful, and in *Massey v. United States*, 281 F. 293, 296, it was said by the Circuit Court of Appeals that a description as intoxicating liquor was sufficient, and that it is not necessary to include any defensive averments. The rule has been stated and followed in other cases. *Dillon v. United States (C. C. A.)* 279 F. 639; *Booth v. United States*, 197 F. 283, 286, 116 C. C. A. 645.

[4] Another point is attempted to be made of the failure of the information to state the names of the alleged purchasers, but this also has been held to be unnecessary. *Massey v. United States*, supra.

[5, 6] The requested instruction, the refusal of which is assigned as error, was based upon *Woo Wai v. United States*, 223

F. 412, 137 C. C. A. 604, wherein it was said that, where an officer of the law induced a defendant to commit a criminal act not contemplated by him, a conviction would be contrary to public policy. That such is the law has been held by our state and federal courts on numerous occasions, but the evidence in the case at bar does not tend to show that appellants were importuned or persuaded to violate any law, or that they did not hold themselves out as ready, able, and willing to possess, sell, and deliver intoxicating liquor whenever the opportunity was presented. The only evidence from which entrapment could possibly be inferred was the fact, frankly admitted by the Irvings, that they were in the employ of the district attorney's office, and that they paid appellants for whisky with money furnished by the district attorney for that purpose. This did not constitute entrapment, nor was it a defense, and there is no showing that appellants were in any manner misled or deceived by the operatives. It was so held in *People v. Barkdoll*, 36 Cal. App. 25, 171 P. 440, and the instructions given both at the requests of the respective parties, and of the court's own motion, fully advised the jury as to the law, and directed that, if they should not find beyond a reasonable doubt that appellants were ready, able, and willing to sell intoxicating liquor, and that they intended to violate the law, and were not induced to do so solely by persons so employed, they should acquit them. The significant fact is that throughout the record no evidence appears to have been offered tending to show that either defendant was entrapped or induced to commit a crime, and that the defense consisted of a complete denial of any possession, delivery or sale of intoxicating liquor. We think the instructions given were sufficient, and that the action of the trial court in refusing to give others as requested was proper.

No error appearing, the judgments and orders denying motion for new trial are affirmed.

FINLAYSON, P. J. [7, 8] I concur. The specific grounds of objection which appellants make to the informations are: (1) It is not alleged who the person was to whom the liquor was sold; (2) it is not alleged that the liquor contained more than one-half of 1 per cent. of alcohol by volume; and (3) it is not alleged that the liquor was fit for use for beverage purposes. The standards

by which the informations are to be tested are furnished by those rules of pleading in criminal actions which are recognized by our state practice as the established rules of this jurisdiction. The Wright Act has adopted the "penal provisions" of the National Prohibition Act, but none of its procedural provisions. When the informations are tested by the rules of pleading established in this jurisdiction, there can be no question as to their sufficiency. The name of the person to whom the liquor was sold is neither descriptive of, nor of the essence of, the offense charged, and therefore its allegation is not essential. *State v. Freulli*, 98 N. J. Law, 395, 119 A. 787; *People v. Malone* (Cal. App.) 229 P. 1000. As to the objection that there is no allegation that the liquor contained more than one-half of one per centum of alcohol, or that it was fit for use as a beverage, it is sufficient to say that the offenses are charged substantially in the language of the penal provisions of the Volstead Act. Section 3 of title 2 of that act (U. S. Comp. St. Ann. Supp. 1923, § 10138½ aa) declares that—

"No person shall * * * manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this act."

It is not necessary to negative any of the exceptions, for the language defining the offenses is so separable from the exceptions named in the statute that the ingredients constituting each offense may be accurately and clearly defined and described without reference to the exceptions. See *State v. Snyder* (N. M.) 227 P. 613. The offenses denounced by the statute are the unlawful manufacture, sale, etc., of "intoxicating liquor." Whether the liquor unlawfully manufactured, sold, or possessed, etc., be of such generally recognized intoxicating liquors as brandy, whisky, wine, or beer, or whether it be some other kind of intoxicating liquor which is fit for use as a beverage, the description of it as "intoxicating liquor" comes within the general designation contained in the statute; and under the rule established by the decisions in this state that is all that is necessary. *People v. Johnson*, 63 Cal. App. 178, 218 P. 449; *People v. Cencevich*, 64 Cal. App. 39, 220 P. 448; *People v. Silva* (Cal. App.) 227 P. 976.

I concur: WORKS, J.

71 Cal. App. 73

**ANDERSON et al. v. JULIUS LEVIN CO.
et al. (Civ. 4859.)**

(District Court of Appeal, First District, Division 1, California, Jan. 31, 1925. Hearing Denied by Supreme Court March 30, 1925.)

Landlord and tenant — 184(2)—Deposit made on execution of lease held not recoverable by assignee of lessee.

Assignee of lessee held not entitled to recover deposit made on execution of lease by itself as sublessee and assignee, where prior to assignment assignor had been divested of all rights under lease and deposit was severally or in entirety specified by lease to lessee to be paid for its execution.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by George Anderson and Robert A. Smith, as individuals and copartners doing business under the firm name and style of the Anderson-Smith Motor Company against the Julius Levin Company and another. From judgment of nonsuit, plaintiffs appeal. Affirmed.

Joseph A. Brown, of San Francisco, for appellants.

Brownstone & Goodman, of San Francisco, for respondents.

ST. SURE, J. Appeal from judgment of nonsuit. The complaint stated a cause for money had and received in three counts, the first count for \$5,000, from W. S. Wright, the second for \$2,000, from W. S. Wright, and the third for money had and received from plaintiffs in the sum of \$3,000. Under the first count an assignment to plaintiffs of Wright's claim is set out. Prayer is for \$5,000, with interest from November 7, 1919. Defendant, Wilton Securities Company, sued as Julius Levin Company, answered denying all the allegations of the complaint, and alleged that none of the counts stated a cause of action against defendant.

The facts, briefly stated, show that on November 3, 1919, W. S. Wright, plaintiffs' assignor here, entered into an agreement of lease with Julius Levin Company for certain premises on Van Ness avenue, San Francisco, at a stipulated rental. The lease, as consideration for its execution, contained a provision for the payment, simultaneously with execution of the lease, of the sum of \$5,000. It was later provided that, if the provisions of the lease were fully performed, the sum so paid might be applied in specified amounts on the last 23 months of the 5-year term. There was no provision in the lease against subletting, and a few days thereafter Wright entered into an agreement of sublease of part of the same premises with the plaintiffs here. A provision for the payment of \$3,000 for the

execution of the sublease was contained therein, and as matter of fact the money so paid was paid directly to the Julius Levin Company by check of the plaintiffs, who paid such sum at defendant's office in company with Wright. The Levin Company had already received \$2,500 from Wright, and the \$3,000 thus paid by plaintiffs was received by them on the Wright account, on which, being overpaid by reason of the \$3,000 payment, they returned \$500 to Wright. Shortly after the leases above mentioned were entered into, a corporation was formed by name of Wright Motor Company, to which Wright made assignment of the lease and all rights thereunder. Business grew steadily worse, and the company later made an assignment for the benefit of creditors, in which Wright, then owner of all the motor company's stock, joined and assented to. The company later was adjudged bankrupt. During the period after the assignment to creditors and preceding bankruptcy, while the assignee for creditors was in charge, and also during part of the period of bankruptcy proceedings, attempts were being made by the assignee and by Wright to rent the premises, for the rent of which he was in default. The matter of taking over the operation of the lease was taken up by the trustee in bankruptcy, and the matter of a claim by Wright in connection with the lease considered by Wright and his then attorney. So far as the record shows, no claim was asserted by Wright, and he acquiesced in the efforts of his lessor to rent the premises and minimize his loss. During part of the time after Wright's default and abandonment, the plaintiffs remained in possession and paid rent to the assignee for creditors. They later discontinued paying rent and removed from the premises, some three months after the adjudication in bankruptcy, delivered the key to a real estate man acting for the Levin Company, and until this suit was brought appeared to have made no claim of any kind in the premises. The entire premises were then leased at a loss by the Levin Company to another motor company. The assignment on which this suit is based was made following all of the above transactions.

After a most liberal allowance of testimony in the trial court, on the expressed intent of the court to do justice to all, a motion for nonsuit was granted, on the grounds that the plaintiffs' assignor was not entitled to sue, having parted with the lease under assignment to creditors; that, if title to the lease had not gone to the assignee for creditors, it vested in the trustee in bankruptcy; that both assignor and assignee defaulted in their contract of lease and are attempting to secure performance of a contract under which they are in default; that the money paid was for execution of the contract and as such is not repayable; the premises were

sublet to the benefit of the subtenant at a loss by the terms of the contract; and, finally, that no contractual relations exist between the Levin Company and plaintiffs—that is, no privileged contract.

A reading of the entire transcript is sufficient to show that respondent's motion for nonsuit was properly granted and the judgment thereon must stand. The assignment to the Wright Company by Wright divested him of all rights under the lease, which a later assignment to plaintiffs could not revive. The Wright Company, by assignment for the benefit of creditors and by virtue of the proceedings in bankruptcy, was divested of all title to the lease. Further, the entire amount here sought to be recovered by different counts is, severally or in entirety, part or all of the amount specified by lease to Wright to be paid for its execution, and not recoverable by him under the decisions. *Ramish v. Workman*, 33 Cal. App. 19, 164 P. 26; *Curtis v. Arnold*, 43 Cal. App. 103, 184 P. 510. On the showing of this ground alone the nonsuit was proper as to the counts for \$5,000 and \$2,000. The documentary evidence also shows that the \$3,000 was paid as part of the \$5,000, and the attempt to vary the effect of the terms of the lease by parol testimony, that its payment was for the benefit of plaintiffs, was of no avail. There were no contractual relations between defendant and plaintiff. The assignment to plaintiff, on which the suit here was brought, carried nothing because its subject-matter of right, granting any existed, had been theretofore effectually conveyed out of plaintiffs' as signor.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

71 Cal. App. 77

(234 P.)

MACOWSKY v. IRVINE et al. (Civ. 4578.)

(District Court of Appeal, First District, Division 1, California. Jan. 31, 1925. Hearing Denied by Supreme Court March 30, 1925.)

1. Appeal and error ☞544(2)—Scope of review on appeal on judgment roll alone, stated.

Where appeal is on judgment roll alone, review is limited to determination of whether complaint states cause of action, whether findings are within issues, whether findings support judgment, and whether reversible error appears on face of record concerning matter of law.

2. Sales ☞391(5)—Buyer may sue on common count to recover payment after rescission.

Buyer after rescinding contract of purchase, under which he has paid money or delivered property, may sue on common count to recover it.

3. Action ☞48(3)—Counts for money had and received and for rescission held not improperly joined.

Where buyer paid purchase price of piano in cash, jewelry, and used piano, and rescinded and offered to return piano and demanded return of money and property for sellers' fraud in delivering old instrument, common count for purchase price as for money had and received and count for rescission praying money judgment in sum of purchase price *held* consistent and not improperly joined under Code Civ. Proc. § 427.

4. Appeal and error ☞931(1)—Presumption attaching to regularity of proceedings and to support judgment held to sustain finding.

Where buyer rescinded contract of purchase for fraud in "dressing up" and delivering old piano and sued in two counts for value parted with in money, jewelry, and used piano as for money had and received, and for rescission praying money judgment, presumptions attaching to regularity of proceedings and to support judgment *held* to sustain finding of indebtedness by seller as made in exercise of court's equitable powers and to do justice even if legal count were defectively stated.

5. Trial ☞397(3)—Findings as to facts admitted by pleadings held unnecessary.

In suit by buyer after rescission on ground of fraud for contract price of piano which he had paid for in money, jewelry, and used piano, findings as to contract price and amounts allowed for goods exchanged *held* unnecessary, where sellers' pleadings raised no issue as to amounts alleged by buyer, thereby admitting them as true valuations.

6. Trial ☞397(2)—Express finding unnecessary in view of construction of findings favorably to judgment where possible.

Where money judgment was given buyer of piano in suit for rescission for fraud, though he had paid contract price in money and goods, in view of construction of findings on appeal to support judgment where possible, especially where fraud appears and appeal is on judgment

roll only, findings *held* to support judgment, though there was no express finding of inability or impracticability of return of goods.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Suit by J. Macowsky against R. S. Irvine and another. Judgment for plaintiff, and defendants appeal. Affirmed.

John W. Marshall, of San Francisco (Knight, Boland, Hutchinson & Christin, of San Francisco, of counsel), for appellant.

Brownstone & Goodman, of San Francisco, for respondent.

ST. SURE, J. This is an appeal upon the judgment roll alone for a money judgment in favor of plaintiff for the contract price of a new Ampico piano agreed to be sold by defendant to plaintiff in consideration of payment of an aggregate of \$1,800, made up as follows: Jewelry, valued at \$755; second-hand piano valued at \$400; and cash in the sum of \$645. The judgment also contained a proviso that upon full payment of the amount adjudged due plaintiff, with maintenance charges, defendant shall be entitled to the return of the piano in controversy.

The complaint set out two causes of action, the first for money had and received in the amount of \$1,800; and the second a statement of a cause of action for rescission of the contract to purchase on the ground of misrepresentation and fraud in "dressing up" and delivering a five year old piano instead of the new one agreed to be purchased by plaintiff, with a statement of notification of rescission on discovery of the fraud, offer to return the piano delivered under the contract, and demand for return of the jewelry, secondhand piano, and cash given in payment. The prayer is for a money judgment of \$1,800, interest from discovery of the fraud, and costs of suit.

Defendant demurred to the complaint generally and for misjoinder of an action for money had and received with an action for rescission of a contract. The demurrer was overruled, defendant answered, the court made findings in favor of plaintiff on all the allegations of the complaint for rescission with the exception, save by reference, of the actual making of the contract, and with an additional finding setting out the refusal of defendants to return the property and money delivered in payment of the piano or to recognize any claim of plaintiff. The concluding finding declares that by reason of the facts defendants are indebted to plaintiff for money had and received in the sum of \$1,800.

As conclusions of law the court determined that plaintiff recover from defendant \$1,800, with interest from the rescinding date—al-

leged as date of discovery of fraud—and costs of suit. It further concluded that upon full payment of the amount awarded plaintiff, together with payment of any sums necessarily expended or incurred by plaintiff in insuring, storing, moving, or maintaining said piano from the date of judgment, defendant shall be entitled to a return of the Ampico piano described in the complaint. Judgment was accordingly entered.

Argument is made by appellant that the findings and the judgment support neither the cause of action for money had and received, nor for rescission of contract. It is further argued that the action of money had and received is an improper one, and that though the court evidently viewed the action as one for rescission, the findings and judgment fail to accomplish the result to be effected by such an action, namely, restoration of the parties to the status they held before entering into the contract on which rescission was sought.

[1] The appeal being on the judgment roll alone, we are limited in our review to a determination of the question: Do the findings support the judgment; or, stated in its parts: (1) Does the complaint state a cause of action; (2) are the findings within the issues; (3) is the judgment supported by the findings; and (4) does reversible error concerning a matter of law appear on the face of the record? *Norton v. Newerf*, 45 Cal. App. 10, 187 P. 57.

[2] The complaint was in two counts, the first for the full amount of value parted with by the plaintiff in cash, jewelry, and Baldwin piano as for money had and received; and the second a statement of a cause of action for rescission on the ground of fraud; the prayer of the complaint being for a money judgment in the sum of \$1,800.

[3, 4] The contract being rescinded, the plaintiff could sue on common count to recover money paid or property delivered thereunder. Note, 30 L. R. A. 50, 53, and cases cited. That the same transaction was stated in two counts, the one giving the widest equitable powers to the court and including by construction the cause set out in the first count and proper at common law, stamps both, if necessary to a holding, with the Code definition of "claims arising out of the same transaction, or transactions connected with the same subject of action, * * *" and therefore causes of action proper to be joined under section 427, Code of Civil Procedure. In this action the first count treated both money and property given under the contract as money had on the theory of definite allowances having been made

for the articles given in exchange. The contract being rescinded, the proper action was by declaration of the cause in equity and suit on the implied promise to repay by the defaulting party of money received, or for the value of goods. The causes were consistent and not improperly joined. Even if plaintiff's legal cause of action were defectively stated, the presumptions attaching to the regularity of the proceedings and to support the judgment will sustain the finding of indebtedness on part of the defendants as made in the exercise of the court's equitable powers and to do full justice between the parties. The rule in such cases is one of justice and equity, not of procedure. 6 R. C. L. pp. 939, 942, and cases cited; *Swan v. Talbot*, 152 Cal. 147, 94 P. 238, 17 L. R. A. (N. S.) 1066; *Kelley v. Owens*, 120 Cal. 502, 511, 47 P. 369, 52 P. 797.

The complaint, then, sufficiently stated a cause of action for rescission, and the first count, if defective, might be wholly eliminated and the same relief given.

[5] The contract price of the Ampico piano, and the amounts allowed for the jewelry and Baldwin piano, together with the money paid, passing from plaintiff to defendant for such contract amount, were admitted by the pleadings. There being no issues raised thereon, findings as to such facts were unnecessary, and they may be considered as facts found to support the judgment, and as true valuations. *Sutherland*, Code Pleading, § 1169.

[6] It is true that there was no finding in terms of the inability or impracticability of a return of the goods to plaintiff to put the parties in statu quo, urged here as an absolute necessity, by defendant and appellant. There is, however, a finding of fraud by defendants, and there are also findings that plaintiff demanded and defendants refused the return of the goods. This court will not presume error, but will, if possible, construe the findings to support, rather than defeat, the judgment. Especially will it do so where, as here, fraud clearly appears and the appellant comes before us on a bare judgment roll. The finding of demand and refusal of return may then be construed as a finding of inability or impracticability of return of the goods, and the finding of indebtedness of \$1,800 as the court's alternative method of awarding substantial justice. On this construction the findings support the judgment. With the liberal rule of interpretation advocated by our Codes, we hold that reversible error does not appear. This being so, the judgment should be, and is, affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

71 Cal. App. 10

(234 P.)

PEOPLE v. MACE. (Cr. 802.)

(District Court of Appeal, Third District, California. Jan. 29, 1925. Hearing Denied by Supreme Court March 30, 1925.)

1. False pretenses ⇨7(5) — Certain false promise held not false pretense warranting conviction.

Defendant's false promise that upon obtaining a loan from prosecuting witness he would make final payment upon X-ray machine and certain medical and surgical instruments and secure title thereto, and thereafter immediately make and execute a chattel mortgage upon the X-ray machine and the instruments to prosecuting witness as security for the loan, held not in itself a false pretense warranting conviction.

2. False pretenses ⇨49(1)—Evidence held sufficient to sustain conviction for obtaining money by false pretenses.

Evidence held sufficient to sustain conviction for obtaining money by false pretenses.

3. Criminal law ⇨747—Determination of conflict in testimony is exclusive province of jury.

Determination of conflict in testimony is exclusive province of jury.

4. False pretenses ⇨49(1)—What proof is admissible as corroborative evidence, stated.

In a prosecution for obtaining money under false pretenses, the circumstances connected with the transaction, the entire conduct of accused, and his declarations to other persons held proper matters to consider as furnishing corroborative evidence contemplated by law.

5. False pretenses ⇨7(1)—When suppression of fact is a "deceit."

Under Civ. Code, § 1710, subd. 3, the suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact, is a "deceit."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Deceit.]

6. False pretenses ⇨7(1)—"False pretense" defined.

A "false pretense" may consist in any act, word, symbol or token calculated and intended to deceive and may be made either expressly or by implication, the form of words in which the pretense is couched being immaterial; the pretense being within the statute if the words create as intended the impression that defendant is making a representation as to a present or past fact.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, False Pretense.]

7. False pretenses ⇨9 — That indebtedness upon accused's home was of public record held not to charge lender of money with knowledge thereof.

The fact that the indebtedness upon the home of accused was of public record does not

charge prosecuting witness who loaned money to accused with knowledge thereof or of its amount.

8. False pretenses ⇨6—Written list of accused's debts used upon application to prosecuting witness for loan held not "false token."

A written list of accused's debts, which he used in applying to prosecuting witness for a loan, held not a "false token."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, False Token.]

Appeal from Superior Court, Mendocino County; Ross Campbell, Judge.

R. D. Mace was convicted of obtaining money by false pretenses, and he appeals. Affirmed.

W. D. L. Held, of Ukiah, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the crime of obtaining money by false pretenses. This appeal is from the judgment and the order denying his motion for a new trial.

[1] The false pretenses alleged in the indictment are that the defendant—

"did * * * pretend and represent to the said H. L. Preston that he, the said R. D. Mace, wanted to borrow from him, the said H. L. Preston, the sum of \$1,200, for the purpose of making a final payment upon a certain X-ray machine, and certain medical and surgical instruments, then and there in the possession of him, the said R. D. Mace; that he, the said R. D. Mace, was solvent; that his liabilities did not exceed the sum of \$2,000; that it was his present intention, and that he would, upon receiving the said sum of \$1,200 from the said H. L. Preston, as aforesaid, make final payment upon said X-ray machine and certain medical and surgical instruments aforesaid, and secure title thereto, and that upon receiving title thereto he would immediately make and execute a chattel mortgage upon said X-ray machine and said medical and surgical instruments aforesaid to him, the said H. L. Preston, as security for said loan of said sum of \$1,200."

The grounds urged for a reversal are: First, "that so much of the representation as is in the nature of a promise is, standing alone, insufficient to warrant a conviction"; second, that the evidence is insufficient to show that the defendant made any of the alleged representations of facts; and third, that the testimony of the prosecuting witness that such representations were made is entirely uncorroborated. The first contention need not be further noticed than to state that the trial court correctly instructed the jury that the alleged false promise was not such a false pretense as would warrant a conviction.

[2] The prosecuting witness is judge of the superior court of Mendocino county. The de-

defendant is a physician and surgeon, and, at the time of the trial, was of the age of 35 years. He located in Ukiah in 1921, and practiced medicine there until March, 1923, Whether he continued thereafter to practice at that place does not appear and is immaterial. He resided in the state of Colorado for two years prior to coming to California. At the time of the alleged false representations, the defendant owed debts contracted while in Colorado in the sum of more than \$1,000 and a total indebtedness of about \$16,000. He testified that the amount thereof was about \$14,000. Preston is the only witness who gave direct testimony that any of the alleged false pretenses were made by the defendant. He testified positively that the defendant stated that he owed but \$2,000. Appellant contends that later in his testimony the witness so qualified such positive statement as to destroy the force thereof, and that, considering the testimony of the witness as a whole, it does not appear therefrom that any alleged false statement of fact was made by the defendant. In order to determine the question thus presented it is necessary to quote extensively from Preston's testimony, maintaining the sequence in which his various statements were made at the trial, even though doing so requires repetition. He testified as follows:

"Q. * * * It is alleged in the indictment that he (defendant) secured the sum of \$200 in money and a \$1,000 Liberty bond on or about the first day of December, 1923, from you under certain alleged misrepresentations. Tell * * * the facts and circumstances attending that matter. A. Well, about the first of November, 1923, or the latter part of October, 1923, Dr. Mace, the defendant, came to my chambers in the courthouse here in Ukiah and wanted to borrow \$2,000, and when he came in he asked me if he could close the door, that he wanted to talk to me about a private matter and didn't want anybody to hear it, or know anything about it, * * * and he sat down and we talked quite awhile over his financial condition, and he stated to me he was buying, or rather paying for an X-ray outfit and some surgical and medical instruments in San Francisco, and that he lacked sufficient money to make the payments, and if I would loan him \$2,000, why that would put him on his feet, and he would go down to San Francisco and pay off the balance of the indebtedness on his X-ray outfit and other medical and surgical instruments, the technical names of them I don't remember, and then come back and give me a mortgage on them. * * * I didn't have that much money on hand, and I said, 'I am expecting some money in about the first of December, could you wait 30 days, until the first of the month,' and he said, 'yes,' that he could stand them off until that time; and either that same day or the next day, I gave him a check for \$200 to make the urgent payments that were to be made on the outfit, so I understood, and then he was to hold them off for 30 days with the assurance that he would have the balance of the money for them the first of December.

* * * I didn't see him any more until about the first of December, when he came back after the balance of the money, and we had another talk and I told him, 'Doctor, I haven't gotten in the money I expected, and it is pretty hard for me to give you the balance of that \$2,000, * * * could you get along on less?' And he said, 'yes.' I says, 'How about another thousand; would that fix you up?' And he says yes, that would be fine, that his collections had been better, and that he could make it on a thousand dollars—be all he needed. So I didn't have the \$1,000 in money, so I went to my safe and got a \$1,000 Liberty bond, and I gave him that. * * * I gave him back the note I had taken previously for the \$200, and took his note for \$1,200; * * * but I am getting a little ahead of my story. I says, 'It may take two or three days to send this bond through the bank to the city, and it may not bring \$1,000.' It had some coupons on it, and I says, 'I will cash it and get you the money on it,' and he says, 'No, I will take the bond; the bond is as good as money to me,' and he insisted that I give him the bond; and I gave him the bond; and I says, 'When you find out the value of that bond, come back and I will credit it on the back of this note,' and he said he would. And then he said he would go down to the city at the first conversation and also the last conversation * * * and finish the payments on his X-ray outfit and other lamps and one thing another and come back and give me a mortgage. * * *

"Q. On the first occasion, * * * did you and he talk over his financial condition? A. Yes; quite thoroughly, I thought.

"Q. What did he say his financial condition was at that time? A. Well, he told me that \$2,000 would put him on his feet; that would pay up his indebtedness, and he would be able then, out of his practice and income from his practice, to save \$100 a month, and that would go towards payment of my indebtedness.

"Q. Did he tell you or show you a list of his liabilities, what he owed? A. Yes, he had a piece of paper, * * * I don't know whether I had it in my hands or not; I thought I had it but I don't find it, but he had a paper there with the figures and what he owed, and he made some figures on it while we were talking.

"Q. Did he mention the name of any people he owed? A. Yes, mentioned the name of O'Connor Furniture Company in Santa Rosa, and Floyd Banker, the automobile man, and these people in San Francisco, the Victor X-Ray machines, or Victor X-Ray Company, I don't remember which it was.

"Q. And he represented to you, did he, that the sum of \$2,000 would put him on his feet? A. So he said.

"Q. That was what his representations were? A. That's what he owed as I understood it. * * * He told me also, 'I can get this money from Mr. Albertson, but I don't want anybody to know I have to borrow money, and I have been doctoring Mr. Albertson and hated to go there and * * * I hesitated to come to you but I thought I could trust you.' * * * He said he could get it through Mr. Albertson or from him. * * * Never saw him any more until after he filed his petition in bankruptcy. I may have seen him around town or in court on some matter but never to talk to. * * *

I believed that \$2,000 would put him on his feet. * * *

"Q. And you relied upon those statements? A. I did.

"Q. And otherwise would you have given him the money or Liberty bond? A. I would not. * * *

"Q. And you relied in part upon the representation that it was his intention to execute the mortgage? A. Yes; sure.

"Q. And you relied in part that it was on the representation that he owed \$2,000 and no more? A. Certainly. * * * He told me if he got the \$2,000 that would put him on his feet and he could pay these people and give me a mortgage and out of his earnings, over and above his living, he could save \$100 a month, and that would go to me until the note was paid."

Cross-examination:

"Q. And he (defendant) had in his hand a paper showing a list of certain creditors you say? A. Yes; and the amounts he owed. * * *

"Q. Did he say anything to you about owing upon his house over here? A. I think that was mentioned.

"Q. You knew he owed \$9,000 on his house? * * * A. I did not. * * *

"Q. And that the public records of this county showed he owed \$9,000 on his house? A. I didn't know anything of the kind until your schedule in bankruptcy. I didn't examine the records. * * *

"Q. You knew, however, that he did owe something on his house? A. I supposed he did.

"Q. Was that included in the \$2,000? A. I don't know whether it was or not; I don't think it was. * * * He told me, in his very words, that the \$2,000 would put him on his feet, and then he would commence paying me back.

"Q. And didn't tell you that \$2,000 was all he owed? A. That's the way I understood it; what that means—put him on his feet. * * *

"Q. Didn't he say \$100 he could save would enable him to pay you and pay Banker? A. No; I don't think he did. He said that Banker was easy on him, and I don't remember how much, but I understood it was not very much.

"Q. You knew he owed on the car? A. He talked about that. * * * He would set aside \$100 and whether he would pay Banker too—I guess he would. * * *

"Q. * * * Did he tell you that he could save \$100 and pay off Banker and pay you? A. I think he did.

"Q. When he told you that he owed \$2,000, * * * did that include Banker? A. I don't know whether it did or not. * * *

"Q. And all he said that made you believe he owed only \$2,000 was the fact he said \$2,000 would put him on his feet? A. Well, that and what he had on the statement and all of the conversation, * * * from his own conversation and all of his talk.

"Q. * * * Was there anything said about a chattel mortgage in the December conversation? A. * * * I think so.

"Q. Are you positive? A. I am not sure; no. * * * I couldn't swear, but I think there was; nothing said he was not going to give me one, I will say that. * * *

"Q. Did you ever mention the mortgage to him (after the December meeting)? A. Never

had an opportunity. I was away the biggest part of January and all of February, and came back the first of March. * * * I think I was away a week or ten days (in December); I am not sure. * * *

"Q. And during none of that time that you were here in the month of December did you call Dr. Mace up and ask him why he didn't give you the mortgage? A. No; I trusted him."

Redirect examination:

"Q. And * * * when he was talking to you, * * * he had a list in his hand? A. He had it on the desk making figures on it while talking. We talked there for an hour.

"Q. And he discussed his financial situation from a reading of that list? A. Absolutely; went over his entire proposition from the time he came here. * * *

"Q. And, as I take it, you talked it over carefully and he represented he didn't owe anyone except those he mentioned to you from the list? A. Absolutely, * * * I says, 'Whatever the Liberty bond brings under a thousand I will credit that on the note,' * * * and he said, 'I will attend to this.' He was very anxious to get his mitts on the bond."

Recross-examination:

"Q. * * * His promise to go to San Francisco and pay off the outfit and come back and give you a chattel mortgage * * * and his representation that \$2,000 would put him on his feet, those were the two things that induced you, and were the sole inducing factors, to get the money? A. Well, I guess that's about right. I was sorry for the fellow and thought he was telling the truth and trying to help him. * * *

"Q. * * * His promise to give you a chattel mortgage and his statement that \$2,000 would put him on his feet, * * * were those the only representations that you relied on? A. Well, I guess that's about all."

Redirect examination:

"Q. And if you believed from his list and from what he told you, that he owed more than \$2,000 and that would not have put him on his feet, would you have let him have the money? A. Absolutely not. * * *

"Q. And all these things combined, all his representations, caused you to part with your money? A. I guess so; those were the main representations, and in the whole transaction I relied upon what he told me as being truthful, and I let him have the money. * * *

"Q. * * * Do you remember an occasion when B. M. Bucknell was in your chambers and yourself was there and also Dr. Mace? A. I remember it. * * * It was just a day or two after the filing of the petition in bankruptcy, * * * along the second, third, fourth or fifth of March. * * * I says, 'Doctor, this is a great surprise to me. * * * Why didn't you come to see us and tell us you were going through bankruptcy and give us an opportunity to protect ourselves? You have sold your place before you went into bankruptcy and collected all you could collect and left us in the dark,' or words to that effect, and I said, 'You didn't tell me anything about owing \$16,-

000; why didn't you tell me that?" and he says, "I don't know, I should have told you but I didn't; I see I made a mistake now."

Relative to the conversation last mentioned, Bucknell testified:

"Judge asked him (defendant) why he didn't tell him that he owed this \$16,000 at the time he wanted that loan. * * * He said nothing, only he said he didn't know why he didn't."

M. H. Iverson, an attorney at law, testified that, as a representative of Preston, he had an interview with the defendant on the 7th of March, 1923, and that the latter stated that he did not promise to give Preston a mortgage to secure payment of the note for \$1,200 and said: "I couldn't give a chattel mortgage on the machines at that time, because I owed more than that on them;" that the promise to give a chattel mortgage was conditional upon securing a loan of \$2,000; that in his conversation with the defendant the witness "had mentioned an X-ray machine and some kind of lamp."

At the time of obtaining the money from Preston, the defendant was indebted to Bucknell in the sum of \$1,500 on two unsecured promissory notes, \$1,000 to a bank in Ukiah on a note indorsed by Bucknell, \$400 as indorser on a note to another Ukiah bank, \$341 to a contractor there, \$217 on an open account with a druggist, more than \$1,000 to creditors in Colorado, \$359.21 on an open account with the Victor X-Ray Corporation of San Francisco, a balance of \$593.20 on a lease contract for the purchase of quartz lamps from the same corporation, \$1,942 on a lease contract for the purchase of furniture from O'Connor Furniture Company of Santa Rosa, \$600 on a lease contract for the purchase of an automobile from Floyd Banker of Ukiah, \$7,700 on a contract for the purchase of defendant's home; and various other smaller sums on running accounts with business men and firms in Ukiah. Payments had been made on all these contracts, and it may be inferred that in every case the value of the property exceeded the balance unpaid thereon, and that, therefore, such balances were not liabilities in the ordinary sense of unsecured debts. The defendant testified that his wife sold her equity in the home, and it is therefore to be inferred that it belonged to her and was of greater value than the balance due thereon. All the other property held by defendant under the contracts mentioned was redelivered to the sellers thereof. The defendant collected all moneys due him on account which he was able to collect, during the month of February, 1924, and, according to his testimony, at the time he filed his petition in bankruptcy, there remained due him on accounts about \$2,000, the value of which does not appear. These uncollected accounts were his only assets. Since his general, unsecured debts amounted to more than \$5,000 at the time of the al-

leged false pretenses, it follows that he was then insolvent.

Shortly after obtaining the \$1,200 from Preston, the defendant paid the Victor X-Ray Corporation the sum of \$100 and made such additional purchases as to increase his indebtedness to that corporation to a total of \$1,249.53. He entered into a new agreement with the corporation, by the terms of which he held the property so purchased and the aforesaid quartz lamps under lease contract for the purchase of the same, title to be transferred to him upon payment of the \$1,249.53. He also gave another person a mortgage on the X-ray machine as security for a prior debt and an additional loan to him of \$100 in cash.

[3] It is unnecessary to set out in detail defendant's testimony in denial of that given by the prosecution. At most it only creates a conflict in the evidence, the determination of which was within the exclusive province of the jury. The defendant denied having represented that he was solvent or that he owed but \$2,000, but testified that he told Preston that his pressing debts amounted to that sum. After stating some of the debts which he told Preston he owed, he testified:

"I stated I owed at that time about \$600 on the car and \$500 and something on the quartz lamps, and would like to pay those two items off so I would only have my house and furniture. I was buying the furniture and house on contract, and, if I could eliminate my payments on the quartz lamps and the automobile, it would give me a leeway to work on, which I figured would take about \$1,100, and the other, the balance of \$900 was to go to paying pressing claims of indebtedness to surgical houses and the Commercial Bank and private individuals in town here."

[4] The defendant's statement to Preston that, after payment of the debts enumerated, "I would only have my house and furniture," evidently meaning that he would have only them to pay for, implies that he represented that \$2,000 would pay his other debts. The defendant testified that his indebtedness to William Langford in Colorado was one of his pressing debts, and that he paid him \$150 out of the money he received from Preston, yet he did not mention this debt to Preston. Preston's testimony is further corroborated by that of Bucknell that the defendant stated "he didn't know why he didn't" tell Preston that he owed \$16,000, by defendant's conduct after obtaining the money and by all the attending circumstances shown by the foregoing testimony of defendant and other witnesses. "In this class of cases the circumstances connected with the transaction, the entire conduct of the defendant, and his declarations to other persons are proper matters for the consideration of the jury, and may be looked to to furnish the corroborative evidence contemplated by the law." People

v. Wymer, 53 Cal. App. 204, 206, 199 P. 815, 816. See, also, *People v. Martin*, 102 Cal. 553, 564, 36 P. 952; *People v. Haskins*, 49 Cal. App. 640, 644, 194 P. 43.

From Preston's testimony as a whole, it fairly appears that the defendant made representations which were calculated and intended to create the belief that he was solvent, and that \$2,000 would pay his debts, and that the prosecuting witness so believed and was thereby induced to part with his property. It is true that, after stating positively that the defendant made such representations, in answer to questions asked him on cross-examination as to whether defendant's promise to give a chattel mortgage and his statement that \$2,000 would put him on his feet were not the "sole inducing factors," the prosecuting witness replied, "I guess that's about right," and to a similar question, "I guess that's about all," but his prior and subsequent testimony, as herein set out, shows that he relied on all the statements made by defendant in their lengthy conversation relative to the defendant's financial affairs, including the written list of liabilities. The defendant had put the interview upon a confidential basis, saying, "I don't want anybody to know I have to borrow money, * * * but I thought I could trust you." According to defendant's testimony, Preston said "he was trying to help me as he knew how hard it was for a young fellow to get a start, as he had done it himself and understood how hard it was."

[5-8] Under such circumstances common honesty and fair dealing required and Preston was justified in assuming that the defendant would make a full disclosure of his financial condition, and, when the defendant made a list of his debts, such statement implied that he did not owe other debts. "The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact" is a deceit. Civ. Code, § 1710, subd. 3. It is not necessary to sustain the charge that the defendant should have stated expressly that he was solvent or that \$2,000 would pay his debts, if all of his statements together reasonably created a belief to that effect. "A false pretense may consist in any act, word, symbol, or token calculated and intended to deceive. It may be made either expressly, or by implication. * * * The form of words in which the pretense is couched is immaterial; if they are intended to create and do create the impression that defendant is making a representation as to a present or past fact, the pretense is within the statute." 25 C. J. 610. While the defendant's false statement that he needed the money to finish making payments on the purchase price of the X-ray machine, and his false promise

that he would use the money to make such payments and then give Preston a mortgage upon it and other property, coupled with his subsequent acts of mortgaging the X-ray machine to secure money from another person, and increasing the existing incumbrance upon the other property, are not of themselves sufficient to sustain the charge, they tend strongly to establish the fraudulent intent necessary to constitute the crime. The fact that the indebtedness upon defendant's home was of public record did not charge Preston with knowledge thereof or of its amount. *People v. Henninger*, 20 Cal. App. 79, 128 P. 352; *People v. Bowman*, 24 Cal. App. 781, 142 P. 495. In the foregoing discussion, the written list of the defendant's debts, used upon the application for the loan, has not been treated as a false token, as it clearly is not such. From a consideration of all the evidence it cannot be said that it is insufficient to justify the verdict.

The judgment and the order are affirmed.

We concur: HART, J.; PLUMMER, J.

70 Cal. App. 738

COPE v. FLANERY, County Auditor.
(Civ. 2835.)

(District Court of Appeal, Third District, California. Jan. 27, 1925. Hearing Denied by Supreme Court March 26, 1925.)

1. Counties $\Leftrightarrow$ 206(1)—Allowance of claim for work conclusive.

Where engineer and county board of supervisors entered into contract for construction of bridge, and plans were before the board, and engineer presented claim for work performed, whether work had been done as contemplated in contract was exclusively for board to determine, and in absence of any allegation of fraud when claim was allowed, question as to performance of services is no longer an open one.

2. Counties $\Leftrightarrow$ 126—Payment to construction engineer held not contingent on adoption of plans, or on final erection of bridge.

Under a contract between county board of supervisors and an engineer for construction of a bridge, providing in part that certain sum was to be paid engineer on a certain date, or on such earlier date that plans and specifications may be adopted by said board, held, that it contemplated that such sum was to be paid on date stated on account of services performed and contracted to be performed, and such payment was not intended to be contingent upon adoption of plans and specifications by board, nor upon final erection of bridge, and, if board abandoned construction of proposed bridge, county would be liable in an action on quantum meruit for services performed by engineer.

3. Counties 113(6)—Board of supervisors held authorized to empower engineer rather than county surveyor to prepare plans for bridge; "privilege."

Pol. Code, § 4041, providing that it shall be "privilege" of board of supervisors to reject all bids for construction of bridge, and order it built under supervision of county surveyor, held to import a discretionary power, authorizing board either to employ an engineer to prepare plans, etc., for construction of bridge and to erect same or have work done under supervision of surveyor, there being nothing in sections 4214, 4219 to the contrary; "privilege" being "a right * * * not enjoyed by all, a special right or power conferred or possessed by one or more individuals" (quoting Words and Phrases, Second Series, "Privilege").

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Application for writ of mandate by Erle L. Cope against H. C. Flanery, as Auditor of the County of Sutter. Judgment for defendant, and petitioner appeals. Reversed, with directions.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant.

Lawrence Schillig, of Yuba City, and W. H. Carlin, of Marysville, for respondent.

PLUMMER, J. By this action the petitioner sought a writ of mandate against the defendant, as auditor of the county of Sutter, commanding and directing the defendant to issue a warrant upon the treasurer of said county in favor of the petitioner, based upon a claim previously allowed by the board of supervisors of said county.

It appears from the transcript that the petitioner, a construction engineer, and the board of supervisors of the county of Sutter, on or about the 5th day of December, 1922, entered into a certain written contract for the preparation and submission by the petitioner to said board of supervisors of plans and specifications for the construction of a certain bridge mentioned in said contract, and further providing that the plaintiff should superintend the construction thereof. This contract is in the following words and figures:

"This agreement, made and entered into this 5th day of December, 1922, by and between Erle L. Cope, of Berkeley, California, and A. E. Schellenger, acting for and on behalf of the county of Sutter and in the capacity of chairman of the board of supervisors of Sutter county, witnesseth:

"That whereas, it is necessary to extend the Nicolaus bridge from the present truss spans westerly to the river levee; and whereas, at a regular meeting of the board of supervisors of the county of Sutter held on the 15th day of November, 1922, said board of supervisors decided to build this extension of reinforced concrete and instructed Erle L. Cope to prepare plans and specifications for and to have borings made for said bridge; and whereas, at

a regular meeting of said board held on the 5th day of December, 1922, the chairman of the board was authorized to enter into a contract with Erle L. Cope, civil engineer, to draw plans and specifications and to superintend the construction of said bridge: Now, therefore, said Erle L. Cope hereby agrees to and with said county of Sutter to draw all plans and specifications and superintend the construction of a reinforced concrete bridge from the end of the present truss spans of the Nicolaus bridge westerly to the river levee, said bridge to be complete in all respects, including approaches, and to be in accordance with the requirements of the state reclamation board. Said plans and specifications to include copies not exceeding fifteen (15) in all, and to be complete with drawings and working plans in all respects for receiving bids for such construction.

"It is understood that by superintendence is meant that said Erle L. Cope shall make a visit to said bridge during the building thereof as often as required, and that he will at all times give his advice to said board concerning the construction of said bridge. And it is further understood that the inspectors on construction shall be selected by and work under the direction of said Erle L. Cope, and shall be paid by the county of Sutter. It is further agreed that if said board chooses to make alterations or extensions in connection with said bridge that said Erle L. Cope will provide plans and specifications for such work and shall superintend the same.

"And said county of Sutter, acting by and through the chairman of said board, hereby agrees that if said Erle L. Cope shall fulfill all the terms and agreements of his employment herein contained, then it will pay said Erle L. Cope six (6) per cent. of the cost, said cost is understood to be the lower of engineer's estimate or accepted bids of said bridge with approaches as follows, to wit: Two thousand (2,000) dollars on February 6, 1923, or on such earlier date that plans and specifications may be adopted by said board of supervisors, two thousand (2,000) dollars on June 4, 1923, and the balance thereof monthly when payment is made for labor or materials, in the proportion that said payments bear to the total cost of the work.

"In witness whereof, said parties have hereunto set their hands this 5th day of December, 1922. Erle L. Cope, A. E. Schellenger, as Chairman of the Board of Supervisors of the County of Sutter."

After the execution of this agreement it appears that the petitioner prepared plans and specifications for the construction of a reinforced concrete bridge according to the terms of said agreement, and also filed with said board of supervisors supplementary plans and specifications. These plans and specifications have not been rejected, nor does it appear from the transcript that said plans were, prior to the beginning of this action, finally approved or adopted by the board of supervisors. After the preparation and presentation of the plans and specifica-

tions contemplated in said written agreement, and the presentation of the same to the board of supervisors of said county, the petitioner, on or about the 6th day of February, 1923, presented, and the board of supervisors of said county allowed, the petitioner's claim for the sum of \$2,000 for and on account of the first payment for the work performed and to be performed by the petitioner under the written agreement hereinbefore set forth. Upon presentation of said claim, so allowed by the board of supervisors, to the defendant, as auditor of said county, the defendant refused to draw his warrant upon the treasurer of said county for the payment thereof. Upon the trial of this action in the court below, the defendant had judgment and the petitioner appeals.

The findings of the court show that, at the time of the approval of said claim by the board of supervisors, and at the time of the beginning of this proceeding, there were sufficient funds in the county treasury of the county of Sutter to the credit of the said board of supervisors, and available and applicable to said payment, if the same constituted a legal and proper charge against the county; that the board of supervisors of said county by the execution of said contract had not incurred any indebtedness or liability exceeding, for the fiscal year of July 1, 1922, to July 1, 1923, the income and revenues provided for such year. The court also found that during said period of time, there was a duly elected, qualified, and acting county surveyor of the county of Sutter. After making the findings to which we have referred, the court drew its conclusions of law that the petitioner take nothing by reason of this action. The validity or invalidity of the agreement is not referred to in the conclusions of law, and the conclusions of the court in relation thereto can only be inferred from the fact that the defendant was awarded judgment.

Though not set forth in the findings and conclusions of the trial court, it would appear from the argument of counsel for respondent that the court arrived at its judgment upon the theory that the contract had not been performed sufficiently to entitle the petitioner to the first payment therein provided, or that the contract was invalid and gave the petitioner no rights therein as against the county of Sutter. The agreement referred to specifies the work to be done in the orderly course which would be pursued in the event of the building of the contemplated bridge. The plans and specifications are to be presented. The plans were to include certain numbers of copies, together with completed drawings and working plans, complete in all respects for the receiving of bids for such construction. The contract does not in express terms provide for the date when such plans and drawings were to be presented to the board of supervisors, but

there appears to be no question, as appears from the transcript, that the plans, drawings, specifications, etc., were presented to the board of supervisors as contemplated by said agreement prior to the 6th day of February, 1923. Upon that date the board of supervisors, having the plans and specifications before it, and being conversant with the work performed by the plaintiff, or petitioner, allowed him the amount of the first payment provided for in said agreement.

It is contended in this particular that this first payment was made contingent upon the adoption of the plans and specifications by the board of supervisors, and much stress is laid upon the wording of the clause in the agreement which reads: "Two thousand (2,000) dollars on February 6, 1923, or on such earlier date that plans and specifications may be adopted by said board of supervisors." It would seem that the construction contended for would necessitate the reading of this clause of the agreement as though it were written as follows: \$2,000 on February 6, 1923, provided that the plans and specifications presented by the petitioner had been adopted, or, if such plans and specifications are adopted prior to that date, then, upon the date of such adoption. We do not very well see how the construction contended for by the respondent, that the payment provided for in the agreement to be made on February 6, 1923, is in any manner contingent upon the adoption of the plans and specifications by the board of supervisors. The more reasonable construction, and what we think was contemplated by the parties entering into the same, was and is that \$2,000 was to be paid upon that date on account of the services performed and contracted to be performed.

[1] The claim as presented purports to be for engineering work on the bridge mentioned in the contract. The plans, drawings, etc., were before the board of supervisors. Whether the work had been done as contemplated was a matter exclusively for the board of supervisors to ascertain and determine, and, in the absence of any allegation of fraud, when action has been taken thereon by the board of supervisors, and the claim allowed, the question as to the performance of the services is no longer an open one. In *McFarland v. McCowen*, 98 Cal. 329, 33 P. 113, quoting from the syllabus, the law is thus stated:

"Where a claim for services, which, if performed, is a legal charge against a county, has been duly presented to the board of supervisors of the county, regularly considered, allowed, and ordered paid, the action of the board is, in the absence of fraud, conclusive, and the auditor cannot lawfully refuse to draw his warrant therefor upon the treasurer upon the ground that such services were never rendered, and he may be compelled by writ of mandate to draw such warrant."

This court, in *Carmichael v. Riley*, 56 Cal. App. 409, 205 P. 478, in considering the allowance of a claim by a reclamation board, states the rule in relation to the action of such boards as follows:

"Having reached the conclusion that the district was bound by the terms of the agreement, it follows that the allowance by the board of petitioner's claim is conclusive upon the question of the district's negligence as well as of the compensation due petitioner therefor. *Colusa County v. De Jarnett*, 55 Cal. 373; *McFarland v. McCowen*, 98 Cal. 329, 33 P. 113; *McConoughey v. Jackson*, 101 Cal. 265, 40 Am. St. Rep. 53, 35 P. 863; *McBride v. Newlin*, 129 Cal. 36, 61 P. 577; *County of Santa Cruz v. McPherson*, 133 Cal. 282, 65 P. 574; *County of Alameda v. Evers*, 136 Cal. 132, 68 P. 475; *County of Yolo v. Joyce*, 156 Cal. 429, 105 P. 125; *Victors v. Kelsey*, 31 Cal. App. 796, 161 P. 1006."

In the recent case of *Nightingale v. Williams*, as Auditor, etc. (Cal. App.) 233 P. 807, the court said:

"The determination of the council on the question of the performance of the work is a determination of an issue of fact, which, if the legal * * * procedure has been followed, will be taken as conclusive by the courts."

[2] It is true that the contract contemplated considerable future work after the date of February 6, 1923, such as the superintendence of the construction of the contemplated bridge according to the plans and specifications, as finally adopted by the supervisors. It would further appear that the construction contended for by the respondent would lead to the conclusion that no part of the compensation agreed to be paid the petitioner would become due or payable to him until the contemplated bridge had been finally finished. We do not think that the contract is susceptible of such construction, nor do we think that the parties thereto contemplated that no compensation was to be made to the petitioner until the proposed structure had been finally completed. There does not appear to be anything in the contract making the first payment set forth therein contingent upon the final erection of the bridge. We think, under the terms of the contract, if the board of supervisors finally conclude to abandon the construction of the proposed bridge, the county, nevertheless, would be liable upon an action quantum meruit for the services performed by the petitioner, if the contract is one which the supervisors had authority to execute. That the board of supervisors might have made the first payment contingent, in any event, upon the adoption of the plans and specifications presented by the petitioner, does not necessitate the conclusion that the board of supervisors has done so, because that course would have been a better business one. The board has found that the engineer has performed certain services; that those services are worth the sum of \$2,000. No

question of good faith on the part of the board of supervisors is presented to us for consideration.

We think, under the contract, the board had a legal right to consider the petitioner's claim and make the findings at which it arrived. Having done so, we are bound by that conclusion. We may further add that the findings of the court show the action of the board of supervisors was not a payment for unperformed services, or for services that might never be performed. We think the board had jurisdiction to take into consideration the fact of the reasonable value of engineering services in preparing plans, specifications, and drawings for the contemplated bridge, and it cannot be reasonably argued that the board, in allowing the claim, was making a donation. The board, in the allowance of the claim, also was in a position to take into consideration the prospective cost of the structure to be erected, and to determine whether the payments provided for under the contract on certain dates would, or would not, amount to a sum in excess at 6 per cent. of the cost of building the proposed bridge. The length of the structure, its width, its height, and the different elements entering into the plans were all before the board of supervisors, and were matters for them to consider, and, nothing appearing in the transcript to the contrary, it must be assumed by this court that the findings of the board of supervisors were amply supported by the facts appearing before it at the time of the allowance of the claim.

[3] The vital question in this case really is: Did the board of supervisors have power to employ any one, other than the county surveyor, to prepare plans, specifications, drawings, etc., for the construction of the contemplated bridge, and also provide for the erection thereof, under the superintendence of the construction engineer so employed? Section 4041 of the Political Code, so far as it applies to this case, and as governing the powers of the board of supervisors, reads as follows:

"The boards of supervisors, in their respective counties shall have jurisdiction and power, under such limitations and restrictions as are prescribed by law: * * *

"5. To lay out, maintain, control, construct, repair and manage * * * bridges within the county, unless otherwise provided by law, and to grant franchises and licenses to collect tolls thereon. * * *

"7. Whenever the cost of construction of any bridge * * * shall exceed the sum of five hundred dollars, such work shall be done by contract, and any contract therefor shall be void unless the same shall be let as hereinafter provided. The board of supervisors shall adopt plans and specifications, strain sheets and working details therefor, and must advertise for bids for the performance of the said work in a newspaper of general circulation published in the county for at least twenty

days * * * and said board shall award the contract to the lowest responsible bidder * * * provided, that for the construction of any bridge * * * if the board of supervisors shall be advised by the county surveyor or engineer that the work can be done for a sum less than the lowest responsible bid, it shall then be their privilege to reject all bids and to order the work done or structure built by day's work, under the supervision and direction of the said surveyor or engineer. * * *

"41. To do and to perform all other acts and things required by law not in this title enumerated, or which may be necessary to the full discharge of the duties of the legislative authority of the county government."

The argument in this case circles around the proviso clause, which authorizes the board, in the event that it shall be advised by the county surveyor that the work can be done for less than the lowest responsible bid, it shall then be the privilege of the board to reject all bids and to order the work done by day's labor under the direction of the county surveyor or engineer. The word "engineer" appears in the section, as amended by the Legislature, providing for the appointment of county engineers instead of election of surveyors, but that amendment has been held inoperative in the case of *Coulter v. Pool*, 187 Cal. 181, 201 P. 120. The section must be read as though only the word "surveyor" occurred therein. It will be noted that the Legislature has used the word "privilege," which imports the idea that the board of supervisors, under the contingencies provided for, may exercise the right of having the bridge constructed by day labor and not under contract. The term "privilege" is defined by the *Standard Dictionary* as "a peculiar benefit, favor or advantage." "A right * * * not enjoyed by all; a special right or power conferred or possessed by one or more individuals." 3 *Words and Phrases*, Second Series, 1206. A number of other definitions of this word is there given, none of which hold the work to be mandatory in its signification. We think the language used imports a discretionary power, and vests in the board of supervisors authority, either to proceed by contract, or to have the work done by the employment of day laborers, as to the board may seem most advantageous. A somewhat analogous question was considered by the Supreme Court of this state in *Woolwine v. Superior Court*, 182 Cal. 388, 188 P. 569, the question being as to the authority of the board of supervisors to employ some one other than the district attorney to manage certain litigation. In deciding the question, the court said:

"Section 4041 of the Political Code, relating to the powers of supervisors, declares that they shall have jurisdiction and power, under such limitations and restrictions as are prescribed by law, 'to direct and control the prosecution and defense of all suits to which the county is a party, and, by a two-thirds vote of

all the members, may employ counsel to assist the district attorney in conducting the same.' Subdivision 16. Under this provision it has become the settled law of the state that the board of supervisors has power to employ an attorney, other than the district attorney, to prosecute or defend an action to which the county is a party. * * * 'Whether, in any particular case, such employment shall be made is addressed to the discretion which they are to exercise in behalf of the public interests. If, in their opinion, the interests of the county require such employment it is their duty to secure the services of a competent attorney therefor.'"

In support of this rule, a number of authorities are cited. In *Nickerson v. San Bernardino*, 179 Cal. 518, 177 P. 465, the court, in considering the powers of the board of supervisors and the lack of authority on the part of the courts to control their actions in certain cases, thus states the law:

"When the Legislature has committed to a municipal body the power to legislate on given subjects or has committed to it judgment or discretion as to matters upon which it is authorized to act, courts of equity have no power to interfere with such a body in the exercise of its legislative or discretionary functions."

The question under consideration in the *Nickerson Case*, supra, was that of purchasing land for a hospital site, and it was urged upon the court that the board of supervisors had acted illegally in buying too large a tract, and in answer to this, the court further said:

"All these matters were committed by the statute solely to the board, and their determination involved both legislative action and the exercise of discretion, neither of which was subject to review or control of any court. Whether, in the exercise of legislative powers, a board acts wisely or unwisely is no concern of the courts. They cannot enter the board room and substitute their judgment for that of the board nor interfere at all with its action unless the board is exceeding its legislative powers, or its judgment or discretion is being fraudulently or corruptly exercised."

The various sections found in article 1, chapter 8, tit. 2, pt. 4, of the Political Code, under the title of Department of Public Works, show clearly that the Legislature did not contemplate that a county surveyor would in every case, or even in any case, be a competent construction engineer. The language of the Legislature must be construed in the light of that which is common knowledge to every one; i. e., there is a vast difference between surveying land, making plats, and running lines, marking boundaries, and the building of bridges, such as now are and were being erected when the provisions of the Code under consideration were adopted. Entirely different are the qualifications required for an ordinary surveyor, as contemplated by section 4214 of the Political Code, and a construction engineer competent

to erect large structures, or bridges, where tensile strength, resistance to climatic conditions, the consideration of all the various qualities of materials entering into the structure must be known in advance, and the weight or load capable of being carried thereby accurately determined in order to safeguard the interests of all who may use the same. These very facts necessitate the vesting in the board of supervisors the discretionary power included in the word "privilege."

Section 4214 of the Political Code, to which we have adverted, specifies that the surveyor must be a licensed land surveyor of the state, and must make any survey that may be required by order of court, or of the board of supervisors, etc. There is nothing in the section which contemplates the possession of any of the qualifications necessary to perform the services contemplated by the agreement entered into between the plaintiff and the board of supervisors of the county of Sutter. The making of field notes and plats of surveys, and the filing of them in certain offices, where they may be preserved for the benefit of the public, carries with it nothing that imports the possession of technical skill requisite to perform the services required of a construction engineer. Nor, do we think, that section 4219 of the Political Code trenches at all upon the powers of the board of supervisors. That section has to do with the duty of surveyors as they may be imposed by the board of supervisors. The section reads:

"The surveyor shall make such surveys of county roads, and perform such other engineering work as the board of supervisors may direct. All such maps and field-notes of surveys shall be filed in the office of the surveyor, and the same shall thereafter be and remain the property of the county. It shall be the duty of the surveyor to advise the board of supervisors regarding all engineering work, and to perform such engineering work * * * as may be required by the board of supervisors."

The subject there dealt with is that of county roads, with which there is connected some engineering work, such as the filling up of depressions, leveling down hills, etc. That the whole section has in view the making of field notes and matters of that kind is clearly shown by the second sentence, which, as we have seen, refers to maps, field notes of surveys, etc., being filed. There is not one word about building plans, the erection of structures of any kind, or the determining of any of the factors entering therein by the surveyor. That the surveyor may be consulted does not necessitate that his advice be followed. It is simply a matter of legislative discretion with the supervisors.

The respondent calls our attention to the case of *McCarthy v. Board of Supervisors*, 15 Cal. App. 576, 115 P. 458, where the power of the board of supervisors to follow the advice of the county surveyor and have a bridge built by day's work was considered. As we

read that case, instead of sustaining the contentions of the respondent, it simply exemplifies what we have herein been setting forth, that the board of supervisors, under the provisions of section 4041 of the Political Code, may have certain work in relation to bridges, wharves, chutes, and shipping facilities done by day work, under the supervision of the county surveyor, instead of by contract. It may further be noted that the board is given absolute power in the employment of persons qualified to prepare plans, specifications, strain sheets, and working details, and when the work is done by contract, to entirely dispense with the services of the county surveyor. This to us necessarily implies the power of the board to employ some one competent to determine whether the structure contracted to be erected is being built according to the plans and the materials used therein, of the kind and quality, tensile strength, etc., called for by the specifications.

While the briefs show, the transcript does not set forth, the magnitude of the work to be undertaken by the board of supervisors in the instant case, but it is readily conceivable that the extent and character of the work about to be undertaken is of such importance that the board of supervisors, in the exercise of a wise discretion, might determine to exercise their privilege in the first instance, as to the employment of some one competent to superintend the work from the initial step to its final completion and also to determine that no one would be better qualified to perform such duties than the engineer, who has drawn the plans, strain sheets, working details and had calculated the tensile strength of the materials required, what their composition should be, and the various qualities of all the building material that should enter into the structure.

The fact that the board of supervisors might, after entering upon the work and the advertising for bids, have concluded to discontinue further proceedings, is not, we think, a determinative factor in this case. The board of supervisors of Sutter county, as we have shown, had the right to employ the plaintiff to perform certain labors for the benefit of the county, and the board of supervisors has determined that services of the value of \$2,000 have been performed by the plaintiff for the county of Sutter. This finding is conclusive. In view of what has been said, we think the following premises laid down by the appellant sound: The contract is valid as within the authority of the board of supervisors; under the contract \$2,000 was payable on February 6, 1923; the supervisors, in approving the claim, took all proceedings required by law; their approval of the claim was conclusive on the courts that petitioner had performed sufficiently to entitle him to this payment; petitioner, in presenting plans and specifications, had done all that he was required to do by February 6,

1923; that there is neither allegation nor element of fraud entering into this proceeding.

The judgment of the trial court is reversed, and it is further ordered that the trial court enter judgment in favor of the plaintiff, and issue its mandate requiring and commanding the defendant, as county auditor of the county of Sutter, to draw his warrant in favor of the plaintiff in the sum of \$2,000.

We concur: FINCH, P. J.; HART, J.

71 Cal. App. 22

In re CLARY'S ESTATE. (Civ. 2791.)

(District Court of Appeal, Third District, California. Jan. 29, 1925. Hearing Denied by Supreme Court March 30, 1925.)

1. Executors and administrators ⇨464—Remedy against heirs of executor failing to account for assets is by proceeding to compel accounting.

Where executor, who is indebted to estate, or retains or fails to account for moneys or assets, dies before administration is completed or before distribution is made, the estate's remedy against his heirs is by proceeding to compel accounting under Code Civ. Proc. § 1639, despite section 1447.

2. Executors and administrators ⇨464—Probate court held without jurisdiction, as against heirs, to set off distributive share of their ancestor as executor, against his debt to estate.

Probate court, on petition for settlement of surviving executor's accounts and for distribution, held without jurisdiction, as against heirs of deceased executor, to appropriate his distributive share as legatee, or the commissions earned by him, to the extinguishment of his debt to the estate, in view of Code Civ. Proc. § 1639, despite section 1447.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

In the matter of the estate of Abraham Everstine Clary, deceased. From a decree of the superior court, directing a distribution, certain heirs appeal. Reversed.

Griffen, Boone & Boone, and Edward T. Taylor, all of Modesto, for appellant.

Grant & Bailey, of Woodland, for respondent.

HART, J. The facts of this controversy are: That Abraham Everstine Clary died testate in the county of Yolo, state of California, on the 3d day of November, 1920. Surviving him were his wife Johanna and six children. Two of his sons, Edward F. Clary and Charles M. Clary, were nominated in his last will as executors thereof, qualifying as such on the 6th day of December, 1920, and jointly acting as such until the 4th day of April, 1921, when Charles M.

Clary died intestate in the county of Monterey, state of California. From the last mentioned date E. F. Clary continued as sole executor of said will.

The will of Abraham E. Clary provided that all the property of the estate was to go to the children of the deceased in equal shares, subject, however, to the right of the widow, Johanna, to the income from all the property during her life and "in case the income was insufficient for her care then the property was to be applied for her support, the estate not to be distributed until the death of the widow." On the 23d day of June, 1921, approximately two months after the death of Charles M. Clary, the widow of Abraham passed away.

Charles M. Clary left surviving him his widow, two sons, and a daughter. Cecil M. Clary, son of Charles M., deceased, after due proceedings in the superior court of Monterey county, was appointed and later qualified as the administrator of the estate of Charles M. It having been determined, after the usual proceedings in such cases had been taken, that the estate of Charles M. was less than the sum of \$2,500 in value, the whole of the same, on her application, was by the court set apart and assigned to his widow. Code Civ. Proc. § 1469.

Subsequent to the making of the decree by the superior court of Monterey county in the estate of Charles M. Clary, setting apart the whole of his estate to his widow, the real and other property belonging to the estate of Abraham E. Clary was sold and converted into cash, and at the time said estate was distributed by the decree of the superior court of Yolo county to the beneficiaries named in the will to succeed thereto upon the death of the widow, the executor, E. F. Clary, had in his hands in cash the sum of \$7,544.58.

Immediately following the death of Abraham E. Clary, and prior to the death of Charles M. Clary, a promissory note for the sum of \$3,000, dated August 1, 1918, in favor of said Abraham, and signed by said Charles M. Clary, was found by E. F. Clary, the other executor, among the effects of Abraham, said note at all times subsequent to the time it was so found remaining in the hands of said E. F. Clary. Said note was made payable "one day after date to the order of A. E. Clary." Neither the note, nor the indebtedness it represents, was ever at any time included in any inventory of the estate of Abraham E. Clary, nor in any account of an executor as an asset of his estate, except in the final account. Nor was there any appraiser appointed to appraise the property of the estate of A. E. Clary until the 3d day of October, 1921, when one J. D. Musgrove was appointed sole appraiser of said estate, and qualified as such on the 28th day of October,

1921. No inventory was filed in the estate of A. E. Clary prior to January 9, 1922, nine months, approximately, after the death of Charles M. Clary.

As to said promissory note, the petition for settlement of the final account and distribution of the estate of Abraham E. Clary states:

"That he (E. F. Clary, sole executor) filed inventories of all property which has come to his hands, except that at the time of the death of said Charles M. Clark he was indebted to the estate of A. E. Clary on a promissory note for \$3,000, on which had been paid \$700 on account of principal, and \$125 interest, leaving then due and owing from said Charles M. Clary to the estate of said Abraham Everstine Clary, * * * the sum in excess of \$2,000; that your petitioner is informed and believes, and therefore avers, that it was the duty of the said Charles M. Clary to inventory his said indebtedness to said estate as cash in his hands, but through inadvertence or ignorance of the law the said Charles M. Clary did not so inventory said note, and the same does not appear in the inventory of said estate."

Payments on principal and interest on the note were indorsed on the back thereof; the last payment on principal having been made on November 21, 1921, and on account of interest on January 2, 1920.

It is admitted that no demand was ever made upon C. M. Clary by his coexecutor to settle or pay said note or indebtedness to the estate of A. E. Clary, and that no claim based upon said note was ever filed or presented to the estate of said C. M. Clary, deceased; nor was there any attempt ever "made to collect the indebtedness alleged to have arisen from the note prior to the filing of the petition for final distribution four years and three months after the note became due"; that "no other steps were taken at that time, with the exception of petitioning the court that the executor be allowed to retain the interest of C. M. Clary (in the estate of A. E. Clary) on account of said indebtedness"; that "no discharge of record has been entered discharging the said Cecil M. Clary as administrator of the estate of C. M. Clary."

Written objections and exceptions were interposed by the heirs of Charles M. Clary, deceased, to the final account, report, and petition for distribution of the estate of A. E. Clary, deceased. Among the grounds of objection to said account, etc., was and is that A. E. Clary, prior to his and C. M. Clary's death, released the latter from all obligation to pay said note. It was also objected that the note and indebtedness thereby evidenced was barred by subdivision 1, section 337 of the Code of Civil Procedure. The jurisdiction of the superior court sitting in probate to hear and determine the matter thus presented was also challenged.

Evidence, both oral and documentary, was taken, and the court found as to said note

and indebtedness against all the claims made by the heirs of C. M. Clary in their exceptions to the settlement of the final account, and found in particular that said A. E. Clary was the owner and holder of said note, upon which there was due the sum of \$2,965.91 at the time said C. M. Clary qualified as executor, and upon which nothing had been paid. The court further found that the sum total of all the commissions earned by the executors of the will of A. E. Clary for their services as such was \$498.28, of which amount one-fourth, to wit, the sum of \$124.57, was earned by C. M. Clary while acting as a joint executor of said will.

As to the promissory note and the indebtedness remaining unpaid thereon, the court decreed:

"That it was the duty of the said Charles M. Clary, upon accepting the appointment of joint executor of the said last will and testament of Abraham Everstine Clary, deceased, to have inventoried, as 'cash then in his hands,' the amount of his indebtedness to the said Abraham Everstine Clary, or his estate, which he did not do."

The court further decreed:

"That but for such indebtedness, aggregating \$2,965.91, the said Charles M. Clary, or his heirs at law, or successors in interest (the contestants herein), would have been entitled to receive upon the distribution of said estate the sum of \$1,257.50 as his distributive share, together with the further sum of \$124.51 hereinabove allowed as his share of the commissions earned by the executors of said estate, aggregating \$1,382.07, which sum should be retained by said Edward Ferguson Clary, executor, and be and is hereby set off against his (said Charles M. Clary's) said indebtedness of \$2,965.91 to the estate of Abraham Everstine Clary, deceased."

The contention of the respondent is that, inasmuch as the indebtedness of C. M. Clary to A. E. Clary existed at the time the former qualified and so accepted his appointment as executor of the will of the latter, said indebtedness, upon acceptance by C. M. Clary of such appointment, became, under the terms of section 1447 of the Code of Civil Procedure, money and assets of the estate of A. E. Clary in the hands of C. M., as such executor; that it was within the jurisdiction of the superior court, in the exercise of its probate jurisdiction and on the hearing of the petition for the settlement of the final account and for a decree of distribution, to require an accounting of such assets; that, if the same be not thus accounted for, the court is authorized, in its decree settling the final account, to adjudge that C. M. Clary was and is indebted to the estate of A. E. Clary to the extent of said indebtedness, and further adjudge and decree that the distributive share of said C. M. Clary in said estate and his commissions for his services as such executor be retained by the estate as an off-

set to or in recoupment of said indebtedness. As seen, the court below adopted that view of the case, and upon that theory, as to said indebtedness, made and entered its decree. Section 1447 of the Code of Civil Procedure provides:

"The naming of a person as executor does not thereby discharge him from any just claim which the testator has against him, but the claim must be included in the inventory, and the executor is liable for the same, as for so much money in his hands, when the debt or demand becomes due."

Counsel for the respondent cite a number of cases from other jurisdictions which declare it to be the rule that—

"If a legatee under a pecuniary bequest or a distributee is indebted to the estate, the amount of the debt may be retained from the legacy or distributive share, and the balance, if any, paid by him to the legatee or distributee in full of his claim; and the same rule is applicable to the assignees of the legatee or distributee, or to persons otherwise succeeding to his interest. This is often spoken of as a right of set-off, but it is said that, strictly speaking, it is a right of retainer." 11 Am. & Eng. Ency. of Law, p. 1170, and cases named in the footnotes.

This right, it is said in some of the cases, is founded on the principle that the administrator or executor has an equitable lien on the share of the distributee or legatee until the latter has discharged the obligation which he owes to the estate. *Holmes v. McPheeters*, 149 Ind. 587, 49 N. E. 452. And "it is an equitable right of its own nature, and not at all dependent upon any statute." *Webb v. Fuller*, 85 Me. 443, 27 A. 346, 22 L. R. A. 177.

In our state there are cases which hold that the superior court, sitting in probate, has jurisdiction to hear and determine the question of the title to money or other personal property which has come into the possession of an executor or administrator in his official capacity, and which, in fact, belongs to the estate, but which such executor or administrator claims to be the owner of in his individual capacity and adversely to the estate. *Stevens v. Superior Court*, 155 Cal. 148, 150, 99 P. 512; *In re Burdick*, 112 Cal. 387, 391, 44 P. 734; *Estate of More*, 121 Cal. 609, 54 P. 97; *Estate of Walker*, 125 Cal. 242, 57 P. 991, 73 Am. St. Rep. 40; *Estate of Thomas*, 140 Cal. 397, 73 P. 1059; *Estate of Pease*, 149 Cal. 167, 170, 85 P. 149; *Estate of Hall*, 154 Cal. 527, 98 P. 269; *Estate of Emerson*, 175 Cal. 724, 167 P. 149; *In re Loheide*, 17 Cal. App. 475, 120 P. 56.

It will be noted, however, that in all the last above named cases the issue arose during the course of administration of the estate and while the executor or administrator was still alive and acting as such executor or administrator, and involved the question whether the executor or administrator had

accounted for all the assets of the estate coming into his possession as such officer; the question always being raised by the heirs, the devisees, or legatees by objections to the petition praying for the settlement of the account of the executor or administrator. There is, though, a much more forceful reason why the course pursued by the court below as to the alleged indebtedness of C. M. Clary to the estate of A. E. Clary cannot be approved, and that reason is to be found in the fact that the Legislature of 1905 took occasion to prescribe specifically in section 1639 of the Code of Civil Procedure the course to be followed in the matter of the settlement of the estates of deceased persons where the situation is similar to that presented here. That section reads:

"If any executor, administrator or guardian dies, his accounts may be presented by his personal representatives to, and settled by, the court in which the estate of which he was executor, administrator or guardian is being administered, and, upon petition of the successor of such deceased executor, administrator or guardian, such court may compel the personal representatives of such deceased executor, administrator or guardian to render an account of the administration of their testator or intestate, and must settle such account as in other cases."

In *King v. Chase*, 159 Cal. 420, 115 P. 207, the Supreme Court had occasion to consider the purpose and scope of the above section. It appears that one Levi Chase, in the year 1896, was appointed as executor of the estate of his deceased wife, Cornelia Chase. Levi entered upon the discharge of his duties as such executor and continued so to act until his death on the 30th day of May, 1906. Subsequently Charles A. Chase, as the executor therein named, caused to be filed for probate the will of Levi Chase, and letters testamentary were issued to him. In August, 1906, the court in which was pending the administration of Cornelia Chase's estate appointed Charles W. King administrator with will annexed of said estate. King, as such administrator, brought an action against Charles A. Chase, as executor of the will of Levi Chase, "and individually, to obtain an accounting of the property belonging to the estate of Cornelia A. Chase, which came to the possession of defendant as executor of the will of Levi Chase, and for the recovery of such property when ascertained and determined." A trial of the issues was had, and findings were made to the effect that a large sum of money and certain specific personal property belonging to Cornelia's estate were in the possession of Levi Chase, as executor of Cornelia's will before and at the time of his death, and that the same passed into the possession and control of Charles A. Chase, as executor of the will of said Levi Chase. Judgment passed in favor of King, as administrator of Cornelia Chase's estate

and against Charles A. Chase, as executor of Levi's will, compelling the latter to turn over to said Charles A. King, as administrator of Cornelia's estate, all the money and personal property in his (Charles A. Chase's) possession, as executor of Levi's will. Charles A. Chase, as executor, etc., appealed. In disposing of the case on appeal, the Supreme Court, speaking through Mr. Justice Sloss, said at pages 422 and 423 (115 P. 208):

"Prior to 1905, when section 1639 was adopted, the statutes of this state contained no provision authorizing the superior court sitting in probate to settle such accounts. Nor was any such power conferred on the probate court, as that court existed under the Constitution of 1849. For this reason, it was uniformly held that a bill in equity to compel the executor or administrator of an executor or administrator to settle the account of his testator or intestate with the estate in which the decedent had been acting was the appropriate, as it was the only, procedure. *Bush v. Lindsey*, 44 Cal. 121; *Chaquette v. Ortet*, 60 Cal. 594; *In re Thompson*, 101 Cal. 349 (35 P. 991, 36 Pac. 98, 508); *Vance v. Smith*, 124 Cal. 219 (56 P. 1031); *Slater v. McAvoy*, 123 Cal. 437 (56 P. 49); *Zurfluh v. Smith*, 135 Cal. 644 (67 P. 1089); *Guardianship of Wells*, 140 Cal. 349 (73 P. 1065). The power of a court of equity to entertain a suit of this character is, in these cases, based upon the very ground that there is no other method of compelling the accounting. Thus, in *Bush v. Lindsey*, 44 Cal. 121, the court said: 'We are referred to no provision of the probate act which authorizes the probate court to cite the administrator of an administrator to settle the account of his intestate with the estate of which he was the administrator, and, after a careful examination of the act, we find none which confers that authority. The power must be lodged in some tribunal to require such an account to be taken and settled; and if the probate court does not possess it, it must reside in the district court, as a branch of its equitable jurisdiction.' So, in *Chaquette v. Ortet*, 60 Cal. 594, the court states that 'there is no provision of the statute providing for the settlement of the account of an administrator who dies before rendering an account. It is because of the absence of such statutory provision that the right and duty to compel such accounting belongs to a court of equity.' * * * While the power of the court, sitting in probate, was limited, under the pre-existing law, to a settlement of the accounts of a living administrator or executor, this statute extends the authority to cover the entire field of accounting by executors or administrators, so long as the estate itself remains subject to the jurisdiction of the court. That this is a wise and reasonable provision is not to be doubted. The court which has taken charge of the administration of the estate of a decedent is the proper forum for the determination of all questions incidental to that administration. The settlement of the accounts of the personal representative appointed to conduct the administration is one of the principal functions of the probate court."

See, also, *In re Philbrook*, 47 Cal. App. 678, 683-4, 191 P. 77; *Estate of Randall*, 188 Cal. 329, 333, 205 P. 118.

In the case of *In re Smith*, 108 Cal. 115, 40 P. 1037, Robert Smith died testate in the year 1891, and named his sons, John A. and William R., as executors. Both qualified, both were beneficiaries under the will, and both, after service, died before settlement of their accounts. In 1893, and after the death of the executors just named, one Robert Cardiff was appointed administrator with the will annexed, and subsequently in the same year filed his final account. The court found that during the executorship of John A. Smith he received \$264.65, moneys of the estate, and disbursed the sum of \$17.50, leaving in his hands at the time of his death \$247.15, belonging to the estate of deceased which was never paid over. The court said:

"When John A. died his estate went into probate. His brother William continued as executor of the father's estate, but presented no claim against the estate of the brother. When William in turn died the time for presenting claims against the estate of John A. had expired. The court distributed to the estate of John A. the three-tenths of the residue of the personal property devised to him and did not deduct the two hundred and forty-seven dollars and fifteen cents from his distributive share. John A. held the estate's money as trustee, and upon his death, being indebted to his beneficiary, the estate, its position became no better than that of any other creditor unless it was able to pursue the precise trust fund. *Lathrop v. Bampton*, 31 Cal. 23, 89 Am. Dec. 141; *Roach v. Caraffa*, 85 Cal. 436. It was the duty of William, as surviving executor, to have presented a claim against his brother's estate or to have compelled an accounting of his brother's trust in equity. In *re Allgier*, 65 Cal. 230; *Chaquette v. Ortet*, 60 Cal. 594. The court had no power to deduct the amount from the share of the estate of John A. upon distribution. Assets cannot be collected upon distribution (*In re Cook*, 77 Cal. 232, 233, 11 Am. St. Rep. 267), and the two hundred and forty-seven dollars and fifteen cents was not an advance to the devisee, so as to bring this case within the principle of *Estate of Moore*, 96 Cal. 522."

In re Smith was decided in the year 1895 and prior to the enactment of section 1639 of the Code of Civil Procedure.

[1] It will be observed from the decision that, even before the enactment of section 1639 of the Code of Civil Procedure, the court had no power in settling the final account of the deceased to deduct from the distributive share of the executor of such estate, who was also a legatee or a distributee therein, the amount of any money or debt he might have retained or owed the estate arising during the course of his administration thereof as executor.

Counsel for the respondent contend that the case of *In re Smith* is not in point here, for the reason that in that case an attempt

was made "to charge the administrator with a liability which did not exist against him at the time of his appointment, but which arose out of facts occurring during his administration," whereas in the instant case the executor was indebted to the testator or his estate at the time he accepted the appointment of executor, upon the happening of which event the debt became "money in his hands" for which he was liable to the estate by virtue of the provisions of section 1447 of the Code of Civil Procedure. We can perceive no real distinction between the two situations. In both cases the executor was indebted to the estate by reason of having failed to account for certain moneys coming into his possession and belonging to the estate as part of the assets thereof. The only difference between the two is that in this case the money was assets in the hands of the executor only in contemplation of law, while in the case of *In re Smith* the money was actually in his hands. There is nothing in the language of section 1447 which would justify the conclusion that any other course to obtain an accounting at the hands of the heirs of C. M. Clary for the money which was theoretically in said Clary's possession as executor than that prescribed by section 1639 should be resorted to. In both cases it is nothing less than a failure of the executor to account for certain assets of the estate, although in such a case as this there may be circumstances which would justify a less rigorous enforcement of the obligation to account than where the assets are or were actually in the hands or possession of the executor as such. In other words, the provision of section 1447 that a debt by the executor to the deceased is to be regarded as money in his hands for which he is liable to the estate, being a mere fiction of law, "can only subsist with justice, and should not be allowed to work injustice, either by charging the administrator with contempt or embezzlement, in not paying over moneys not received" where he is not able to pay. *Estate of Walker*, 125 Cal. 242, 57 P. 991, 73 Am. St. Rep. 40. But, at any rate, whatever might have been the rule of procedure in such a case as the one we have here prior to the enactment of section 1639, or whatever may be the procedure in such cases in other jurisdictions, it is certainly thoroughly established by said section that, where the heirs of an executor are proceeded against to account for any moneys or assets which their

ancestor, as executor, failed to account for in his administration of the estate, the proceeding for such accounting must be inaugurated under said section of the Code of Civil Procedure.

[2] If it should be necessary to decide, as the above-mentioned Eastern cases declare, that, where an executor or administrator, who is also a distributee or legatee of the estate of the will of the deceased or an heir, has retained or not accounted for some of the assets of the estate, or is indebted to the estate, the estate may be vested with an equitable lien upon the distributive share or legacy of such executor or administrator, still, where such executor or administrator has died before the completion of the administration of the estate or prior to the distribution thereof, leaving heirs, the proper mode for the determination of the matter as against such heirs, or it may be correct to say, for the enforcement of such lien as against such heirs, is now that prescribed by section 1639 of the Code of Civil Procedure. At all events, a consideration of the provisions of section 1639 compels the conclusion that the court below in this proceeding was without jurisdiction, as against the interests of his heirs, to appropriate the distributive share of C. M. Clary in the estate of his father or the commissions earned by him as executor to the extinguishment of his indebtedness to said estate.

There are other questions raised, which, in view of the conclusion at which we have arrived herein, we do not think it is necessary to discuss.

That portion of the decree of the court below appealed from is reversed.

We concur. FINCH, P. J.; PLUMMER, J.

NOTE BY THE COURT.—After the filing of the above opinion on January 29th, the opinion of the Supreme Court in the case of the *Claire A. Cates, Executrix of the Estate of Alton M. Cates, Deceased, v. Mary B. Cates, Administratrix of the Estate of Horace G. Cates, Deceased*, 232 P. 972, appeared in the *San Francisco Recorder* of January 30th. That case, while different from this in the facts, nevertheless discusses and therein applies the principle underlying section 1639 of the Code of Civil Procedure, and therefore we now cite the *Cates Case* as in support generally of the conclusion arrived at in the instant case.

71 Cal. App. 134

**PEOPLE v. ONE 1924 STUDEBAKER
SPORT AUTOMOBILE (LUND-
BLADE, Intervener).
(Civ. No. 5136.)**

(District Court of Appeal, First District, Division 2, California. Feb. 3, 1925. Hearing Denied by Supreme Court April 2, 1925.)

1. Intoxicating liquors ⇨246—Forfeiture of seller's interest in automobile used in transportation of intoxicating liquors held not authorized.

Neither Wright Act nor Volstead Act (U. S. Comp. St. Ann. Supp. 1923, § 10138¼ et seq.) authorizes forfeiture of seller's interest in automobile sold under conditional contract of sale, and used in transportation of intoxicating liquors, for seller's lack of reasonable diligence in ascertaining use to which car is put.

2. Intoxicating liquors ⇨251—Seller's rights under contract of conditional sale of automobile sought to be forfeited held not lost by delay.

Seller of automobile under conditional contract of sale, which automobile was sought to be forfeited for use in transportation of intoxicating liquors, held not to lose any right therein by waiting 17 days before declaring vendee in default for nonpayment of installments under contract.

3. Intoxicating liquors ⇨245—Wright Act adopted only penal provisions of Volstead Act.

Wright Act adopted only penal provisions of Volstead Act (U. S. Comp. St. Ann. Supp. 1923, § 10138¼ et seq.).

4. Intoxicating liquors ⇨246—Forfeiture of automobile for use in transportation of intoxicating liquors held not authorized as against innocent seller.

Forfeiture of automobile, sold under conditional contract of sale for use in transportation of intoxicating liquors, and payment of net proceeds of sale into county treasury held not authorized under Volstead Act (U. S. Comp. St. Ann. Supp. 1923, § 10138¼ et seq.) or Wright Act as against seller, who had no knowledge of such illegal use.

5. Intoxicating liquors ⇨246—General equitable jurisdiction to abate nuisances does not include power to forfeit innocent seller's interest in automobile used to transport liquor.

General equitable jurisdiction to abate nuisances does not include power to order sale of automobile used by buyer under conditional sale in transporting intoxicating liquors, and payment of proceeds into county treasury, as against innocent seller.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action by the People of the State of California against one 1924 Studebaker sport automobile, model Big Six, engine No. 29991, etc., to establish a nuisance and sale under the Wright Act, in which Fred H. Lund-

blade intervened. Judgment for plaintiff, and the intervener appeals. Reversed, with directions.

Hearing denied by Supreme Court; RICHARDS, J., dissenting.

W. Ernest Dickson, of Eureka, for appellant.

Arthur W. Hill, Dist. Atty., and J. J. Cairns, Deputy Dist. Atty., both of Eureka, for the People.

LANGDON, P. J. This action was brought against a Studebaker automobile seized under the Wright Act (St. 1921, p. 79) because it was being used in the transportation of intoxicating liquor. The complaint set out the fact of illegal use by Gilbert Whetstone, the registered owner, and his conviction for the offense; that F. H. Lundblade was the legal owner of the automobile. It was prayed that the court fix a time and place for a hearing of the matter and prescribe the notice to be given to the registered and legal owners and also to the holders of liens and other interests therein, and that upon the hearing a decree be made adjudging the said automobile to be a common nuisance, and directing its sale by the sheriff of the county, the proceeds to be applied to the payment of costs, and the "balance to be disposed of as provided by law."

Upon notice to the legal owner, Fred H. Lundblade, he intervened in the action, and set forth in his pleading that he was the legal owner of the automobile and had sold the same to Whetstone upon conditional contract of sale, upon which only \$451 had been paid, leaving a balance unpaid of \$1,692. It is then alleged that Whetstone has defaulted in his payments under the contract, and under its provisions the legal owner elects to declare the entire balance of the purchase price due and payable, and to take possession of the automobile, etc. Intervener prayed that, if an order of sale of the car be made, it be conditioned upon receiving a bid for at least the amount due the intervener, and that, if such amount could not be obtained, the car be returned to the intervener.

[1, 2] The trial court found, substantially, all the foregoing facts, and also found that the legal owner had no knowledge of the illegal use of the automobile. It also found that the legal owner was guilty of laches is not exercising reasonable diligence to ascertain the use to which the automobile was being put and also in not declaring the purchaser in default and recovering possession of the automobile on December 10, 1923, when the purchaser was first in default under his contract, and in permitting said purchaser to use said automobile for 17 days thereafter, or until December 27, 1923.

These two latter findings cannot have any legal force or effect, and are immaterial here because it cannot be seriously contended that a seller of automobiles is bound to be "reasonably diligent" to ascertain the use to which each car he sells is put or suffer a penalty of forfeiture of his interest in the same. No provision of the Wright Act nor of the National Prohibition Enforcement Act (U. S. Comp. St. Ann. Supp. 1923, §§ 10138¼ et seq.) is authority for this position, and, certainly, no general rule of law would warrant it. Also a vendor does not lose any rights by waiting 17 days before declaring his vendee in default under his contract under any general rule of law with which we are familiar. Indeed, the district attorney of Humboldt county, representing the people in this action, admitted in oral argument before this court that the findings just mentioned do not strengthen or give support to the judgment which we are reviewing.

[3, 4] However, from the foregoing findings of fact, the trial court concluded that the automobile should be sold at public auction by the sheriff, and that the net proceeds of the sale should be paid into the treasury of Humboldt county.

The intervener has appealed. It is admitted by the respondent that no penal provision contained in the Volstead Act authorizes the judgment, and that, on the contrary, said act expressly provides for reimbursement of lienholders in the event of the sale of property used in transportation of intoxicating liquor, where such lienholders had no knowledge of the illegal use. It is settled that the Wright Act adopted only the penal provisions of the Volstead Act. *People v. Buttulia* (Cal. App.) 233 P. 401. Respondent contends that the method provided in the Volstead Act for disposition of the proceeds of a sale is a procedural provision, and is not a part of the Wright Act. We think this reasoning is "beside the mark." The situation merely presents a case where it is sought to enforce an extreme penalty against an innocent owner of an automobile, which penalty is not only not provided in the Volstead Act, but is expressly denied therein, and, consequently, is not a penalty under the Wright Act.

Respondent, being unable to escape the logic of this situation, takes upon appeal a new theory. Respondent concedes that no statutory power is given to forfeit the interest of an innocent lienholder or person situated as is the appellant here, but maintains that, under the general equitable power of courts to abate nuisances, the trial court had the power to sell this automobile which had become a nuisance by reason of its use. To concede that the trial court had this general power does not solve the problem before us. The appellant is not disputing the pow-

er of the trial court to order the automobile sold and thus abate the nuisance. He is merely demanding that, after the nuisance is abated by the sale of the property, the court continue its equitable jurisdiction to do equity and order the net proceeds paid to the owner of the property who has been guilty of no fault and who has fallen under the provisions of no statute penalizing him.

[5] None of the cases relied upon by respondent discuss the disposition of the proceeds of a sale made to abate a nuisance under the general powers of a court of equity. The obvious answer to respondent's contention is that the nuisance was abated by the sale, which ended the power of the court, except to return the money to the persons entitled by law thereto. A general equitable jurisdiction to abate nuisances does not include a general power of forfeiture without warrant of law.

The judgment is reversed, with directions to the trial court to enter a judgment in accordance with the views herein expressed.

We concur: STURTEVANT, J.;
NOURSE, J.

71 Cal. App. 105

BOGNUDA v. PEARSON et al. (Civ. 2756.)

(District Court of Appeal, Third District, California, Jan. 31, 1925.)

1. Appeal and error ⇐607(1) — Transcript held not available on appeal, where not complying with statutory requirements.

Where judgment was entered March 5, notice of appeal was filed April 2, notice requesting clerk to prepare transcript of testimony was filed June 6, and certificate of clerk of court dated December 3 stated that settlement of bill of exceptions was not pending, transcript was not prepared as required by Code Civ. Proc. § 953a, and could not be considered on appeal.

2. Appeal and error ⇐612(4)—Trial court's certificate to transcript held insufficient.

Trial court's certificate to transcript must comply substantially with Code Civ. Proc. § 953a, requiring judge to certify to truth and correctness thereof, and certificate reciting that transcript is "hereby settled, allowed, and approved in accordance with the provisions of the statute" was insufficient to be considered on appeal.

3. Appeal and error ⇐616(3)—Instructions, to be reviewable on appeal, must be authenticated by trial court, or parties must stipulate they were instructions given.

Under Code Civ. Proc. §§ 670, 953a, instructions do not constitute part of judgment roll, but must be included in reporter's transcript, and where they are included in clerk's transcript, in order to be reviewable on appeal, they must be authenticated by trial court,

or parties must stipulate that they were instructions actually given.

4. Appeal and error ☞938(3)—Instructions presumed given at appellant's request.

In absence of anything in transcript prepared under Code Civ. Proc. § 953a, to show at whose request instructions were given, presumption is that they were given at appellant's request.

5. Appeal and error ☞1—Manner of preparing records or transcripts on appeal is statutory, and statute must be complied with.

Manner of preparing records or transcripts on appeal is statutory, and statute must be complied with.

6. Appeal and error ☞648—Where appellate court considered appeal, it was too late to be relieved from default in preparing transcript.

Where appellate court considered appeal, it was too late to be relieved from default in preparing transcript, under Code Civ. Proc. § 953a, by application under section 473.

Appeal from Superior Court, Glenn County; Claude F. Purkitt, Judge.

Action by J. Bognuda against Elizabeth B. Pearson and another. Judgment for plaintiff, and defendants appeal. Affirmed.

W. T. Belieu, of Willows, for appellants.

George R. Freeman, of Willows, for respondent.

HART, J. The plaintiff sued the defendants to secure a judgment for damages in the aggregate sum of \$8,000, alleged to be the extent, measured in money, of the injury alleged to have been inflicted upon the crops of alfalfa growing on certain lands of plaintiff in Glenn county and upon said lands by the alleged acts of the defendants in causing said lands to be flooded with water. The complaint specifically describes those acts, and the answer likewise denies each and all of the averments of plaintiff's pleading. The cause was tried by a jury, who awarded the plaintiff damages in the sum of \$4,000. Judgment was entered accordingly. The defendants appeal from said judgment, and in the preparation of the record on appeal attempted to proceed according to the method prescribed by section 953a of the Code of Civil Procedure.

The respondent contends that the appeal, in so far as the same is supported or supposed to be supported by the clerk's transcript or record on appeal, is not reviewable, for the reason that said transcript was not prepared and is not authenticated as required by said section 953a. The contention is sound and must be sustained. In fact, the attorney representing the appellants has not, in his brief or otherwise, attempted to combat the position taken by the respondent that, for the reason above stated, the

clerk's transcript on appeal cannot be reviewed. From this we might assume that the attorney for the appellants clearly appreciates the impregnable force of the objection. But the objection should, of course, be herein considered. Section 953a of the Code of Civil Procedure provides that:

"Any person desiring to appeal from any judgment, order or decree of the superior court to the Supreme Court or any of the District Courts of Appeal, may, in lieu of preparing and settling a bill of exceptions pursuant to the provisions of section 650 of this Code, * * * file with the clerk of the court from whose judgment, order or decree said appeal is taken, or to be taken, a notice stating that he desires or intends to appeal, or has appealed therefrom, and requesting that a transcript of the testimony offered or taken, evidence offered or received, and all rulings, instructions, acts or statements of the court, also all objections or exceptions of counsel, * * * be made up and prepared. Said notice must be filed within ten days after notice of entry of the judgment, order or decree, or if a proceeding on motion for new trial be pending, within ten days after notice of decision denying said motion, or of other termination thereof."

Said section further provides that, upon receiving said notice, it shall be the duty of the court to require a stenographic reporter to transcribe fully and completely the phonographic report of the trial. The section then proceeds to define the duties of the stenographic reporter under the order of the court and to specify the matters to be contained in the transcript, the preparation thereof to be completed and filed with the clerk of the court by such reporter within 20 days after said notice has been filed with said clerk. Thereupon the clerk of the court must forthwith give the attorneys appearing in said cause notice that said transcript has been filed, and that within five days after receipt of said notice said transcript will be presented to the judge for approval.

"At the time specified in the notice of the clerk to the attorneys said transcript shall be presented to the judge for his approval, and the judge shall examine the same and see that the same is a full, true and fair transcript of the proceedings had at the trial, the testimony offered or taken, evidence offered or received, instructions, acts or statements of the court, also all objections and exceptions of counsel and matters to which the same relate. The judge shall thereupon certify to the truth and correctness of said transcript and the same shall, when so settled and allowed, be and become a portion of the judgment roll and may be considered on appeal in lieu of the bill of exceptions now provided for by law."

[1] The transcript herein discloses that the judgment was entered on the 5th day of March, 1923, and that the notice of appeal was filed April 2, 1923. The notice required by the above section, stating that the defend-

ants intended or desired to appeal from the judgment, and requesting that a transcript be prepared or made up as above indicated, does not appear in the record. With the transcript, however, upon a sheet of paper separate and apart from the transcript itself, is the certificate of the clerk of the court to the effect that the notice for the transcription of all the proceedings had at the trial, including the testimony offered or taken, evidence offered or received, rulings, etc., was not filed with said clerk until June 6, 1923, and that at the date of the certificate (December 3, 1923) there was not pending the matter of the settlement of any bill of exceptions. It is only necessary to compare these facts with respect to the preparation or attempted preparation of the transcript with the requirements of section 953a of the Code of Civil Procedure, specifying the time within which the steps thereby made necessary to be taken to perfect a record on appeal under the provisions thereof, to make it very clear that the reporter's transcript was not prepared as required by said section and for that reason is not available for the purposes of this appeal. In other words, the reporter's transcript cannot be considered in the determination of this appeal. See *Des Granges v. Des Granges*, 175 Cal. 67, 70, 165 P. 13; *Morey v. Paladini*, 187 Cal. 727, 203 P. 760; *In re Barney*, 191 Cal. 18, 21, 214 P. 853.

[2] Furthermore, the certificate of the judge purporting to authenticate the correctness of the reporter's transcript does not conform to the requirement of section 953a in that particular. The judge's certificate is that said transcript "is hereby settled, allowed, and approved in accordance with the provisions of the statute," while said section provides that the judge shall "certify to the truth and correctness of said transcript." It goes without saying that the reporter's transcript must be authenticated substantially as the statute requires; otherwise, it cannot be considered in connection with the disposition of the appeal which it is designed to support. See *Williams v. Lane*, 158 Cal. 39, 109 P. 873. Obviously, the reviewing courts must be furnished with legal evidence of the fact that what are brought to them as records on appeal are in truth the transcripts or other proper reproductions of all that took place at the trials, or so much thereof as it may be desired shall be reviewed.

The appellants object to certain instructions embraced within the court's charge to the jury. These assignments cannot be reviewed. With the record is a written stipulation by the parties, upon a sheet of paper separate from the transcript, that the instructions of the court, "as copied and compared by the clerk, and numbered pages 35 to 54, inclusive, may be inserted in the clerk's transcript on appeal," and that the clerk's certificate as to the number of the pages of

his transcript may be corrected accordingly. It was further therein stipulated that "this stipulation is not intended to waive any other objections to said transcript."

[3] The instructions of the court do not constitute a part of the judgment roll. Code Civ. Proc. § 670. They must be inserted and included in the reporter's transcript. Code Civ. Proc. § 953a; *Tracy Brick & Art Stone Co. v. Wurster*, 44 Cal. App. 652, 656, 187 P. 125. Where, however, they are included in the clerk's transcript, and so may be treated as a part of the record on appeal, the instructions, to be subject to review on appeal on objection that they misstate the law applicable to the case, must be authenticated or certified by the judge as the instructions which were actually given upon the trial of the cause, or in the absence of such authentication, there must be a stipulation by the parties that they were the instructions so given. *Tracy Brick & Art Stone Co. v. Wurster*, supra. The instructions in the clerk's transcript here are not certified by the trial judge as the instructions submitted to the jury by the court, nor is there a stipulation of the parties to that effect.

[4] But there is still another obstacle in the way of reviewing the objections to the instructions in this case in the fact that there is nothing to indicate or show at whose request the instructions were given—whether at the request of the plaintiff or the defendants. The presumption is, therefore, that they were given at the request of the defendants. *Gray v. Eschen*, 125 Cal. 1, 5, 57 P. 664; *Sutter Butte Canal Co. v. Am. Rice & Alfalfa Co.*, 182 Cal. 549, 553-554, 189 P. 277. It results from the foregoing considerations that there is nothing left before us which is reviewable but the judgment as supported only by the judgment roll. No error appears on the face of the judgment roll, and none is claimed. The complaint states facts sufficient to disclose a cause of action against the defendants for the relief sought, and is invulnerable as against the special objections thereto as set forth in the demurrer.

[5, 6] It is clear from the foregoing that there is open to this court, in disposing of this appeal, no other course than that of affirming the judgment. Of course, it is always to be deprecated where a cause on appeal cannot be considered and disposed of upon the merits of the controversy. But the mode and manner of preparing records or transcripts on appeal is of statutory origin, and the requirements of the statute as to the preparation of such records or transcripts must be complied with, although, in many instances, the reviewing courts, always preferring to dispose of cases on the merits thereof, have stretched the rules regulating the matter of taking appeals almost to the "breaking point" to avoid denying to litigants, in such cases, the right to have their

complaints against the result reached below reviewed and passed upon. Perhaps the defendants in this case, by seasonable action, might have been relieved from their default in the matter of the preparation of a transcript on appeal under section 953a by an application for such relief under section 473 of the Code of Civil Procedure. This course, though, they did not adopt, and it is now too late to put in motion the proceeding authorized by the last named section for the purpose of securing such relief. *Des Granges v. Des Granges*, 175 Cal. 67, 71, 165 P. 13; *Morey v. Paladini*, 187 Cal. 727, 731, 203 P. 760; *In re Barney*, 191 Cal. 18, 21, 214 P. 853.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

71 Cal. App. 34

FORREST v. FINK. (Civ. 4763.)

(District Court of Appeal, First District, Division 1, California. Jan. 30, 1925. Rehearing Denied Feb. 27, 1925. Hearing Denied by Supreme Court March 30, 1925.)

1. Trial $\S$ 296(4,5)—Instruction held not erroneous as stating that plaintiff had right to diminish speed of his machine without warning, in view of other instructions.

In action for injuries when plaintiff's machine was struck from the rear by defendant's machine, instruction held not erroneous as stating that plaintiff had right to diminish speed of his machine without giving a signal or warning of his intention to do so, in view of other instructions.

2. Highways $\S$ 172(1)—Motor Vehicle Act relating to giving of signals construed.

Motor Vehicle Act, $\S$ 20n (St. 1919, p. 216) requiring one driving on highway, turning, stopping, or changing course, to plainly signal his intention to other vehicles, would not require driver of vehicle on every deviation from a direct course ahead to look back to ascertain condition of traffic behind him.

3. Trial $\S$ 295(1)—Verdict should remain, if instructions as a whole do not mislead jury.

Verdict should remain, if instructions as a whole do not mislead jury.

4. Appeal and error $\S$ 1170(1)—Any error in overruling objection held not to require reversal, where no showing of miscarriage of justice.

In action for injuries when plaintiff's machine was struck from the rear by defendant's machine, any error in overruling defendant's objection to proceeding with trial until plaintiff had complied with Workmen's Compensation Act, $\S$ 26, relating to serving notice on his employer of pendency of action, was of procedure, and would not require a reversal in view of Const. art. 6, $\S$ 4½, where there was no showing that defendant had suffered prejudice

amounting to miscarriage of justice by omission complained of.

5. Appeal and error $\S$ 909(1) — Appellate court would presume that giving of notice under Workmen's Compensation Act was regular.

In action for injuries when plaintiff's machine was struck from rear by defendant's machine, in which defendant admitted that insurance carrier of plaintiff's employer was notified of pendency of action as required by Workmen's Compensation Act, $\S$ 26, by written notice of some form, appellate court would presume, where notice was not made a part of record, that giving thereof had been regular.

6. Evidence $\S$ 314(2)—Testimony of medical witness as to what statistics showed concerning injuries similar to those received by plaintiff held not objectionable as hearsay.

Testimony of medical witness as to what statistics showed concerning result of injuries similar to those received by plaintiff held not objectionable as hearsay, since his answer would be assumed to have been a conclusion reached after a judicious comparison of all that he had read or learned on subject.

7. Evidence $\S$ 536—Witness, to qualify as an expert, must be skilled in his business or profession.

Witness, to qualify as an expert, must show himself to be skilled in his business or profession.

8. Evidence $\S$ 558(1)—Opinion of expert witness subject to most rigid cross-examination.

Opinion of an expert witness as well as its source may be subjected to most rigid cross-examination.

Appeal from Superior Court, Alameda County; Mortimer Smith, Judge.

Action by Frank Forrest against Henry Fink. Judgment for plaintiff, and defendant appeals. Affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant.

Ford & Johnson, of San Francisco, for respondent.

KNIGHT, J. This is defendant's appeal from a judgment obtained by plaintiff in an action wherein plaintiff recovered damages for injuries sustained by him in a rear-end collision between an ambulance he was driving and another automobile driven by the defendant.

The facts are as follows: The accident occurred about 10 o'clock in the morning, September 16, 1922, while the ambulance was being driven by plaintiff along Foothill boulevard, a short distance west of San Leandro creek in the county of Alameda. This boulevard is about 70 feet wide, and just east of the point of collision there is a curve in the road, which was negotiated by the am-

bulance at a speed estimated by various parties as between 5 and 25 miles an hour. Shortly thereafter the machine operated by defendant followed at a speed estimated as being in excess of 30 miles an hour and by one witness as 40 miles per hour. There is a conflict in the evidence regarding the circumstances which occurred immediately preceding and at the time of the accident. Defendant contends that the ambulance slowed down sharply or stopped, without giving signals of an intention to do so. Other testimony is to the effect, that, if there was any diminution of speed at all, it was a gradual slowing up of the ambulance before a stop. At any event, the automobile driven by defendant collided with the rear end of the ambulance causing plaintiff's head to bump against the plate glass front of the ambulance and fracture his skull.

[1-3] The first contention urged by appellant is that the court erred in giving the following instruction:

"You are instructed that the driver of the ambulance had a legal right to operate the same on the highway in question as slowly as he desired, and that he had a legal right to diminish the speed of his automobile without giving any signal or warning of any kind to vehicles approaching from the rear of his intention to do so, provided he may do so without accident to a vehicle following, that is, if the vehicle following be not so close that to do so would be dangerous. The Motor Vehicle Act of this state provides that signal must be given to vehicles following in the rear only before turning, stopping, or changing the course of the vehicle which is preceding."

Appellant's objection to this instruction is that the jury was advised that under the circumstances stated in said instruction respondent had the right to diminish the speed of his machine without giving a signal or warning of his intention to do so. In view of the other instructions given, which must be read in connection with the one complained of, we think the jury was correctly and fully instructed upon the subject.

Section 20n of the Motor Vehicle Act provides that one driving on the highway shall ascertain if there is sufficient space for turning, stopping, or changing his course, and, "if the movement or operation of other vehicles may reasonably be affected" thereby, he shall give plainly visible signal to the person operating said car. "A practical and reasonable construction of this provision [subdivision 'n' of section 20 of the Motor Vehicle Act (Stats. 1919, p. 216)] would not require the driver of a vehicle upon every deviation from a direct course ahead to look back to ascertain the condition of traffic behind him. This particular situation would be covered by his duty to use ordinary care, and whether or not he did so would be for the jury to decide upon the particular circumstances of the case" (Noce v. United

Railroads, 53 Cal. App. 512). This becomes doubly apparent when it appears that the trial court instructed the jury that, if plaintiff failed to comply with the Motor Vehicle Act of the state of California, "and said failure or omission so to comply contributed directly to the happening of the collision," then the verdict should be for defendant, if said failure or omission was the proximate cause of the accident. The jury was also instructed that it is the duty of a driver about to stop a motor vehicle or to abruptly or suddenly check its speed to extend his hand and arm as provided by law, and that a failure so to do is prima facie evidence of negligence when an accident results. This latter instruction, we think, covers the situation precisely, and, if the instructions as a whole do not mislead the jury, the verdict should remain. *Garrette v. Grangers' Business Ass'n*, 58 Cal. App. 396, 208 P. 1010. Finally an instruction was given, which, after stating a hypothetical case, upon which plaintiff might recover, contained this qualification:

"If you shall also find that the plaintiff, F. Forrest, carelessly and negligently or carelessly or negligently slowed the speed of the automobile without making any sign as required by law, and that said negligence on his part proximately caused and contributed to the happening of the accident, then your verdict shall be in favor of defendant."

We are of the opinion that the instructions, as a whole, embodied a correct and full exposition of the law upon the subject in controversy.

[4, 5] The next contention urged by appellant is that the trial court erred in overruling defendant's objection to proceeding with the trial of the case until plaintiff had complied with section 26 of the Workmen's Compensation Act (St. 1919, p. 920) relating to serving notice upon his employer of the pendency of the action. The section requires either an employer or employee when bringing an action for damages to notify the other by registered mail of such fact, and of the name of the court in which such suit is brought, "filing proof thereof in such action, and, if the action be brought be either, the other may, at any time before the trial on the facts, join as party plaintiff, or must consolidate his action, if brought independently." Evidently the only benefit inuring to a defendant under this statute is to prevent a duplication of action against him for the same tort. The service of the notice upon the employer and the filing of proof thereof are not jurisdictional, but, as was said in *Van Zandt v. Sweet*, 56 Cal. App. 164, 204 P. 860, the failure to give such notice would be ground for continuance until such time as the notice should be given. It would therefore appear in the present case that the error committed, if any there be, was one of

procedure, which would not require a reversal of the judgment, unless it has been shown by appellant that by the omission complained of he has suffered prejudice amounting to a miscarriage of justice. Section 4½, art. 6, Const. Cal.; *Lutz v. Merchants' Nat. Bank*, 179 Cal. 401, 177 P. 158. In view of the state of the record before us, it is apparent that no such showing has been made. In the first place, respondent claims that, before the conclusion of plaintiff's case, proof that notice had theretofore been given the employer was filed, and from which it is claimed it appeared that the insurance carrier, who was the real party in interest, so far as the effect of such notice is concerned, had actual notice of the pendency of the action and had consented to their interest being represented by plaintiff's counsel. While it is true, as appellant points out, such notice or proof of notice is not made a part of the record of the case, nevertheless appellant admits that some sort of document had been filed, but in this respect contends that the same was ineffectual, either in form or procedure, to meet the requirements of the statute. Inasmuch as appellant admits that the insurance carrier was notified by the service of some form of written notice, and in view of the fact that the notice itself is not made a part of the record before us, so as to show, as appellant claims, it was totally insufficient for any purpose, we must, in the absence of such evidence to the contrary, presume that the giving of such notice has been regular. In *Hulbert v. All Night and Day Bank*, 29 Cal. App. 765, 157 P. 546, the court held that, even though a contention is made that an individual should be made a party litigant was technically correct, nevertheless, under certain circumstances, the case was one to which the provisions of section 4½ of article 6 of the Constitution should be applied. That would seem to be a more serious fault in the conduct of the case than the one appearing in the case at bar, because here, if the appellant has any doubts as to his status in connection with the employer or the insurance carrier, he may still protect his interest by causing said notice to be served upon either or both of them any time before final judgment.

[6-8] Appellant's final contention is that the trial court erred in permitting a medical witness to testify as to what statistics showed concerning the result of injuries received similar to those received by plaintiff. The particular testimony to which reference is made followed a question by counsel for plaintiff as follows:

"Have you made a study of the statistics relative to brain tumors, the percentage of cases of brain tumor which give a previous history of either a fracture of the skull or brain injury?"

Objection was made on the ground of hearsay, which objection was overruled. His reply was:

"Yes, 27 per cent. of them gives a history of such injury."

Later the witness said:

"Well, of course, he may get over this. The chances are two to one from statistics that I have already quoted that he will not. He may go on the way he is now, and he may get a good deal worse."

The point is made that the doctor, instead of giving his own opinion, fortifying it by his reading, if he wished, based his entire answer upon the statistics, which are admittedly hearsay. Appellant relies upon the case of *Bailey v. Kreutzmann*, 141 Cal. 519, 75 P. 104, as supporting his contention that the testimony in question constitutes ground for reversal. In that case the experts were allowed to recite instances from specific medical reports and authors, which purported to prove certain facts. This would clearly be hearsay. Likewise it would clearly be irrelevant on direct examination to educe testimony on other particular cases, even though similar, as this would be a violation of the rule that the testimony must be confined to the point in issue. It is clear that the witness, to qualify as an expert, must show himself to be skilled in his business or profession, but there is no precise rule as to how that skill must be acquired. He may be an expert through knowledge derived from the study of the subject only. 2 Jones' Commentaries on Evidence (Horwitz) § 368. The same author says:

"The opinion of physicians and surgeons may be admitted to show the physical condition of a person, * * * the effect of disease or of physical injuries upon the body or mind, * * * the probably future consequences of an injury, when the consequences anticipated are such as in the ordinary course of events may be reasonably expected to happen, and are not merely speculative or possible." Section 378.

An expert witness might reasonably be expected to rely, to a great extent, upon the statistics he has studied, which must be taken into consideration with his observation and experience. This, apparently, was the view taken by the court in *Healy v. Visalia, etc., R. R. Co.*, 101 Cal. 585, 36 P. 125, in which the court said:

"The witness was asked as an expert what would be likely to be the result of certain injuries to the brow or forehead. This question sought to obtain from him his own opinion of these results, and the fact that he was called as an expert assumed that his opinion was based, not merely upon the empirical knowledge which he had gained through his own practice, but also that which he had acquired in the study of his profession. * * * As an ex-

pert it was competent for him to give the grounds upon which he based his opinion, as well as the opinion itself, and the fact that his opinion was based upon information derived from his reading did not make it incompetent for him to so state."

In the case at bar the witness referred to "statistics," while in *Healy v. Visalia, etc., Co.*, supra, reference was made to "cases on record." We feel that the situation here is entirely different from allowing medical or scientific books to be read to the jury or seeking to influence them by opinions or theories contained in such books. His answer must be assumed to have been a conclusion reached by him after a judicious comparison of all that he had read or learned upon the subject, and upon his opinion, as well as its source, he could be subjected to the most rigid cross-examination. *Healy v. Visalia, etc., R. R. Co.*, supra.

The judgment is affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

71 Cal. App. 82

ATKINSON v. UNITED RAILROADS OF SAN FRANCISCO et al. (Civ. 4860.)

(District Court of Appeal, First District, Division 1, California. Jan. 31, 1925. Hearing Denied by Supreme Court April 1, 1925.)

1. Carriers ⇨316(4)—Doctrine of res ipsa loquitur held applicable in favor of passenger as against carrier.

In action for death of passenger, when street car in which he was riding struck a truck, as against street railroad, doctrine of res ipsa loquitur was applicable in favor of passenger.

2. Carriers ⇨321(21)—Use of word "presumption" in doctrine on res ipsa loquitur instead of "inference" held not fatal.

In action for death of passenger, when street car in which he was riding struck a truck, use of word "presumption" in instruction on doctrine of res ipsa loquitur instead of "inference" held not fatal.

3. Negligence ⇨121(2)—Doctrine of "res ipsa loquitur" stated.

Doctrine of "res ipsa loquitur" relates merely to probative force of evidence, and does not dispense with necessity of defendant's negligence, and when case is finally submitted to jury weighing presumptions, proofs, and all evidence, burden of proof is still on plaintiff to establish affirmatively defendant's negligence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Res ipsa loquitur.]

4. Carriers ⇨316(4)—Doctrine of res ipsa loquitur held applicable in action for death of passenger in so far as specific acts of negligence alleged in complaint were concerned.

In action for death of passenger when street car in which he was riding struck a

truck, plaintiff who pleaded specific acts of negligence of street railroad was entitled to application of rule of res ipsa loquitur in so far as such specific acts of negligence alleged in complaint were concerned.

5. Trial ⇨296(7)—Giving of general and specific instruction on doctrine of res ipsa loquitur held cured by other instruction.

In action for death of passenger, in which plaintiff pleaded specific acts of negligence, that court gave two instructions on doctrine of res ipsa loquitur, one general in form and other applicable to particular acts of negligence pleaded, did not constitute error, in view of full instruction on burden of proof.

6. Appeal and error ⇨1068(1)—Giving of general and specific instruction on doctrine of res ipsa loquitur held not erroneous, in view of verdict.

In action for death of passenger, in which plaintiff pleaded specific acts of negligence, that court gave two instructions on doctrine of res ipsa loquitur, one general in form and other applicable to particular acts of negligence pleaded, did not constitute error, where verdict of jury was not based on any other act of negligence than those alleged.

7. Carriers ⇨321(21)—Instruction that proof of injury to passenger casts burden of proof on carrier alone held not erroneous.

In action for death of passenger when street car in which he was riding struck a truck, instruction that proof of injury to passenger cast burden of proof on carrier alone held not erroneous, where it was doubtful as to which of defendants' negligence was cause of passenger's injury.

8. Carriers ⇨321(21)—Instruction held not erroneous as requiring carrier to disprove negligence by preponderance of evidence.

In action for death of passenger when street car in which he was riding struck a truck, instruction that proof of injury to passenger casts burden of proof on carrier alone held not erroneous as requiring street railroad to disprove negligence by a preponderance of the evidence.

9. Trial ⇨295(1)—All instructions are to be considered together.

In determining effect of a particular instruction, all instructions are to be considered together.

10. Appeal and error ⇨1048(6)—Cross-examination of motorman, relative to reasons for leaving employment of street railroad, held harmless.

Cross-examination of motorman of car, involved in accident, relative to reason for leaving employment of street railroad, if error, held harmless, where on direct testimony he stated that he left on his own accord, and where court later at defendant's request with consent of plaintiff fully instructed jury to disregard entire matter.

Appeal from Superior Court, City and County of San Francisco; Edward P. Shortall, Judge.

Action by Margaret Atkinson, as administratrix of the estate of John J. Atkinson, deceased, against the United Railroads of San Francisco and others. Judgment for plaintiff, and named defendant appeals. Affirmed.

Hearing denied by Supreme Court; MYERS, C. J., and LENNON and WASTE, JJ., dissenting.

Wm. M. Abbott and Kingsley W. Cannon, both of San Francisco (Ivores R. Dains, of San Francisco, of counsel), for appellant.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for respondent.

KNIGHT, J. The decedent, John J. Atkinson, was killed while riding as a passenger on one of the street cars operated by the defendant United Railroads of San Francisco, when said car collided with an automobile truck belonging to the codefendants George Sharetz & Sons. Plaintiff, as the administratrix of the estate of her deceased husband, commenced this action for damages, charging that the wrongful death of her husband had been caused by the joint and concurring negligence of said defendants. The collision occurred on Third street, between Twenty-Second and Twenty-Third streets, San Francisco, on June 26, 1920. The negligence charged against the street car company was that its car was being carelessly operated at an excessive rate of speed, in violation of the municipal ordinance, and without any notice or warning of its approach; and, as against the codefendants, it was alleged that they carelessly and without notice or warning of any kind operated said truck from one side of Third street to the other in front of said street car. The action was tried before a jury, resulting in a verdict for the sum of \$22,700 in favor of plaintiff and against the defendant United Railroads of San Francisco; the owners of the truck were absolved from liability. The defendant United Railroads of San Francisco has appealed.

The evidence, bearing upon some points, is conflicting, but the sufficiency thereof, to sustain the verdict, is not challenged; four of the five points urged by appellant for a reversal of the judgment consisting of attacks upon the instructions, while the fifth point is an assignment of error pertaining to the admissibility of evidence. The circumstances leading up to the collision are as follows: Shortly after the noon hour, on Saturday, the day of the accident, Atkinson, the decedent, boarded a south-bound car of the defendant company on Third street, some distance north of the intersection of Third and Twenty-Second streets, which car was then, with a number of others, standing on a loop or curve, near the Union Iron Works, for the purpose of allowing passengers to board the same. There was also a string of empty street cars standing on the north-bound tracks, on Third street, between Twenty-Second and Twenty-

Third streets, waiting to take the loop, and which obscured the view of the motorman of the south-bound cars, from observing north-bound traffic on the easterly side of Third street. At this particular time the easterly side of Third street, between the north-bound cars and the curb, was practically blocked by parked automobiles, thereby making it necessary for north-bound traffic on Third street to proceed to the left of those empty street cars. This situation made it dangerous for the south-bound street cars to travel fast or without warning between Twenty-Second and Twenty-Third streets. Respondent's evidence shows that, notwithstanding the situation described, the motorman of the crowded car on which decedent was riding applied the propelling power of the car in full when he left the loop, and, as the car approached Twenty-Second street, its speed increased, on account of the descent in grade, so that when it passed Twenty-Second street it was running without any warning at the rate of between 30 and 40 miles an hour. Before it reached Twenty-Third street it collided with the broad side of the truck, demolishing the front end of the car and resulting in the decedent's death. The evidence further shows that the truck at the time of the collision was attempting to turn around on Third street, in order to return to Twenty-Third street, and that the motorman observed said truck at a considerable distance before the collision. The truck had proceeded up Third street, on the easterly side thereof, until it had almost reached the most southerly end of the string of empty street cars standing on the north-bound tracks, but, being unable to make a turn at Twenty-Second street, owing to a torn-up condition of the street at that intersection, and being unable also to proceed farther northerly on the easterly side of Third street, because that side of the street was blocked with standing automobiles and street cars, the driver attempted to make the turn at the point indicated, which was some 300 feet north of the intersection of Twenty-Third street, when the collision occurred.

[1] The first contention made by appellant is that the trial court erred in instructing the jury on the doctrine of *res ipsa loquitur*, first, for the reason that it was a question for the jury to determine which instrumentality was the proximate cause of the injury. It is insisted by appellant that before the doctrine of *res ipsa loquitur* may be declared to the jury it must appear as a matter of law that appellant had exclusive control of the causative force, and that the accident could not plausibly have happened without defendant being negligent; also that it must clearly appear that the immediate cause of the accident is under the control of appellant or those for whom it is responsible, and that, where the immediate cause of the injury is

only a consequence of an act controlled by the defendant, and not the act itself, the presumption of negligence does not arise, because the proximate cause of the act is then brought in question. In support of this contention appellant cites and relies on the case of *Harrison v. Sutter St. Ry. Co. & Nat. Brewing Co.*, 134 Cal. 549, 66 P. 787, 55 L. R. A. 608, wherein it is claimed the court held that in a suit against two defendants arising out of a collision between a car and a brewing company's wagon there was no presumption or inference of negligence against either defendant.

This same question has been before the courts of this state on several occasions since *Harrison v. Sutter St. Ry. Co.*, supra, was decided, and this contention has been, we think, definitely determined adversely to appellant's views. In those later cases the ruling in *Harrison v. Sutter St. Ry. Co.*, supra, has been uniformly interpreted to mean that under the circumstances therein presented no presumption of negligence arises against both defendants, which, obviously is a different proposition than holding, as appellant contends, that there is no presumption of negligence against either defendant; and in those later cases the doctrine has been made clear that under such circumstances a presumption or inference of negligence does arise as against the carrier on whose instrumentality the injured party was riding at the time he received his injuries. For instance, in the case of *Houghton v. Market Street Ry.*, 1 Cal. App. 576, 82 P. 972, it was said:

"Appellants, however, contend for a rule which we think is not sustained by authority or reason—namely, that no presumption of negligence arose against either defendant, citing *Harrison v. Sutter Street Ry. Co.*, 134 Cal. 549, 66 Pac. 787. That case went no further than to decide that no presumption of negligence arose against both defendants; it appearing that the injury occurred to a passenger on the railway company's car in a collision with the defendant brewing company's wagon. That a presumption of negligence arose as against the defendant railway company in the present case, see * * * *Osgood v. Los Angeles Traction Co.*, 137 Cal. 280, 92 Am. St. Rep. 171, 70 Pac. 169. * * * *Sullivan v. Market Street Ry. Co.*, 136 Cal. 479, 69 P. 143."

The case of *Osgood v. Los Angeles Traction Co.*, 137 Cal. 280, 70 P. 169, 92 Am. St. Rep. 171, was an action to recover damages for personal injuries resulting from a collision between a car of the Los Angeles Traction Company and one of the Los Angeles Railway Company. The court, in discussing the case of *Harrison v. Sutter Street Ry. Co.*, supra, said:

"It was held that no presumption of negligence arose in a suit against the railway company and the owner of the wagon as between themselves. The trial court refused to instruct the jury, at plaintiff's request, that a presump-

tion of negligence arose against both defendants. * * * But the question now here was not decided. * * * The question now here is as to the presumption against the proprietor of the vehicle occupied by the plaintiff. Clearly the rule applies to such proprietor. * * * If the fault or negligence which was the proximate cause of the injury was attributable to some other vehicle under other and independent control, the defendant could so show, and that would be a good defense, but the presumption of defendant's negligence arises regardless of the fact that the injury may have been caused by some other agency. The instruction did not shift the burden of proof of the whole case to defendant. It was nothing more than saying that, upon the particular issue, plaintiff has established negligence on defendant's part, and defendant must meet this proof by 'showing that the injury was without any negligence on its part.'"

This language was quoted with approval in *Housel v. Pacific Electric Ry. Co.*, 167 Cal. 245, 139 P. 73, 5 L. R. A. (N. S.) 1105, Ann. Cas. 1915C, 665. It is therefore plain, we think, that "as against the carrier it appears to be settled by the decisions in this state that under such circumstances as appear here the doctrine of *res ipsa loquitur* is applicable in favor of the passenger." *Housel v. Pacific Electric Ry. Co.*, supra.

[2] We believe the use of the word "presumption" in said instruction, instead of the word "inference," was not fatal thereto. It is true, as appellant points out, in the recent case of *Dowd v. Atlas Taxicab & Service Co.*, 187 Cal. 523, 202 P. 870, the court held that the trial court was justified in modifying a proposed instruction, in that particular, before it was given to the jury; but the court did not go so far as to hold that the use of the word "inference" was essential to the soundness of said instruction; and, inasmuch as the form used in the present case has been expressly approved in numerous previous cases which are hereinafter cited, we are of the opinion that the giving of the same in the form complained of did not have the prejudicial effect upon the jury appellant attributes to it. *Meyer v. McNutt Hospital*, 173 Cal. 156, 159 P. 436; *Wyatt v. Pacific Electric Ry. Co.*, 156 Cal. 170, 103 P. 892; *Housel v. Pacific Electric Co.*, supra; *Steele v. Pacific Elec. Co.*, 168 Cal. 375, 143 P. 718; *Osgood v. Los Angeles, etc., Co.*, 137 Cal. 280, 70 P. 169, 92 Am. St. Rep. 171; *McCurrie v. Southern Pacific Co.*, 122 Cal. 558, 55 P. 324; *Judson v. Giant Powder Co.*, 107 Cal. 549, 40 P. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146.

[3-6] Appellant's next point relates to the doctrine of *res ipsa loquitur*. The case was presented to the jury, so far as the evidence was concerned, in the same manner as if it were an ordinary action for damages, based upon negligence; the plaintiff having assumed the burden of proof upon all affirmative allegations set forth in the complaint, and the trial court having fully instructed the jury

that the burden was upon plaintiff to prove those allegations before she was entitled to a verdict. However, along with the other instructions given, the court instructed the jury, in effect, that the doctrine of *res ipsa loquitur* applied, and gave two instructions upon that subject; one being general in form and the other applicable to the particular acts of negligence pleaded. Appellant contends that the doctrine of *res ipsa loquitur* did not apply, and that it was therefore error for the court to instruct the jury that it did. This contention is grounded upon the claim that respondent, in her complaint, pleaded specific acts of negligence; that consequently she excluded from the case the doctrine of *res ipsa loquitur*, and lost the right to have the jury instructed upon that subject. As sustaining such contention appellant cites and relies principally upon the recent cases of *Connor v. A., T. & S. F. Ry. Co.*, 189 Cal. 1, 207 P. 378, 26 A. L. R. 1462; *Marovich v. Central California Traction Co.*, 191 Cal. 295, 216 P. 595, and *McKeon v. Lissner* (Cal. Sup.) 223 P. 965, which cases, it may be said in passing, were the first ones decided in this state wherein there was an enforcement of the rule that allegations of specific acts of negligence precluded the application of the doctrine of *res ipsa loquitur*, and all of those cases were decided after the trial of the instant case. In so far as appellant is concerned, it was alleged in the complaint that it "negligently and carelessly, and without any notice or warning, ran and operated said street car along the south-bound track maintained by defendant * * * at a greater speed than fifteen miles per hour, in violation of section 3" of the municipal ordinance. Appellant's codefendant was also charged with concurring negligence in the operation of its truck, and it was then alleged that the concurring negligence of both defendants constituted the proximate cause of the injuries. Answering appellant's contention, respondent disputes the assertion that the allegations of negligence contained in said complaint were confined to specific acts, and in this regard claims that both general and specific acts of negligence are alleged, and that the situation is therefore controlled by the decision in *Roberts v. Sierra Ry. Co.*, 14 Cal. App. 183, 111 P. 519, 527, wherein it was held that allegations of specific acts of negligence do not preclude reliance upon the doctrine of *res ipsa loquitur*, where general negligence is also alleged. In support of such claim respondent endeavors to point out that the allegations in this complaint are comparatively as general in form as those employed in numerous other cases wherein the courts of this state have held that application of the doctrine of *res ipsa loquitur* was proper. *Sallee v. United Railroads of San Francisco*, 40 Cal. App. 51, 180 P. 74; *Zerbe v. United Railroads of San Francisco*, 56 Cal. App. 583,

205 P. 887; *Murray v. United Railroads of San Francisco*, 49 Cal. App. 462, 193 P. 596; *Bourguignon v. Peninsular Ry. Co.*, 40 Cal. App. 689, 181 P. 669; *Lippert v. Pacific Sugar Co.*, 33 Cal. App. 198, 164 P. 810; *Soto v. Spring Valley Water Co.*, 39 Cal. App. 187, 178 P. 305. However that may be, we think that the question of whether or not the complaint also contained allegations of general negligence becomes immaterial, in view of the conclusion we have reached that under the circumstances revealed by the record the instructions complained of were not prejudicial, in that they could not have applied to any other acts of negligence than those specific acts pleaded, and that so far as those acts were concerned plaintiff was entitled to the benefit of the application of the doctrine of *res ipsa loquitur*.

Upon investigation of the adjudicated cases upon this question it will be ascertained that a sharp conflict of authority exists in reference to the extent to which the court should go in the enforcement of such rule. In some states the courts have gone so far as to establish, and have attempted to follow, an absolute rule to the effect that, where specific acts of negligence are pleaded, the right to rely upon the presumption resulting from the doctrine of *res ipsa loquitur* is totally lost. *Cooper v. Century Realty Co.*, 224 Mo. 709, 123 S. W. 848; *Roscoe v. Metropolitan Street Ry. Co.*, 202 Mo. 576, 101 S. W. 32; *May v. City of Hannibal*, 186 Mo. App. 602, 172 S. W. 471; *Byland v. E. I. Du Pont de Nemours*, 93 Kan. 288, 144 P. 251, L. R. A. 1915F, 1000; *Chicago Union Traction Co. v. Leonard*, 126 Ill. App. 189. And this is so even though the complaint also contains allegations of general negligence. *May v. City of Hannibal*, supra. In other states the courts have gone almost to the other extreme in holding that plaintiff is in no wise deprived of the benefit of such doctrine merely because he has made allegations of specific omissions of duty. *Walters v. Seattle R. & S. R. Co.*, 48 Wash. 233, 93 P. 419, 24 L. R. A. (N. S.) 788; *Washington-Virginia R. Co. v. Bouknight*, 113 Va. 696, 75 S. E. 1032, Ann. Cas. 1913E, 546; *McNamara v. Boston, etc., R. Co.*, 202 Mass. 497, 89 N. E. 131; *Cassady v. Old Colony, etc., Ry. Co.*, 184 Mass. 156, 68 N. E. 10, 63 L. R. A. 285; *Nashville I. Ry. v. Gregory*, 137 Tenn. 422, 193 S. W. 1053.

But a third class of cases is found in still other jurisdictions wherein a qualified rule is adopted and followed, which is to the effect that, where plaintiff makes specific allegations of negligence, he must rely for his recovery upon, and he is limited to, such specific acts of negligence, and cannot recover for any other negligent act, but he is not deprived of the benefit of the doctrine of *res ipsa loquitur* so far as those specific acts of negligence are concerned. In other words, it is held in substance that the allegation of

specific acts of negligence, while not depriving plaintiff of the benefit of said doctrine, relieves the carrier from the burden of disproving or meeting any other negligent acts than those alleged, for the reason that, having specified the acts of negligence, plaintiff will be confined to them and not allowed to prove or to recover upon other causes than those alleged. *Palmer Brick Co. v. Chenall*, 119 Ga. 842, 47 S. E. 329; *Terre Haute & I. R. Co. v. Sheeks*, 155 Ind. 74, 56 N. E. 434; *Southern Ry. Co. v. Adams*, 52 Ind. App. 322, 100 N. E. 774; *Louisville & S. I. Traction Co. v. Worrell*, 44 Ind. App. 480, 86 N. E. 78. *Thompson on Negligence* (volume 6, § 7643) states this modified rule as follows:

"The plaintiff, in an action for personal injuries, is not deprived of his right to rely upon the doctrine of *res ipsa loquitur* by reason of having averred the particular act of negligence complained of, where such act is the one which the legal inference of negligence tends to establish,"

—and gives as authority the case of *Galagher v. Edison Illuminating Co.*, 72 Mo. App. 576, which case is apparently a modified view of the absolute rule announced in other cases in that same state.

In adopting a rule for this state, we are of the opinion that it was not intended to declare an absolute and unqualified rule, that is, one so drastic as to deny plaintiffs in all cases, and under all circumstances, the benefit of the doctrine of *res ipsa loquitur*, merely because they have voluntarily gone further than the law required them to go, in particularizing the specific acts of negligence upon which they relied for a recovery; but that it was intended that the more liberal rule should be followed which restricts plaintiff, in his proof and recovery, to the specific acts alleged, and relieves the defendant from the burden of exculpating himself from any other acts of negligence than those alleged, but which does not, so far as those particular acts of negligence are concerned, deprive plaintiff of the benefit of the doctrine of *res ipsa loquitur*. This conclusion is based, primarily, upon the fact that admittedly the rule, as enforced in this state, is not without qualification, for in *Connor v. A., T. & S. F. Ry. Co.*, supra, it is said:

"However, where the explanation leaves it doubtful as to whether or not the ultimate cause of the injury is the negligence of the party charged, it is proper to instruct the jury as to the *res ipsa loquitur* doctrine." *Zerbe v. United Railroads of San Francisco*, 56 Cal. App. 583, 205 P. 887.

And again, in *Roberts v. Sierra Ry. Co.*, supra, wherein it is held that, notwithstanding allegations of specific acts, the presence of additional allegations of general negligence justifies the application of said doctrine. Secondly, we find nothing in the holding or the reasoning of any of the three cases relied upon by appellant which conflicts with

the liberal rule we believe was intended to be declared and followed.

The case of *Connor v. A., T. & S. F. Ry. Co.*, supra, was one wherein the judgment was reversed, not because the trial court instructed the jury that the doctrine of presumed negligence did apply, but because of its refusal to instruct the jury that such doctrine did not apply; and such doctrine did not apply for the obvious reason that the statement of plaintiff's cause of action and the proof offered in support thereof showed that the accident was caused by negligent acts which did not give rise to the doctrine of *res ipsa loquitur*. In *Marovich v. Central California Traction Co.*, supra, five specific acts of negligence were charged in the complaint. A verdict was awarded to plaintiff. Upon appeal it was held that there was no evidence whatever offered in support of one of those alleged acts; although two of the others were proved, the court held, as matter of law, that neither constituted negligence; and of the remaining two the court said that there was no sequential relationship between them and the injury. The giving of the instruction upon presumed negligence was therefore erroneous because it allowed the jury to base its verdict upon some element of damage not pleaded, and perhaps not proved.

The case of *McKeon v. Lissner*, supra, was reversed mainly because it was alleged that the injuries were received as a result of the failure of defendants to keep an elevator and the apparatus for operating the same in order and repair; whereas the proof showed that the proximate cause of plaintiff's injuries was the failure to have the hallway leading to the elevator properly lighted, and that act of negligence was not pleaded. It therefore appeared that the verdict was doubtless rendered against the defendant, under the doctrine of *res ipsa loquitur*, for a specific act of negligence with which defendants were not charged in the complaint, and which, if true, did not give rise to the application of that doctrine.

Analyzing the record of the case at bar in the light of the three cases last above mentioned, we do not find present here any of the reasons which there invoked the operation of the rule and caused the reversals therein. Here the specific acts of negligence charged were that the car was operated at an excessive and dangerous rate of speed and without warning of its approach; the proof, so far as our attention has been called, was confined to those specific acts; appellant was not called upon to meet any other act of negligence than those alleged in the complaint. Notwithstanding the giving of the two instructions upon the doctrine of *res ipsa loquitur*, the trial court, in other instructions, clearly stated to the jury the specific acts of negligence alleged in the complaint, and which plaintiff would be required to

establish before she was entitled to a verdict. Its instructions as to acts of negligence were restricted to the specific acts alleged. Later, it instructed the jury as follows:

"The burden of proof rests upon plaintiff to establish the negligence alleged in the complaint by a preponderance of evidence. If, therefore, you find that the evidence does not preponderate in favor of the plaintiff upon the issue of negligence, I instruct you that the plaintiff has not made out a case, and your verdict must be in favor of defendant. United Railroads of San Francisco. If you find that the evidence as to negligence on the part of the defendant United Railroads of San Francisco does not preponderate in favor of the plaintiff, but is equally balanced both in weight and quality, I instruct you that the verdict must be in favor of the defendant United Railroads of San Francisco."

And again in the following language:

"In civil cases, and, of course, you understand this is a civil case, the affirmative of the issue must be proven. The affirmative here is upon the plaintiff as to all affirmative allegations of the complaint. Upon the plaintiff, therefore, rests the burden of proof of such allegations."

In the case of *Connor v. A., T. & S. F. Ry. Co.*, supra, the situation was different. There "no instruction was given to the jury defining negligence or informing them that for the plaintiff to recover it must be shown that the injuries received by him were the proximate result of the negligence of the defendants nor was any instruction given upon the measure of damages." It is therefore manifest, we think, that the jury in the instant case could not have based its verdict against appellant upon any other act or acts of negligence, real or imaginary, than those alleged and proved; and, as before stated, the sufficiency of the evidence to sustain the verdict is admitted; counsel for appellant in their closing brief saying:

"At the outset of this reply brief we desire to state that no contention has heretofore been made nor is any contention now made that the evidence is insufficient as a matter of law to justify the verdict."

In this regard the case is clearly distinguishable from *Marovich v. Central California Traction Co.*, supra, because there, as above pointed out, the evidence was held to be entirely insufficient, upon any one of the five specific acts alleged, to justify a verdict for the plaintiff. In the present case, if the elements of violated signals, or defective brakes or other equipment, or any other independent specific act of negligence, had become an issue, a different situation might be presented. True, there was some evidence offered by respondent to the effect that the motorman abandoned his post, but such evidence cannot be considered as showing an independent act of negligence; it was merely incidental to and directly connected with the

charge that the car was operated at a careless and dangerous speed. Appellant was consequently not required to exculpate itself from any acts of negligence other than those alleged. The instant case, in this respect, is not analogous to *McKeon v. Lissner*, supra, for there, as stated in the opinion:

"The defendants were brought into court upon notice that they were charged with negligence in respect of the repair of the elevator, and in no other respect whatever. They were never notified that any other or different claim would be made against them. Under these circumstances, to tell the jurors, after the close of the trial, that if they should find that the defendants were negligent in the matter of lighting the hallway they should return a verdict for plaintiff, would be to authorize a verdict against the defendants upon a claim against which they had never been called upon to defend themselves. This, in effect, is what was done by the giving of the *res ipsa loquitur* instructions. If plaintiff desired to rely upon this additional claim of negligence, she should have notified the defendants thereof by pleading it in her complaint. *Cary v. L. A. Railway Co.*, 157 Cal. 599, 603, 108 Pac. 682, 27 L. R. A. (N. S.) 764, 21 Ann. Cas. 1329."

Furthermore, it must be conceded that the doctrine of *res ipsa loquitur* relates merely to the probative force of evidence. It does not dispense with the necessity of evidence of defendant's negligence. In other words, the presumption merely aids the plaintiff in the discharge of his burden. 6 *Thompson on Negligence*, § 7641, and cases cited. From proof of certain facts presumptions may arise, but those presumptions are merely evidence, like other proof in the case, and, when the case is finally submitted to the jury, weighing presumptions, proofs, and all the evidence, the burden of proof is still upon the plaintiff to establish affirmatively the negligence of the defendant. *Wiley et al. v. Bondy*, 23 Misc. Rep. 658, 52 N. Y. S. 68. In the case at bar the trial court, as heretofore shown, fully instructed the jury upon the question of burden of proof. For the reasons stated, it must be held that respondent was entitled to the application of the rule of *res ipsa loquitur*, in so far as the specific acts of negligence alleged in the complaint were concerned, and, it appearing from the state of the record before us that the verdict of the jury was not based upon any other act of negligence than those alleged, that no error was committed in the giving of said instructions complained of.

[7, 8] Appellant also objects to instruction XIV, wherein it was stated that proof of injury to a passenger casts the burden of proof upon the carrier alone. In view of the language in *Connor v. A., T. & S. F. Ry.*, supra, that where the explanation leaves it doubtful as to whether or not the ultimate cause of the injury is the negligence of the party charged, it is proper to instruct the jury as to the *res ipsa loquitur* doctrine, we think

VERNON v. PLUMAS LUMBER CO.

(Civ. 2867.)

(District Court of Appeal, Third District, California. Jan. 31, 1925. Hearing Denied by Supreme Court March 30, 1925.)

the instruction complained of was properly given, and that the instruction did not have the effect, as appellant contends, of compelling appellant to overcome or disprove negligence by a preponderance of evidence. *McCurrie v. Southern Pacific Co.*, 122 Cal. 561, 55 P. 324; *Osgood v. Los Angeles Traction Co.*, 137 Cal. 280, 70 P. 169, 92 Am. St. Rep. 171; *Roberts v. Sierra Ry. Co.*, supra. It related merely to the establishment of a prima facie case. Upon the subject of burden of proof the jury was fully instructed, as the instructions heretofore quoted will show.

[9] Instruction XV is attacked for the alleged reason that said instruction assumed there was an absence of evidence showing that the death of decedent was caused without negligence on the part of appellant. While this form of instruction, if standing alone, might be subject to criticism (*Scarborough v. Urgo*, 191 Cal. 341, 216 P. 534), the fault therein disappears when it is read with the other instructions, and all are considered together. *Boa v. S. F., etc., Ry. Co.*, 182 Cal. 93, 187 P. 2. And, besides, the form of instruction here given has been in several cases expressly upheld. *Murray v. United Railroads*, 49 Cal. App. 462, 193 P. 596.

The contention is also made that the court erred in giving instruction LI, claiming that it was an instruction upon a question of fact. In the case of *Runnels v. United Railroads*, 175 Cal. 528, 166 P. 18, the court said that—

"The duty of stopping, looking, and listening made incumbent upon one about to cross the right of way of a steam railroad is not the rule governing the rights of foot passengers and vehicle drivers in venturing upon, crossing, or using the tracks of a street railroad."

When the instruction complained of is read in connection with instruction XXXIII, it is entirely free from the vice asserted.

[10] The final contention of appellant is that error was committed because counsel for respondent was allowed to ask certain questions of the motorman of the car involved in the accident relative to reasons for his leaving the employment of the appellant company. Counsel for appellant had already elicited from the witness the evidence that he had left appellant's employ "of his own accord," and respondent's counsel therefore claimed the right to cross-examine him upon the subject. Assuming that there was transgression committed by respondent's counsel in this respect, we think it was not serious, in view of the fact that the court later, at appellant's request, with the consent of respondent, fully instructed the jury to disregard the entire matter.

The judgment is affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

1. False imprisonment ☞8—Delay in taking plaintiff before magistrate held to constitute false imprisonment.

Where defendant's agents, who twice arrested plaintiff without warrant, instead of taking plaintiff before magistrate as required by Pen. Code, §§ 145, 849, each time placed him in jail while they consulted attorneys, and then repaired to the magistrate's office, though the magistrate was accessible, there was such unnecessary delay in taking plaintiff before magistrate as constituted false imprisonment.

2. False imprisonment ☞8—Unreasonable delay in bringing prisoner before magistrate constitutes false imprisonment.

A prisoner is entitled to a hearing within a reasonable time after his arrest, and an unreasonable delay in bringing him before magistrate constitutes false imprisonment.

3. Appeal and error ☞1011(1)—Trial court's conclusion on conflicting facts conclusive on appeal.

In an action for malicious prosecution, where defense rested upon disputed facts, conclusion of trial court upon such facts is conclusive on appeal.

4. Malicious prosecution ☞64(2)—Finding of want of probable cause sustained.

In an action for malicious prosecution, evidence held to sustain finding that defendant's agents did not act in good faith upon advice of counsel, nor state all facts in case, and were not advised that a criminal prosecution would lie, and that there was no probable cause for prosecution.

5. Malicious prosecution ☞20—Advice concerning civil rights held properly excluded in action for malicious prosecution.

In action for malicious prosecution, for interference with defendant's timber rights by operation of plaintiff's mining claim, evidence as to advice received by defendant from forestry service of the United States held properly excluded, since advice concerning civil or equitable rights would have no bearing in a criminal action.

6. Appeal and error ☞233(1)—Objection to misjoinder of actions not taken in statutory manner not available on appeal.

An objection to misjoinder of actions, not taken in manner provided by Code Civ. Proc. § 434, is not available on appeal.

7. False imprisonment ☞36—Imprisonment and following prosecutions not merged as respected damages.

That arrests and false imprisonment without warrant and without being promptly taken before magistrate were followed by prosecutions based on complaints and warrants, in which plaintiff was again arrested, did not merge the wrongs or deprive plaintiff of right

to recover for each period of incarceration and for the malicious prosecutions following.

8. Malicious prosecution ⚖️69—**In awarding damages, trial court justified in considering punishment plaintiff would have received had he been found guilty.**

In action for false imprisonment and malicious prosecution, trial court in awarding damages was justified in considering punishment plaintiff would have received had he been found guilty of charges alleged against him by defendant.

9. Appeal and error ⚖️932(1) — **Appellate court will not assume that trial court acted from passion or prejudice in awarding damages, unless some showing to that effect.**

In action for false imprisonment and malicious prosecution, tried before court without jury, appellate court will not assume that trial court, in awarding damages, acted either from passion or prejudice, unless some showing to that effect is made.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by W. P. Vernon against the Plumas Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Brownstone & Goodman, of San Francisco, and M. C. Kerr, of Quincy, for appellant.
L. H. Hughes, of Quincy, for respondent.

PLUMMER, J. This is an appeal by the defendant from a judgment awarding the plaintiff the sum of \$1,650 damages, for and on account of four causes of action, two for unlawful arrests and two for malicious prosecution. It appears from the transcript that, on or about the 3d day of January, 1918, the plaintiff, W. P. Vernon, with others, located a certain placer mining claim named the "Questionnaire" situated in Plumas county, state of California; that in this location notice the claim was described as being situated in range 11 east; in October of the same year, upon having a survey made of the claim, it was discovered that the claim was really situated in range 12. Thereupon, and on the 9th day of that month, a new location was posted and recorded correctly describing the range in which the claim was situated. It also appears that from the date of the original location the plaintiff continued in possession of said mining claim, performed annual work thereon, and proceeded to some extent with the development thereof. This work was continued from time to time by the plaintiff down to the time of the occurrences constituting the gravamen of this action. Some time between the 3d day of January, 1918, and the 1st of October, 1918, the defendant lumber company purchased from the United States, through its forestry service, the timber situated on certain lands in Plumas county. The area on which the timber pur-

chased was situated embraces the mining claim of the appellant. Nothing was done by the appellant toward removing the timber situated on the plaintiff's mining claim until early in the spring of 1923, when the defendant began making preparations to remove said timber, and built a logging road and log landing in a certain ravine below the point where the plaintiff had theretofore been engaged in mining, and down which ravine the waters used by him in his mining operations had flowed and would naturally flow. It does not appear that the plaintiff knew anything of the construction of this road or of the logging dam.

Early in the month of May, 1923, the plaintiff returned to his mining claim and prepared to again work thereon, and, in doing so, turned water from the source of his supply through a ditch theretofore constructed by him conveying water to his diggings. On the 17th, while the plaintiff was at work, he discovered that water being used by him had been turned out of this ditch, and upon inquiry plaintiff was advised by one McDonald, the wood's foreman of the appellant, that he (McDonald) had turned the water out of the plaintiff's ditch and away from the plaintiff's diggings. Upon being advised of this fact, the plaintiff on the following day, May 18th, called at the office of the appellant and inquired of I. M. Johnson, the manager of appellant, if the water used by him in his mining operations would cause appellant any injury. It appears that Mr. Johnson refused to discuss the matter with the plaintiff, but threatened to have the plaintiff arrested and taken to Quincy if he turned any water into that ravine and also told the plaintiff that he had "no business up there." Plaintiff returned to his mine and resumed work thereon, and while so engaged on the mine on May 19th he was arrested by Roy M. Johnson, an employee of the appellant, and son of I. M. Johnson. The arrest was made without any warrant having been issued for the apprehension of the respondent and without any complaint having been filed against him and while the plaintiff was engaged in working on the mining premises claimed as his property. Following this arrest, the plaintiff was taken to Quincy and, as found by the court, imprisoned in the county jail at Quincy for the period of three hours, during which time I. M. Johnson consulted an attorney named M. C. Kerr and the district attorney of Plumas county, and then went to the office of a justice of the peace at Quincy, swore to a complaint against the plaintiff, secured the issuance of a warrant of arrest, and thereafter the plaintiff was arrested under said warrant; the plaintiff, being allowed to go on his own recognizance, returned to his mining claim and again re-

sumed operations thereon, and on the morning of May 21, 1923, he was again arrested by the said Roy M. Johnson without any warrant, taken to the town of Quincy, and detained at the county jail for the period of two hours, during which time the said I. M. Johnson swore to a second complaint, procured the issuance of a second warrant, and the plaintiff was subsequently rearrested under said second warrant. Thus the plaintiff was arrested twice without any warrants and twice after warrants had been issued. It appears also that the plaintiff was detained and held in the custody of the said Roy M. Johnson several hours other and in addition to the time he was confined in the county jail at Quincy. A trial being had upon the first complaint, the plaintiff was acquitted, and the second complaint was thereupon dismissed. Thereafter the plaintiff began this action, founded upon the alleged unlawful imprisonment on May 19, 1923, the alleged unlawful imprisonment on May 21, 1923, the alleged malicious prosecution of plaintiff, by reason of the first complaint sworn to by I. M. Johnson, and the alleged malicious prosecution of plaintiff by reason of the second complaint sworn to by the said I. M. Johnson. Two other grounds were alleged which need not here be considered, as they are in no wise involved in this case. It may be stated that the transcript shows that the arrests made without warrants were made upon the direction and procurement of I. M. Johnson, the manager of the defendant and appellant in this case. The charge of false imprisonment embraced in the plaintiff's complaint rests upon his unlawful detention prior to the issuance of any warrant for his arrest.

[1] Section 849 of the Penal Code reads:

"When an arrest is made without a warrant by a peace officer or private person, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and an information, stating the charge against the person, must be laid before such magistrate."

Section 145 of the same Code is as follows:

"Every public officer or other person, having arrested any person upon a criminal charge, who willfully delays to take such person before a magistrate having jurisdiction, to take his examination, is guilty of a misdemeanor."

The facts exhibited by the transcript in this case, which we have set forth, show that there was no effort made by the agents of the defendant to comply with the provisions of section 849, *supra*. Instead of taking plaintiff before the magistrate, he was placed in jail while the acting parties themselves went and consulted two attorneys and then repaired to the magistrate's office. No reason is given whatever why the plaintiff was not taken before the magistrate at the

time the persons effecting his arrest went to the office of the magistrate. That the magistrate was accessible clearly appears from the fact that the agents of the defendant went to his office and swore out a warrant. These facts appear in relation to both arrests, they show clearly that there was no necessity for imprisoning the plaintiff either upon the first or the second arrest; that there was no warrant for confining him in the jail; and that it was their duty and within their power to take the plaintiff to the office of the magistrate in Quincy, without first placing him in the county jail. We do not need to decide whether the agents of the appellant brought themselves within the provisions of section 145, Penal Code, further than to state that there is nothing in the record establishing any necessity for the action of the agents of the defendant, in taking the plaintiff to the county jail instead of taking him with themselves at the time they repaired to the presence of the magistrate. Under the circumstances, we do not very well see how the trial court could have come to any other conclusion than that there was an unnecessary delay in taking the plaintiff before the committing magistrate, and therefore that his imprisonment, as found by the trial court, was wholly unwarranted. That the agents of the appellant were ignorant of the provisions of section 849 of the Penal Code does not lessen their duty in such cases, nor obviate the results of the clear showing in the transcript that the plaintiff was unnecessarily confined in the county jail while deliberations were being had as to the further proceedings to be taken. In *Keefe v. Hart et al.*, 213 Mass. 476, 100 N. E. 558, Ann. Cas. 1914A, 716, the Supreme Court, considering similar questions, said:

"It cannot be determined as a matter of law that a delay of an hour and a half, by officers arresting without warrant, in taking the prisoner before a magistrate, was reasonable, since such delay might have been beyond the time of adjournment of the magistrate's court, and involved a further delay; the question becoming one of law only when the facts are agreed."

And the same court in its opinion further said:

"The defendants had no right to detain the plaintiff to enable them to make a further investigation of the charge against him. It was their duty to bring him before the court as soon as reasonably could be done."

[2] The defendant's agents in this case did exactly what the Supreme Court of Massachusetts has said is unlawful to be done under such circumstances. The plaintiff was not only imprisoned while the agents of the appellant were not only not investigating the charge against the plaintiff, but were making efforts to have some charge placed against the plaintiff, and his arrest there-

after effected under a warrant charging him with an offense. In *Jackson v. Miller*, 84 N. J. Law, 189, 86 A. 50, it was held that the detention in a public place for even an hour of a person arrested without a warrant, by a deputy fish and game warden, upon what seemed to be probable or good cause to believe that the law had been violated, constituted false imprisonment. The rule is well established that a prisoner is entitled to a hearing within a reasonable time after his arrest, and that a delay for an unreasonable time in bringing him before the magistrate for examination constitutes false imprisonment. *Gomez v. Scanlan*, 155 Cal. 528, 102 P. 12; *Clark v. Tilton*, 74 N. H. 330, 68 A. 335; *Piedmont Hotel Co. v. Henderson*, 9 Ga. App. 672, 72 S. E. 51; *Jackson v. Miller*, 84 N. J. Law, 189, 86 A. 50; *Schoette v. Drake*, 139 Wis. 18, 120 N. W. 393. The foregoing clearly establishes that the two charges of false imprisonment preferred by the plaintiff against the defendant in his action for damages are abundantly supported by the law and testimony, and that no other conclusion could have been reached by the trial court.

Are the two causes of malicious prosecution supported by the record? Was there probable cause, and did the defendant's agents act upon the advice of counsel in such manner and degree as relieves the defendant from responsibility?

By way of special defense, the defendant alleged in its answer that it consulted M. C. Kerr, an attorney at law of good standing, having offices in Quincy, Plumas county, state of California, and also the district attorney of Plumas county, and stated to said persons all the facts of the case and was thereupon advised by the said Kerr and the district attorney that a prosecution would lie against the plaintiff and that the defendant acted honestly and in good faith upon that advice and thereupon instituted the prosecutions referred to in plaintiff's complaint. The finding of the trial court was that the agents of the defendant did not act either honestly or in good faith upon the advice of counsel and that the defendant's agents did not state to said persons all the facts in the case, and the defendant's agents were not advised that a criminal prosecution would lie. The court also found that there was not probable cause for the prosecutions herein referred to. In *Johnson v. Southern Pac. Co.*, 157 Cal. 333, 107 P. 611, the court held:

"When there is no conflict in the evidence, the question whether or not the evidence introduced for the plaintiff shows probable cause is always for the court to decide; and it is error in such case, where there is probable cause, to submit any question to the jury."

In 16 California Jurisprudence, 751, § 18, the law applicable to the questions which we are considering is thus set forth:

"The good faith, the belief and the knowledge of defendant are necessarily questions of fact to be determined by a jury, unless established by uncontroverted testimony or admitted by the defendant or his counsel. So whether or not the defendant acted bona fide upon counsel's advice is a question of fact for the jury. The question whether the defendant had or had not probable cause for instituting the proceeding is a matter of law to be determined from the facts established in the case. If the facts are admitted, the question is solely one of law, for the court. If the facts are disputed and the evidence is conflicting, the question of what the facts are is one of fact, and the question as to whether or not the facts found establish want of probable cause is one of law for the court. If, however, there is affirmative evidence of the actual belief of the defendant sufficient to justify a conclusion that he did not in fact believe in the truth of the charge, the question of probable cause to that extent involves a question of fact to be submitted to the jury."

In *Dawson v. Schloss*, 93 Cal. 194, quoting from page 202, 29 P. 31, 32, we find the questions here presented treated in this manner:

"Appellant contends that he was advised by counsel that there was probable cause for believing respondent guilty of perjury; that he in good faith acted upon such advice; and, therefore, that he is not responsible, even though there may have been no probable cause. In order to avail himself of this defense, it devolved upon the defendant to prove that before receiving the advice he had fairly and fully communicated to his counsel, or at least that his counsel knew, all the facts within defendant's knowledge tending to prove or to disprove probable cause for the prosecution. * * * Did the defendant make the required communication to his own counsel? And did he believe the plaintiff guilty, at the time he made his affidavit to that effect? These questions having been properly submitted to the jury with proper instructions by the court, the verdict necessarily implies that the jury answered one of them, at least, in the negative."

The court then stated that there was evidence tending to prove that the defendant did not fully state to his counsel all the facts within his knowledge, etc.

The asserted superior title to the premises on which the plaintiff was working appears to have been really the basis of the prosecutions instituted against him and this superior claim appears to be based to a considerable extent upon the error which occurred in the plaintiff's first location notice. We do not here assume to consider any question of title other than as the same bears upon the finding of the trial court that there was no probable cause for the action taken by the defendant. The transcript shows that the plaintiff did the necessary annual assessment work upon his mining claim and that he had worked upon his claim every year after its location up to the time of his arrest. The testimony also shows that the defendant's manager had seen the plaintiff working his mining claim.

The testimony in this particular is as follows:

"Q. You knew that he (plaintiff) had been mining in that vicinity before? A. Yes, sir. I had seen him working there.

"Q. And in doing that you knew that he was mining on his own ground? A. I knew he was mining up there.

"Q. And you knew that he mined there with water, and that that water would come down this particular creek where you built your log-way? A. Yes, sir.

"Q. And you knew that before you built this road and log landing, didn't you? A. Yes."

The testimony of the witness Orr of the United States Forestry Service is illustrative:

"A. I told Mr. Vernon that I would like to have him show me where his claim was, so that if the claim was owned by him or he had a title to it, we could keep off it. Mr. Vernon and Mr. Johnson and I walked up and found this notice on a tree. * * *

"Q. You refer to the notice dated October 9, 1918? A. Yes, sir.

"Q. And where did you see that notice at that time? A. He did.

"Q. And what did he say about it; that is, Mr. Vernon? A. He said that was where he had filed the mining location.

"Q. What did you say to him? A. I asked him what date it was.

"Q. And what did he say? A. He said, 'I don't know,' but he says, 'We will look on the claim.' I says, 'All right, we will look,' and it said October 9, 1918.

"Q. And what did you say to him? A. I said, 'Mr. Vernon, if that is the case your timber (claim?) has been taken up since the timber was sold to Mr. Johnson, and under that procedure it would be necessary for us to go ahead and cut the timber to see that Mr. Johnson removed it.' * * *

"Q. And what did he say in reply to that? A. He says, 'I think there is some mistake on this notice and let us check it,' and we checked the description and found it was wrong, and I says, 'I will go into the recorder's office and see if your filing date is right.'"

The question of title appears to have been taken up by the defendant with the Forestry Service of the United States and the following telegram received:

"San Francisco, Calif., May 18, 1923.

"Forest Supervisor

"Quincy California

"Notify owner Questionnaire Claim any interference with timber sale operations will result in legal proceedings Federal Court Recent decision Circuit Court Appeals sustains our position."

This telegram, or a correct copy of it, appears to have been exhibited to the plaintiff by some one of the defendant's agents. The witness then testified:

"A. Mr. Vernon was, at the time I called on him, eating his dinner. He came out, and I handed him a copy of a telegram from the forestry and let him read it, and in the presence

of Mr. Erickson and myself he put on his glasses and read it.

"Q. And then did he hand it back to you? A. He did.

"Q. What did he say? A. 'Well, what about it?' was his exact words, and I wanted to find out whether he was going to turn the water in or not, which I asked him.

"Q. What did he say? A. He said he was."

The transcript shows more testimony along the same line, but the whole purport of it exhibits simply a dispute as to who was the owner of the premises, and this apparently was all founded upon the errors in the plaintiff's notices of location and as to what rights, if any, the plaintiff acquired thereunder, also the alleged superior right of the defendant to the unobstructed use of the premises in order to remove the timber standing thereon appears as an actuating motive in all the proceedings.

As to whether the defendant acted upon the advice of counsel, what advice was received, and what was stated to counsel, the appellant relies upon the following:

"Q. And did you tell him what the Forestry Service had done about sending the telegram up? A. Yes.

"Q. And did you tell everything that you knew about this particular incident? A. Yes.

"Q. That caused you to complain against Mr. Vernon? A. Yes, sir.

"Q. And what did Mr. Kerr tell you? A. He suggested just exactly what I done.

"Q. And what was that, what did he suggest? A. I file a complaint against him for interfering with our operations.

"Q. Now, did you act honestly and in good faith upon the advice of Mr. Kerr? A. Absolutely; yes, sir.

"Q. Were you actuated by malice, hatred, or ill feeling, in swearing out the complaint against Mr. Vernon? A. Never had a word with him in my life and no malice against him whatever.

"Q. And when you acted upon the advice of Mr. Kerr and swore to this complaint, were you actuated by an honest belief that he was guilty of the offense that you charged him with? A. Absolutely.

"Q. When you instituted the criminal prosecution against Mr. Vernon upon the advice of Mr. Kerr, did you honestly believe in good faith that he was guilty of the offense as charged against him? A. Absolutely; yes, sir.

"Q. Now, Mr. Johnson, besides consulting Mr. Kerr before you swore to this complaint on May 19th, did you also consult the district attorney of this county? A. I did.

"Q. Mr. S. C. Young? A. Yes.

"Q. And did you state to Mr. Young all of the facts that you have stated that you stated to Mr. Kerr? A. I did.

"Q. Did Mr. Kerr accompany you to Mr. Young, the district attorney's office? A. He did.

"Q. And was he there during the time you stated the facts to him? A. Part of the time.

"Q. Did the district attorney—what did the district attorney tell you as to whether or not a prosecution would lie against the defendant, against Mr. Vernon? A. If it would what?

"Q. What did the district attorney tell you as

to whether or not a complaint would be good against the defendant Vernon, against the defendant Vernon in that proceeding? A. He thought it was all right.

"Q. And who prepared the complaint? A. The district attorney, Mr. Young.

"Q. Now, did you state to the district attorney and to Mr. Kerr all of the facts within your knowledge in respect to this offense? A. Absolutely.

"Q. With which you had charged Mr. Vernon? A. Yes.

"Q. Mr. Kerr, did Mr. Johnson, Mr. I. M. Johnson, consult you on the 19th day of May, 1923, in respect— A. (interrupting). As to the particular date—

"Q. Let me finish my question—in respect to whether or not he could swear to a complaint against Mr. Vernon? A. The date of the first complaint, that the first complaint was filed, Mr. Johnson, according to my best recollection of the thing, was, he called me on the phone in the morning before he came down, and we had some conversation regarding Mr. Vernon turning in some water that was damaging the roadway, etc., and something was said about an injunction being prepared or in the course of preparation by the Forest Department. However, I think that I told Mr. Vernon over the 'phone that I would see him when he came down, and upon his arrival in Quincy he either came to the office or called me up from the Forest Office. I am not sure as to that. At any rate, we were together at the office of the Forest Supervisor of the Plumas National Forest, at the office in Quincy, and in conversation with Mr. Rogers there the matter of this timber sale and the rights under it were discussed, and I don't know whether Mr. Orr was there or not; but, at any rate, there was something came up about there apparently had been some discussion as to this before and Mr. Rogers gave me a letter that was written by Mr. Dechant and giving the citations of the United States and federal citations regarding the rights of a timber purchaser to move timber. Well, I think that was one the things that I went—that the consultation at the Forest Office was as to the fact as to whether or not a timber sale had been made. That was substantiated. Then the matter of destruction of property, and Mr. Johnson informed me that the water had been turned in and was destroying the property and the road, the road of the Plumas Lumber Company. I went with Mr. Johnson to the district attorney's office and was there a portion of the time while Mr. Johnson was giving him the facts concerning the matter, but I wasn't there all the time. I wasn't there the full time and personally don't know who prepared the complaint, but the complaint was afterwards prepared, but from the facts as given to me by Mr. Johnson and looking up the law, I did advise him that he had an action against Mr. Vernon for the injury, or attempted destruction of his property, not of Mr. Johnson's, but of the Plumas Lumber Company, I believe, or Mr. Johnson, under his timber sale."

On cross-examination, after testifying that he had threatened to arrest the plaintiff, the witness I. M. Johnson further testified:

"Q. You knew that he had been mining in that vicinity before? A. Yes, sir; I had seen him working there.

"Q. In that immediate vicinity, when you built your road this year, you knew that he had been working in that canyon for years? A. Yes, sir; I did.

"Q. What did you mean, Mr. Johnson, when you told him if he turned water into that canyon that you would take him to Quincy? A. Simply that I would arrest him for interfering.

"Q. Now, you had your mind made up from the time you had this visit from Mr. Vernon in your office, prior to any arrest at all, that the minute that he turned any water through to mine with, you were going to have him pinched, weren't you? A. Yes, sir. * * *

"Q. What was your motive and reason for instituting both of these criminal prosecutions against Mr. Vernon? A. For protection to our business. We either had to close or stop Mr. Vernon, one or the other.

"Q. Now, then, you testified on direct examination, I think, that the reason you had Mr. Vernon arrested was because you wanted it as a protection to your business, is that right? A. Yes, sir."

[3, 4] There are other portions of the testimony referred to by the counsel for the respective parties, but we think the foregoing is sufficient to justify the trial court in reaching its conclusion in this case, and clearly sets forth that every element of defense tendered in this cause rested upon disputed facts, and therefore that the conclusion of the trial court upon such facts is conclusive here. There is sufficient testimony in the transcript, as set forth, to support the findings of the trial court, even though there is testimony from which the court might have come to a different conclusion. The transcript further shows that the witness Johnson was unable at the time of the trial to detail what facts he had stated either to Mr. Kerr or the district attorney, and the only evidence in relation thereto is such as hereinbefore set forth, which consisted simply of conclusions by the witness Johnson that he had stated all the facts and had honestly stated them and had an honest belief, etc. Whether such facts were all stated or honestly stated, or whether the manager of the plaintiff had such honest belief, were matters for the trial court to determine upon conflicting testimony, and being determined adversely to the appellant, cannot be otherwise determined here. The evidence here set forth is that most favorable to the appellant, and yet we think it clearly sufficient to justify the court in concluding that there was no probable cause. When thoroughly considered, we think the trial court had the right to conclude that the appellant was advised simply as to its civil rights and that the criminality of any acts on the part of the plaintiff were not controlling factors. As stated by the manager of the defendant, the arrest was "for protection of our business." To state it another way, it was the substitution of a criminal prosecution instead of a civil action because that method of procedure would more quickly stop the plaintiff's min-

ing operations. All these matters which the trial court sitting without a jury was entitled to take into consideration we think answers all that the law demands in actions such as the one at bar. In *Burke v. Watts*, 188 Cal. 118, quoting from page 123, 204 P. 578, 580, it is stated:

"The law on the subject of malicious prosecution is well established. In *McKenna v. Heinen*, 128 Cal. 97 [60 Pac. 668], an action to recover for malicious prosecution, the court said: 'It is well settled that before a plaintiff can recover in an action for malicious prosecution he must establish concurrently that the defendant proceeded in the action brought by him with malice and without probable cause. The question of malice is one for the jury exclusively, but the court must determine, as matter of law, whether the facts and circumstances as they appear, or are found to exist, constituted probable cause. * * * While it is true that malice may be inferred from want of probable cause, the latter can never be implied from malice.' In *Potter v. Seale*, 8 Cal. 217, the court defined probable cause as 'a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.' In *Harkrader v. Moore*, 44 Cal. 144, also an action for malicious prosecution, it was declared: 'The defense must be that he did believe and had reasonable grounds to believe at the time that the accusation he made was well founded.'"

All these necessary facts, as herein stated, being found adversely to the appellant upon conflicting testimony, establish the defendant's liability upon the two causes of action charging malicious prosecutions.

[5] During the course of the trial the appellant sought to introduce evidence that the Forestry Service of the United States had advised the defendant that the rights of the defendant in the premises predominated; that this information was founded upon certain decisions of the federal courts of the United States to the effect that the mere location of a mining claim gives to the person locating the same no title to the timber thereon, etc. This testimony was excluded, and the ruling of the court is assigned as error. The reasons given by the court in excluding the testimony are sufficient and need no elaboration:

"I will sustain the objection. This ruling is based upon the fact that any advice concerning the civil or equitable rights of the parties * * * would have no bearing whatever in a criminal action."

[6] It is further alleged that there was a misjoinder of actions. This objection, however, was not taken in the manner provided by the Code of Civil Procedure and hence is not available here. Section 434, Code Civ. Proc.; *Fellows v. City of Los Angeles*, 151 Cal. 60, 90 P. 137; *Ransch v. Arp*, 39 Cal. App. 580, 179 P. 694.

[7] We do not find any merit in the contention of the appellant that double awards have been made herein. As we have shown,

the allegation of false imprisonment contained in the plaintiff's complaint and in the testimony set forth in the transcript show two distinct arrests without warrants and imprisonment following each of said arrests and thereafter two other distinct arrests upon the issuing of warrants. The damages claimed, found, and allowed by the court were for the imprisonments following the arrests made without warrants and therefore had nothing to do with the causes of action culminating in the charges of malicious prosecutions. The prosecutions were based upon complaints and warrants and were separate and distinct from the previous false imprisonments; that they followed each other in successive events does not in any wise merge the wrongs inflicted or take away from the plaintiff the right to recover damages for both of the periods when he was falsely incarcerated, nor to recover damages for the malicious prosecutions which were thereafter instituted by the subsequent filing of complaints, issuance of warrants, and following arrests.

[8] It is finally urged that the awards allowed by the trial court are excessive. Had the plaintiff been found guilty of the charges alleged against him, he might have been incarcerated in the county jail for a period not exceeding six months or by a fine not exceeding the sum of \$500 or both. We think the trial court was justified in taking into consideration such matters in measuring the culpability of the intent of the defendant's agents and what injuries they were attempting to inflict upon the plaintiff.

In *Scott v. Times-Mirror Co.*, 181 Cal. 366, 184 P. 681, 12 A. L. R. 1007, the court set forth the matters that may be considered in fixing damages, and then said:

"In fixing damages in this class of cases, which is left to the discretion of the jury, and when the verdict has been approved by the trial court, this court is not authorized to grant a new trial upon the ground of excessive damages, except in a case where it is plain that the verdict was not the result of the fair and honest judgment of the jury"—citing a number of cases. "In the latter case it was said: 'The court below had the power to, and no doubt did, carefully weigh and consider the evidence for the purpose of determining whether or not the verdict was the correct conclusion from all the testimony in the case. It had the power to set aside the verdict, even though the evidence was not conflicting, if convinced that it was unjust, or not in accord with the weight of the evidence. Here we have no such power. The presumptions are all in favor of the correctness of the verdict. To this presumption is added, the sanction of the court below in denying the motion for a new trial.' * * * In the matter of punitive damages it is clear from the authorities that juries have a wider discretion in this regard than they have in the matter of compensatory damages."

[9] The exemplary damages in the instant case amount to the sum of \$150, \$100 in one

case and \$50 in the other; the remainder of the awards consisting of punitive damages awarded by the court. In the instant case the trial was had before the court sitting without a jury, and, unless there is some showing to that effect, we are not at liberty to assume that the trial court acted either from passion or prejudice or from any improper motives whatever.

The judgment and order of the trial court are hereby affirmed.

We concur: FINCH, P. J.; HART, J.

71 Cal. App. 210

JENSEN v. DUKE et al. (Civ. 4495.)

(District Court of Appeal, First District, Division 1, California. Feb. 9, 1925. Hearing Denied by Supreme Court April 7, 1925.)

Mortgages ~~§~~316—Junior mortgage lien, extinguished by foreclosure of senior mortgage lien, held revived by junior mortgagor's acquisition of title.

In view of Civ. Code, § 2930, as to after-acquired titles, junior mortgage lien which was extinguished by foreclosure of senior deed of trust, held revived by junior mortgagor's acquisition of title through deed from purchaser at sale foreclosing senior lien.

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Suit by N. P. Jensen against Margaret E. Duke and others. From a judgment for plaintiff, defendant J. H. De Lange and others appeal. Affirmed.

Geo. D. Hazen and Fitzgerald, Abbott & Beardsley, all of Oakland, for appellants.

Miller, Thornton & Miller and Miller & Thornton, all of San Francisco, for respondent.

CABANISS, Presiding Justice pro tem. This appeal, based upon the judgment roll, is from a decree ordering foreclosure of a mortgage held by plaintiff and later herein to be more particularly mentioned.

The facts, informally stated, are these: Plaintiff executed to A. F. Abbott and F. E. Winnegar a trust deed to a certain lot of land as security for \$3,750 borrowed by plaintiff from Frank B. Abbott. In August, 1918, plaintiff sold the land to defendant Margaret Duke subject to the trust deed, she giving her note for the purchase price (\$1,550), and a mortgage to secure its payment—this being the mortgage plaintiff seeks to foreclose. Plaintiff's debt to Frank B. Abbott not having been paid, on January 3, 1920, the property was validly sold at trustee's sale to him (said Frank B. Abbott); and on January 19, 1920, defendant Margaret Duke purchased the property from Frank

B. Abbott. On April 30, 1920, defendants Margaret and George E. Duke sold and deeded the land to defendants J. W. and J. D. De Lange, who, on the 4th day of June, 1921, executed to the defendant Oakland Title Insurance & Guaranty Company as trustee a deed to secure payment of \$3,250 loaned the De Langes by defendant Equitable Life Insurance Company. All the instruments executed in these various transactions were seasonably recorded.

The sole question is: Was the mortgage lien (admittedly extinguished by the trustee's deed to Abbott) revived by his deed to defendant Margaret Duke (mortgagor), thereby restoring the mortgage as a lien enforceable against her and those deriving title or other interest from her.

There is an absolute dearth of authority in California upon the precise question here to be determined, and yet we feel persuaded that plaintiff's (respondent's) position finds support in section 2930 of the Civil Code, which reads:

"Title acquired by the mortgagor subsequent to the execution of the mortgage, inures to the mortgagee as security for the debt in like manner as if acquired before the execution."

Though defendant Margaret Duke lost title by reason of the trust sale to Abbott, she again acquired title under Abbott's deed to her, and the title thus acquired, inures "to the mortgagee as security for the debt in like manner as if acquired before the execution," i. e., of the mortgage. It will be noted that the instant case is brought literally within the words of the quoted section.

It is intimated by appellant that section 2930 of the Civil Code merely re-enacts a common-law rule pursuant to which title acquired by a mortgagor during the life of the mortgage only inures to the benefit of the mortgagee; and that the rule ceases to apply after foreclosure of senior mortgage or trust deed, as the second mortgage is thereby extinguished. Even though section 2930 of the Civil Code be, in a general way, a re-enactment of the rule already quoted, plaintiff's case is within the purview of the statute; and to hold otherwise would involve a strained construction, where every consideration of justice forbids that the mortgagor should hold his title obtained from Abbott free of plaintiff's mortgage lien.

It must also be borne in mind that many cited California cases holding that foreclosure of a senior lien extinguishes subsequent liens applied the doctrine as between a third person purchasing at such a sale and the junior incumbrancer, and therefore these decisions are not to be regarded as authority for our guidance in the instant case.

It may be further suggested that the reason of the rule which absolutely extinguishes

junior mortgage lien following foreclosure of senior lien, the purchaser at foreclosure sale and his successors in interest being other than the mortgagor, would seem not to apply as to the mortgagor acquiring the title from foreclosure of the first mortgage, whether he acquired title directly under foreclosure deed or indirectly and as the grantee of a third party foreclosure-purchaser.

It is due appellant's counsel to say that he has cited one case (*Plum v. Studebaker*, 89 Mo. 162, 1 S. W. 217) which sustains his position, but which, however, we cannot see our way clear to accept as a correct exposition of the law in view of the positive mandate of the statute.

The judgment should be affirmed, and it is so ordered.

We concur: KNIGHT, J.; ST. SURE, J.

71 Cal. App. 153

Ex parte ORTIZ. (Cr. 1162.)

(District Court of Appeals, Second District, Division 2, California. Feb. 5, 1925.)

Habeas corpus ⇨11—Writ discharged where petitioner submitted himself to custody for sole purpose of procuring determination of constitutional questions.

Where petitioner withdrew bail and submitted himself to custody for sole purpose of applying for writ to procure determination of constitutional questions, writ will be discharged and petitioner remanded to custody.

Application by M. E. Ortiz for writ of habeas corpus. Writ discharged, and petitioner remanded to custody.

Walter W. Hoyer, of Los Angeles, for petitioner.

J. M. Friedlander, City Prosecutor, of Los Angeles, for respondent.

WORKS, J. Petitioner, claiming to be under imprisonment upon a charge of having violated the terms of a certain ordinance of the city of Los Angeles, contends for his release under the writ of habeas corpus. Respondent insists that petitioner is not restrained of his liberty, as that term is to be understood when considering the right to the writ, and that, therefore, the writ must be refused.

Petitioner was taken into custody upon a charge of having violated the provisions of the ordinance. Of this there is no doubt. The undisputed showing of the record is, however, that he was admitted to cash bail in the sum of \$20 by the court in which he was charged. Upon the giving of this bail he was released from custody. Later he withdrew the bail and submitted his person to restraint under the charge. Immediately

thereafter he made application to this court in the present proceeding for the writ of habeas corpus. He was thereupon here admitted to bail in the sum of \$100. This bail he at once gave, and he ever since has been at large.

From these circumstances there is but one inference justly to be drawn: Petitioner withdrew his bail in the nominal sum of \$20 and thereupon submitted himself to custody for the sole purpose of making application for the writ of habeas corpus as a means by which to procure the determination of certain constitutional questions, and not at all for the purpose of procuring his release from an irksome restraint. The courts have often been called upon to deal with similar cases. See *In re Gow*, 139 Cal. 242, 73 P. 145; *Ex parte Schmitz*, 150 Cal. 663, 89 P. 438; *In re Miller*, 13 Cal. App. 564, 110 P. 139; *Matter of Ford*, 160 Cal. 334, 116 P. 757, 35 L. R. A. (N. S.) 882, Ann. Cas. 1912D, 1267; *In re Bernson*, 35 Cal. App. 344, 169 P. 916. The principle of these cases exactly fits the present application.

Writ discharged. Petitioner remanded to custody.

We concur: FINLAYSON, P. J.; CRAIG, J.

71 Cal. App. 213

PEOPLE v. MACIEL. (Cr. 1150.)

(District Court of Appeal, Second District, Division 2, California. Feb. 10, 1925.)

1. Homicide ⇨310(1)—Requested instruction in prosecution for assault with intent to murder held proper.

In prosecution for assault with intent to murder, it would have been proper to have given requested instruction that, in order to justify verdict of guilty of the crime charged, the facts and circumstances proved must be such that, if death had resulted from the shooting, the crime would have been murder and not manslaughter.

2. Criminal law ⇨823(17)—Refusal to give requested instruction as to assault with intent to murder held not reversible error, in view of instructions given.

In prosecution for assault with intent to murder, refusal of instruction differentiating offense charged from assault with a deadly weapon, held not reversible error, in view of instructions given that to justify a conviction of the greater offense, jury must believe beyond reasonable doubt that accused made assault with intent to murder.

3. Criminal law ⇨829(3)—Refusal to give requested instruction covered in instructions in general language held not reversible error.

Refusal to give requested instruction clearly covered in the instructions given, as to intent to murder as element of assault charged,

though in language more general, *held* not reversible error.

4. Criminal law ⚡312—Specific intent constituting element of offense must be proved, no presumption existing.

Where specific intent is an essential ingredient of an offense, the intent must be proved like any other fact in the case, and no presumption of law arises as to the existence of such intent.

5. Criminal law ⚡568—Presence or absence of specific intent may be inferred from surrounding circumstances.

The presence or absence of a specific intent constituting an element of an offense may be inferred by the jury from circumstances surrounding an unlawful act.

6. Homicide ⚡145—Proof of firing of loaded pistol does not create presumption of law of intent to murder.

Proof of firing of loaded pistol at another does not create presumption of law of intent to murder person fired at.

7. Criminal law ⚡763, 764(10), 823(5)—Instruction as to presumption of intent held erroneous and not cured by others.

In prosecution for assault with intent to murder, instruction that when act was unlawful the law in the first instance presumed criminal intent, and burden was on accused to show absence of such intent, *held* unwarranted by Code Civ. Proc. § 1963, subds. 2, 3, as it referred to specific intent to murder, and not intent to do act actually done, erroneous as trenching on jury's province, and not cured by other instructions requiring intent to be proved beyond a reasonable doubt.

8. Homicide ⚡348—Instruction as to presumption of intent not harmless.

In prosecution for assault with intent to murder, intent *held* not shown so conclusively as to render harmless, under Const. art. 6, § 4½, an instruction that criminal intent was presumed in first instance from doing of unlawful act.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Joe Maciel was convicted of assault with intent to commit murder, and he appeals. Reversed.

W. G. Machetanz, of Exeter, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and John L. Flynn, of Los Angeles, for the People.

FINLAYSON, P. J. Defendant, who was charged with an assault upon one Estaban Rosas with a deadly weapon with an intent to commit murder, was found guilty as charged. He now appeals from the judgment of conviction and from an order denying his motion for a new trial. It is claimed that the court erred in refusing to give certain requested instructions, and that one of

the instructions given was prejudicially erroneous.

Defendant and Rosas occupied adjoining premises in the city of Tulare. A toilet located in the rear of defendant's premises was used in common by both defendant and the members of the Rosas family. On the day of the alleged offense the two men met as Rosas was on his way to the toilet. A quarrel ensued, in the course of which blows were struck. After a few minutes of fighting, defendant went into his house and procured a pistol. Rosas' version of what followed after the first altercation, reduced to narrative form, is substantially as follows:

"Defendant went into his house, and I proceeded to the toilet. As I came out of the toilet and had taken three or four steps, defendant, who had come out of his back door with a pistol in his hand, fired two shots at me. Neither shot struck me. Though I was unarmed, I went toward him, and he came toward me. We met and I grabbed him by the collar with my right hand, and with my left I tried to take the pistol away from him. Then he fired the third shot. That one struck me. I was about 30 feet from him when he fired the first shot. It was closely followed by the second. I took about 5 steps after the second shot before I reached him. I wasn't afraid when I advanced toward him after the first shot, for I did not believe he would shoot me if I walked toward him. But I thought that if I turned around and went away that then he would shoot me."

Defendant's version of the affair is substantially this:

"When I entered my house after the first altercation Rosas followed me. I took the pistol from under a pillow and ordered Rosas out of the house. After we got outside, and I was turning to re-enter my house, he caught hold of me and pulled me out. A struggle followed, in the course of which the three shots were fired. At no time did I intend to kill Rosas."

The court, in the main, charged the jury fully and fairly as to the law applicable to the case. The learned trial judge, recognizing that the specific intent to murder is an essential ingredient of the offense with which defendant was charged, was at considerable pains to instruct the jurors that, before they could convict him of the greater offense, i. e., of assault with a deadly weapon with intent to commit murder, they must believe to a moral certainty and beyond a reasonable doubt not only that he committed an assault upon Rosas with a deadly weapon, but that he did so with malice aforethought and with the intention of taking the life of Rosas; also, that if the jurors believed that defendant committed an assault with a deadly weapon but had a reasonable doubt that it was made with intent to commit murder, they should

find him guilty of the lesser offense of assault with a deadly weapon.

[1,2] The court refused to give the following instruction, asked by defendant:

"You are instructed that in order to justify a verdict of guilty of the crime of assault with intent to commit murder, the facts and circumstances proven in a case must be such that, if death had resulted from the shooting, the crime would have been murder and not manslaughter; for if the crime in the case of death would have been only manslaughter, the defendant cannot be convicted of the offense charged, though he might be of assault with a deadly weapon."

This instruction is sound law and might well have been given. *People v. Landman*, 103 Cal. 577, 37 P. 518. We think, however, that the general instructions given by the court whereby the jury was charged, in substance and effect, that in order to justify a conviction of the greater offense, they must believe beyond a reasonable doubt that defendant made the assault with the intent to murder Rosas, were sufficient to advise the jury upon the subject of specific intent. It follows that the refusal to give the instruction was not reversible error.

[3] Three other instructions requested by the defendant were refused by the court. Each of them, if given, would have charged the jury, in substance and effect, that the presence of the specific intent to murder is an essential ingredient of the crime of assault with intent to commit murder. Though these instructions stated the law correctly, their refusal was not error entitling appellant to a reversal. The same proposition—stated, it is true, in language more general than that of the requested instructions—had been clearly announced by the court in the instructions which it gave. The instructions which were given upon the subject of specific intent were neither colorless nor too general. The refusal to state the same proposition in another form was not prejudicial error.

[4-7] We come now to a more serious objection, and one which we are constrained to hold necessitates a reversal of the judgment. The court gave this instruction:

"In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence, but when the act committed by the accused is of itself an unlawful act, the law, in the first instance, presumes the *criminal intent*, and the burden of proof falls upon the defendant to show the absence of *criminal intent*." (Italics ours.)

It is contended, and we think rightly so, that this instruction violates the rule that, whenever a specific intent is an essential ingredient of the offense, no presumption of law can arise as to the existence of such intent, for it is a fact to be proved like any other fact in the case.

The first part of the instruction is based

on and is in the language of section 20 of the Penal Code. But the last part is erroneous, and we think it was also prejudicial. If the court had charged the jury that when the act committed by an accused is unlawful the law raises a disputable presumption that the act was intended, and that the person doing it, if he did not voluntarily, also intended the ordinary consequences of his act, the instruction would have stated a rule of evidence substantially as declared in subdivisions 2 and 3 of section 1963 of the Code of Civil Procedure. " * * * The effect of these statutory rules of evidence," says the court in *People v. Abbott*, 2 Cal. Unrep. 387, 4 P. 769, 772, "is that when the act is proved to have been done by the accused, if it be an act in itself unlawful, the law in the first instance presumes it to have been intended, and the proof of justification or excuse lies on the defendant to overcome this legal and natural presumption." See, also, *People v. Harris*, 29 Cal. 681. Had the court worded its instruction so as to state the law substantially as it is declared in these Code provisions, it would have been properly applicable to the lesser offense of an assault with a deadly weapon; and in that event appellant, if he had desired to limit the instruction to a declaration that it did not apply to the greater offense of an assault with intent to commit murder, would have been obliged to request the court so to declare. *People v. Ramirez*, 64 Cal. App. 358, 221 P. 960.

But the court did not give the instruction contemplated by subdivisions 2 and 3 of section 1963. Instead, it gave an instruction, the vice of which lies in the fact that it goes beyond the rule that an accused who has done an unlawful act is presumed to have intended to do that act, and broadly asserts that when the act committed by an accused is unlawful the law presumes "the criminal intent," without telling the jury what is the criminal intent which the law presumes in such cases. As used in this instruction, the words "criminal intent" are broad enough to include any and every unlawful intent which is embraced within the crime charged against appellant. Included within the charge is the specific intent to murder Rosas, as well as the intent to do the unlawful act; i. e., the intent to discharge the loaded weapon. The fair interpretation of the language of the instruction is that, from the mere fact that the shots were unlawfully fired at Rosas, if they were so fired, the law raises the presumption that appellant not only intended to discharge his pistol, but that he discharged it with the specific intent to commit murder, and that the burden was cast upon him to show the absence of such specific intent. A jury of laymen would so understand it, beyond any doubt.

Looking at the instruction as the jury unquestionably must have viewed it, it is clear-

ly erroneous, for it trenches upon the province of the jury to pass upon all matters of fact. It is only when the intent is not made an affirmative element of the crime that the law presumes that the act, if knowingly done, was done with a criminal intent. 16 C. J. p. 81. When a specific intent is an element of the offense it presents a question of fact which must be proved like any other fact in the case. It is none the less a question of fact though it cannot be proved by direct and positive evidence. All the circumstances surrounding the act furnish the evidence from which the presence or absence of the specific intent may be inferred by the jury, and no presumption of law can ever arise that will decide it. *People v. Mize*, 80 Cal. 41, 22 P. 80; *People v. Perini*, 94 Cal. 573, 575, 29 P. 1027; *People v. Landman*, supra; *People v. Johnson*, 106 Cal. 289, 295, 39 P. 622; *Patterson v. State*, 85 Ga. 131, 11 S. E. 620, 21 Am. St. Rep. 152. In *Patterson v. State*, supra, the court says:

"It [the specific intent] does not require direct or positive proof, but the circumstances must be such as would authorize the jury (and not the court) to infer the intent with which the act was done. * * * Where one is charged with assault with intent to murder, and it is proved that he fired a loaded pistol at another, there is no presumption of law that he intended to murder the person thus fired at."

The vice of the instruction was not cured by what was said in other parts of the charge, to the effect that the defendant could not be convicted of the crime of assault with a deadly weapon with an intent to commit murder unless the jury believed beyond a reasonable doubt that the assault was committed with such intent to murder. The force of the objectionable instruction was left untouched, and its meaning was left unchanged and unimpaired. It and the other instructions, when considered together, amounted to no more than this:

"To warrant the jurors in convicting the defendant of the crime of assault with a deadly weapon with intent to commit murder they must believe beyond a reasonable doubt that the defendant assaulted Rosas with a deadly weapon, with malice aforethought and with the intention of taking the life of Rosas; but if the evidence shows that defendant unlawfully discharged a loaded pistol at Rosas, that act in itself will be sufficient ground for the jury to infer the existence of such malice aforethought and intent to kill." See *People v. Mize*, supra.

[8] The erroneous instruction is beyond the reach of the saving grace of section 4½ of article 6 of the Constitution. It would have been otherwise had appellant been convicted of the lesser offense of assault with a deadly weapon. But he was convicted of the greater offense. To constitute the offense of which he was found guilty, the cir-

cumstances must be such as to authorize the jury, not the court, to infer the existence of the specific intent to murder. We cannot say, after a consideration of the entire evidence, that if this instruction had not been given the jury ought, nevertheless, to have found appellant guilty of an assault with intent to commit murder. Even if we leave out of consideration appellant's testimony to the effect that at no time did he intend to kill Rosas, the circumstances testified to by the complaining witness do not permit of only one reasonable conclusion. The first shot, according to the evidence adduced by the prosecution, was fired when Rosas was about 30 feet away, and the second when he was within a distance of approximately 5 steps. With respect to those shots the evidence would have warranted the jury in adopting one of two possible theories, if the objectionable instruction had not been given; and whichever of these two theories the jury had adopted, we could not have said that it was not a reasonable inference from all the circumstances of the case. These two possible theories are: First, that when defendant fired the shots he actually intended to kill Rosas, but his marksmanship was so poor that he missed his victim; second, that defendant would have killed his enemy had he dared, but his nerve failed him, and therefore he purposely fired wide of the mark, intending to frighten Rosas, but also intending that neither bullet should reach the object of his wrath. Something akin to this second theory must have been entertained by Rosas; for he testified that he was not afraid to advance toward the defendant after the first shot was fired, because he believed that so long as he faced the accused the latter would not shoot him. Which of the two possible inferences mentioned by us should be deduced from the circumstances, or whether some other possible and reasonable inference should be drawn, was a matter which only the jury could decide. The third shot, the one which wounded Rosas, was fired during the scuffle, and it might be that the jury, but for the erroneous instruction, would have concluded that this shot was fired as the result of an unintentional discharge of the weapon while the two men were grappling with each other. In brief, the circumstances are such that we cannot possibly say that the jury would have brought in the verdict which it did if it had received only proper instructions.

Under these circumstances we would not be justified, even under the liberal provisions of section 4½, in disregarding the error and denying a new trial. *Langford v. San Diego, etc., Ry. Co.*, 174 Cal. 734, 164 P. 398.

The judgment and order denying a new trial are reversed.

We concur: WORKS, J.; CRAIG, J.

195 Cal. 600

**REPUBLIC TRUCK SALES CORPORATION
et al. v. PEAK. (S. F. 10339.)**(Supreme Court of California. March 16,
1925. Rehearing Denied April 13, 1925.)

Appeal and error ⇨482—**Motion to vacate order, permitting filing of amended undertaking heard after appeal disposed of, presents but moot question.**

Motion to vacate order, permitting filing of amended undertaking to stay proceedings on appeal from order discharging a writ of attachment, heard after appeal from order discharging writ had been heard and reversed, *held* to present but moot question.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the Republic Truck Sales Corporation and the Republic Motor Truck Company, Inc., against George Peak, doing business as the George Peak Company. From an order discharging a writ of attachment, plaintiffs appeal. On motion to vacate order permitting plaintiffs to file an amended undertaking to stay proceedings on appeal. Motion dismissed.

See, also, 229 P. 331.

Preston & Duncan and Frank Hall, all of San Francisco, for appellants.

Gavin McNab, Nat. Schmulowitz, and Everette C. McKeage, all of San Francisco, for respondent.

RICHARDS, J. The questions presented for decision upon this hearing arose out of the following state of facts, as they appear upon the face of the record in the main case recently decided by this court (*Republic Truck Sales Corp. v. Peak*, 229 P. 331), and which may be briefly summarized as follows: The plaintiffs herein commenced this action against the defendant, George Peak, to recover the aggregate sum of \$50,075.19 as set forth in the several counts of their complaint, and procured a writ of attachment to issue and be levied upon certain personal property of said defendant. At the time of the issuance and levy of said writ, as appears from the sheriff's return thereon, the said property was in the custody of said sheriff under, and was subject to, two prior attachments issued and levied in actions theretofore instituted by other creditors of said Peak. Subsequent to the issuance and levy of the plaintiffs' said writ, the defendant made a motion to discharge the same and release his said property from attachment thereunder upon the ground that said writ did not conform to, but was in violation of, the provisions of section 538 of the Code of Civil Procedure.

The trial court on May 16, 1923, made and entered its order granting said motion, where-

upon the plaintiffs took and perfected an appeal from said order. The plaintiffs also, and at the time of taking said appeal, presented and filed, on June 2, 1923, an undertaking to stay proceedings upon said order pending such appeal in the stipulated sum of \$50,000 and with a qualified surety. In the charging part of said undertaking the surety thereto bound itself in said sum "that, if the said order appealed from or any part thereof be affirmed, appellant will pay all costs and damages which the defendant may sustain by reason of said attachment in the sum hereinbefore mentioned, and that the appellant will obey the order of the appellate court upon this appeal." No objection was made by the respondent, Peak, to the form or substance of this bond, either in the trial court or in this court prior to December 3, 1923. In point of fact, no direct objection was ever made by said respondent to the form or sufficiency of said bond in the form of an application to the trial court, or to this court for relief from the effect of said undertaking, or for the giving of a sufficient undertaking. The matter stood in statu quo until the last-named date, the property of the defendant remaining, so far as the record in the main case or in this proceeding discloses, in the hands of the sheriff, subject to the two prior attachments which had by said sheriff been levied thereon; and in which condition said property still remained and continued up to the time when this court decided the main case, viz., September 23, 1924, holding said attachment to have been valid and reversing the said order of the trial court discharging the same.

On December 3, 1923, however, the plaintiffs and appellants appeared before this court with an application ex parte for leave to file a new and amended undertaking to stay proceedings upon their said appeal, setting forth that its prior undertaking was ambiguous as to the charging part thereof, above quoted, in that the word "appellant" had been inadvertently used therein instead of the word "appellants"; and upon such ex parte application and upon the presentation of a new and amended undertaking correcting said alleged defect, they were permitted by an order of this court to file the same. Thereafter and a few days after the making of said ex parte order the respondent, Peak, filed in this court what he denominated a petition for rehearing, but which this court interpreted to be a motion to vacate said ex parte order, a hearing upon which was accordingly set upon the April, 1924, calendar of this court and the matter was then submitted for decision. In the meantime, the main cause involving the validity of the order of the trial court discharging said attachment came on for hearing, and was submitted to this court for decision, and was by this court decided on September 24, 1924, and such decision became final 30 days thereafter.

By its said decision in the main case this court held that said writ of attachment was properly issued and levied, and that the order of the trial court vacating said writ and discharging said attachment was erroneous, and it accordingly reversed said order; and having done so and its said decision to that effect having become final, it ordered the submission of this particular matter set aside, and the matter placed upon its calendar for the purpose of determining whether or not the questions involved in this particular matter had become moot by virtue of its decision in the main case. This single issue, having been argued by respective counsel, has now been submitted to this court for decision.

We are of the opinion that the questions, raised in this proceeding as to the validity of the original undertaking to stay proceedings upon the order discharging said attachment, and also as to the validity of the subsequent order of this court permitting the filing of a new and corrected undertaking to stay proceedings upon said appeal, have become moot by virtue of our decision in the main case upholding said attachment and reversing the order of the trial court discharging the same. The effect of that decision was to relieve the appellants and their surety from any and all liability upon the original stay bond as well as upon the new and amended undertaking which this court permitted to be filed. If, as the respondent claims, said original stay bond was void, he never did have any right of recovery thereon; and if, as he claims, the ex parte order of this court permitting the appellant to file a new and corrected bond is also void, he is in no better or worse position than he was before. Assuming the original stay bond to be void and our said order as to the filing of the new bond to be also void, what was the position and what were the rights of the respondent after the order discharging the attachment was made, after the appeal from said order was taken and after said alleged void bond to stay proceedings pending such appeal had been given? It is clear that his only and all-sufficient right was that of receiving or of recovering his attached property from the attaching officer, who, after the order discharging the plaintiffs' attachment had been made, had no longer any authority to retain the same under said discharged writ, and who could not justify his further retention thereof because of the giving by the plaintiffs of a void stay bond. The right of recovery of his said property which the defendant then had upon his claim that said stay bond was void, he continued to have down to the date when our decision that the order discharging said attachment was void became final; unless, indeed, the defendant

has himself lost that right by delay or failure in its assertion.

So far as the record in this case discloses, the defendant never did assert that right as against the only person against whom it could be asserted, viz., the attaching officer up to the time when our decision in the main case rendering its further assertion impossible, became final, but, on the contrary, he allowed the attaching officer to remain unmolested in whatever possession of said property he had acquired by virtue of the plaintiffs' writ of attachment. Never having asserted whatever right he gained through the making of the order of the trial court discharging said attachment, he is in the precise position in which he would have been if no stay bond had been attempted to be given; he has allowed the property to remain in custodia legis pending the appeal. This being so, and the decision of this court, declaring the order discharging said attachment to have been erroneous, having become final, he is no longer in a position to be either beneficially or injuriously affected by any order which this court can now make in the premises. If this court should decide that its ex parte order permitting the appellants to file a new and corrected bond was void because ex parte or because said original stay bond was void and hence could not be amended, we are unable to perceive how the defendant could in his present situation be in anywise aided or benefited or injured by such a determination; and a like consequence would follow from the opposite conclusion. If this court should grant the respondent's motion and set aside its ex parte order allowing an amended undertaking to be filed, the respondent would be left in the position of having recourse, if he has any at all, to a stay bond which he insists is void and which, if not void, he has lost the right of access to by virtue of our decision in the main case reversing the order to stay the operation of which such original bond had been given. If, on the other hand, we should deny his motion to set aside our ex parte order the same precise result would follow, since his access to either bond has been cut off by our decision in the main case.

The question, therefore, under any possible view of the situation is moot in so far as this respondent is concerned. If there are other parties who have acquired any rights in or liens upon the property, it is sufficient to say that they are not parties to this appeal, and hence are unaffected by any order which this court has made or might make in the premises. The motion is dismissed.

We concur: MYERS, C. J.; SHENK, J.; LAWLOR, J.; WASTE, J.; SEAWELL, J.; LENNON, J.

195 Cal. 605

Ex parte HAINES. (Cr. 2730.)

(Supreme Court of California. March 19, 1925.)

1. Escape ⇐13—Legislative intent not to punish escapes by misdemeanants not imputed unless clearly called for by statute.

In view of Pen. Code, §§ 105, 106, making no provisions for punishment of escaping misdemeanants, an intent not to punish such escapes under section 107 as amended (St. 1923, p. 270) should be imputed to Legislature only if all terms of amendment studied together clearly call for such interpretation.

2. Escape ⇐13—Statute providing for punishment of escapes held applicable to both felony and misdemeanor prisoners.

Pen. Code, § 107, as amended by St. 1923, p. 270, declaring escape or attempt to escape from institutions therein named a felony, held applicable to both misdemeanor and felony prisoners in view of Pen. Code, § 105, as amended by St. 1905, p. 723, and section 106, as amended by St. 1921, p. 77; Pen. Code, §§ 17, 19; Juvenile Court Laws (St. 1915, p. 1225); St. 1921, p. 809; St. 1913, p. 857; Pen. Code, §§ 1613, 1388; St. 1921, p. 1621; Pen. Code, § 1600; Code Civ. Proc. §§ 1858, 1859, and legislative history in its enactment.

3. Statutes ⇐181(2), 212—Absurd results will not be ascribed to Legislature and inconsistency will not be presumed.

Absurd or unjust results will not be ascribed to Legislature in enactment of statutes if avoidable, and it will not be presumed to have used inconsistent provisions as to same subject in immediate context.

4. Statutes ⇐200, 208—Court not bound by grammatical rules in interpretation and may ascertain meaning from context.

Courts are not bound by grammatical rules in interpretation of statutes and may ascertain meaning of words by context.

5. Statutes ⇐205—Statute construed to give sensible meaning to every part.

Statute should always be so construed as to give a sensible and intelligent meaning to every part and so as to make every provision valid and effective.

6. Statutes ⇐181(1)—Legislative intent being shown, statute must be liberally construed to give effect thereto.

Legislative intent being shown, statute must then be liberally construed to give effect to such intent.

7. Escape ⇐13—Court justified in public interest in adopting construction of statute favoring punishment of all escaping prisoners.

Even if Pen. Code, § 107, as amended by St. 1923, p. 270, providing for punishment of escaping prisoners might be held to be sus-

ceptible of a different construction, court would be justified in public interest in adopting construction favoring punishment of all escaping prisoners.

8. Statutes ⇐181(2)—Courts will avoid result contrary to sound sense and wise policy in construction.

Courts will be astute to avoid a result contrary to sound sense and wise policy in construction of statutes.

9. Statutes ⇐183—Manifest reason and purpose of law not sacrificed to literal interpretation.

While intention of Legislature must be ascertained from words used to express it, manifest reason and obvious purpose of law should not be sacrificed to a literal interpretation of such words.

10. Constitutional law ⇐70(1)—Kind of punishment presents a legislative and not a judicial question.

Kind of punishment to be inflicted for an escape or attempt to escape from custody presents a legislative and not a judicial question, it being for courts or state board of prison directors to determine, within limits fixed by Legislature, extent of punishment.

In Bank.

Habeas corpus by George Haines directed to the Sheriff of Shasta County to secure release of petitioner. Writ discharged, and prisoner remanded.

See, also, 229 P. 984.

A. J. Ashen, of Sacramento, for petitioner.
U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for respondent.

LAWLOR, J. Habeas corpus. The facts in the above-entitled matter are stipulated to be as follows:

On or about the 5th day of June, 1924, petitioner, George Haines, was serving a sentence in the county jail of Shasta county, in the city of Redding, under conviction of a misdemeanor, to wit, malicious mischief, and in the custody of an officer, a deputy sheriff, and while engaged in going to county work escaped from the lawful custody of such officer. Subsequently, the petitioner was charged by the district attorney of said county by information with the crime of escaping from the legal custody of an officer, a felony, committed as follows:

"That the said George Haines * * * did on or about the 5th day of June, 1924, at the city of Redding, county of Shasta, state of California, willfully, unlawfully, intentionally, and feloniously escape from the lawful custody of an officer, to wit, a deputy sheriff, while engaged in going to county work. All of which is contrary to the form, force, and effect of the statute in such cases made and provided

and against the peace and dignity of the people of the state of California."

Petitioner, by virtue of this charge, was imprisoned, detained, confined, and restrained of his liberty by W. W. Sublett, sheriff of the county of Shasta, at the county jail in said county, and it was with regard to this custody that this court granted his petition for a writ of habeas corpus.

It is contended by petitioner that the charge under which he is held and thereby deprived of his liberty does not constitute a public offense, "inasmuch as, at the time of said alleged escape said George Haines was not a prisoner charged with or convicted of a felony, but was a prisoner convicted of a misdemeanor": that section 107 of the Penal Code "applies only to prisoners charged with or convicted of a felony. The gist of said section is, 'Every prisoner charged with or convicted of a felony * * * who escapes or attempts to escape * * * is guilty of a felony and is punishable as provided in section 108 of the Penal Code.' In between the words quoted, there appear several relative clauses, all beginning with the word 'who,' and connected by the disjunctive 'or.' It seems apparent that the relative pronoun 'who' in all of said relative clauses, must relate back to the prisoner mentioned in the first part of the section, to wit, a prisoner charged with or convicted of a felony"; that if it were the intention of the Legislature to make section 107 apply both to misdemeanor and felony prisoners, "then there would absolutely be no reason why it should have inserted after the word 'prisoner' the words 'charged with or convicted of a felony.' It would have, in such case, used the same expression as used in a prior statute, namely, 'every prisoner,' without any qualifying phrase as to the character of the prisoner"; that the Legislature in amending the section in 1923 intended "to provide that a felony prisoner, no matter whether he was confined in the county jail, or in the state prison, or in a county hospital, or in any other place, if he escaped, or attempted to escape, would be guilty of a felony and not, as before said amendment, guilty of a misdemeanor if he escaped from one place, and guilty of a felony if he escaped from some other place"; and that "if it can be said that there is a doubt as to the intent of the Legislature, * * * such doubt is dispelled by an examination of the history of the passage of this amendment * * * the bill as first introduced was broad enough to include both felony and misdemeanor prisoners. The bill as amended the first time was rather ambiguous and probably could have been construed to include both felony and misdemeanor prisoners, but the assembly by its action clearly indicates that it did not approve the including in said bill even

by inference misdemeanor prisoners, and therefore by striking out of the word 'or' and inserting the words 'who is' in lieu thereof, showed its intention to make said section 107 as amended to apply only to felony prisoners."

It is conceded by the respondent that if the act of escaping from the custody of the sheriff by a prisoner convicted of a misdemeanor does not fall within the terms of section 107 of the Penal Code as amended in 1923 (Stats. 1923, p. 270), the sheriff is without authority to hold petitioner for the crime of escaping from his custody since there is no other provision in the penal law of the state which provides a penalty for the act of escaping from the county jail or from the lawful custody of an officer by a prisoner confined or held therein on a misdemeanor charge.

Respondent contends, however, that section 107 is reasonably capable of only one meaning, which is that it applies to *all* prisoners confined in a county jail, and that the phrase "charged with or convicted of a felony" in said section is merely descriptive of one class of prisoners to whom the act relates. This contention is based upon the following grounds: (1) That prior to the amendment of section 107 in 1923, every prisoner confined in any other prison than the state prison who escaped or attempted to escape therefrom was guilty of a misdemeanor and, if the section as amended applies only to prisoners charged with or convicted of a felony, the existing law has been repealed, which result is not consistent with a sound policy and will lead to mischief. (2) That the legislative intent to include all prisoners is evidenced by the title of the act which discloses that the purpose of such act is to amend section 107, and not to repeal the existing law and enact a new law destroying "all the vital terms" of the section as it stood before the amendment; by the clause relating to a prisoner "who is engaged on any county road or other county work" which clause is inapplicable to a "felony prisoner" for the reason that the law does not provide that prisoners in the state prison may be required to work upon county roads or other county work; that the Legislature is presumed to have known this and therefore to give effect to this language *all* prisoners must be included within the meaning of the section. (3) That the rule is that statutes must be liberally construed with the object of giving effect to the legislative intent and a sound policy. (4) That the act of escaping is recognized by the common law as *malum in se* and the fact that the Legislature has raised the crime from a misdemeanor to a felony by the amendment of 1923 can have "no weight in the matter of judicial construction of the law itself."

The sections of the Penal Code relating to escapes from prison are as follows:

"Sec. 105. Every prisoner confined in a state prison for a term less than for life, who escapes therefrom, is punishable by imprisonment in a state prison for a term of not less than one year; said second term of imprisonment to commence from the time he would otherwise have been discharged from said prison." Amendment approved 1905; St. 1905, p. 723.

"Sec. 106. Every prisoner committed to a state prison for a term less than for life, who escapes or attempts to escape while being conveyed to or from or while confined within such prison or while at work outside such prison under the surveillance of prison guards is guilty of a felony and on conviction thereof the term of imprisonment therefor shall commence from the time such convict would otherwise have been discharged from said prison." Amendment approved May 9, 1921; St. 1921, p. 77.

As enacted in 1872, section 107 read as follows:

"Every prisoner confined in any other prison than the state prison, who escapes or attempts to escape therefrom, is guilty of a misdemeanor."

The Legislature in 1923, by "An act to amend section one hundred seven of the Penal Code, relating to escapes and attempts to escape from county jails, city jails, and county hospital, and from the custody of the sheriff," declared section 107 to be amended as follows:

"[1] Every prisoner charged with or convicted of a felony who is confined in any jail or prison or an inmate of any public training school or reformatory or county hospital, [2] or who is engaged on any county road or other county work [3] or who is in the lawful custody of any officer or person, [4] who escapes or attempts to escape from such jail, prison, public training school, reformatory or county hospital, [5] or from the custody of the officer or person in charge of him while engaged on or going to or returning from such county work [6] or from the custody of any officer or person in whose lawful custody he is, [7] is guilty of a felony and is punishable as provided in section one hundred eight of the Penal Code." St. 1923, p. 270.

We have inserted the above numerals in section 107, as amended, for convenience of reference in the discussion of its provisions. Section 105 as amended in 1905, we have seen, relates to the escape of prisoners confined in a state prison who may under that section and sections 13 and 671 of the penal Code to be sentenced to a term of imprisonment ranging from one year to any number of years not less than one or to life, in terms. Section 106 as amended in 1921, it has been indicated, covers the case of a prisoner committed to a state prison who escapes or attempts to escape while being conveyed to or from or while confined within such prison

or while at work outside such prison under the surveillance of prison guards. Under this section and sections 13, 18 and 18a of the Penal Code, the minimum punishment would be six months and the maximum five years in the penitentiary.

These sections are directed to escapes or attempted escapes from the state prison, or escapes or attempted escapes while being conveyed to or from or while confined within such prison or while at work outside such prison. By "work outside" undoubtedly means work done for the state as, for instance, work on the state highway and not county work.

[1] It is plain from the terms of sections 105 and 106 that no provision whatever is made therein for the punishment of misdemeanor prisoners who escape or attempt to escape and if petitioner's contention, that section 107 excludes escapes or attempts to escape by such prisoners, be sound, such escapes or attempts to escape by misdemeanor prisoners are not now punishable at all. In the face of such a prospect an intention not to punish escapes or attempts to escape by misdemeanants should be imputed to the Legislature only when all the terms of the amendment studied together clearly call for such an interpretation.

[2] Section 107 before the amendment plainly applied to felony and misdemeanor prisoners, and we have arrived at the conclusion that, although section 107, as amended, now prescribes a felonious penalty, it is still directed to both classes of prisoners. Before proceeding to an analysis of section 107, we will state the respective contentions and arguments of the parties pertinent to the rules of construction applying to this proceeding.

In connection with petitioner's claim that section 107 applies only to prisoners charged with or convicted of a felony, it is urged in his behalf that the amendment is grammatically correct and free from ambiguity; "that where the language of a statute is not ambiguous, but of plain and obvious import, the rule is imperative to follow the language employed in its interpretation"—citing *Hawley v. Brumagim*, 33 Cal. 394; *In re Mitchell*, 120 Cal. 384, 52 P. 799; *Davis v. Hart*, 123 Cal. 384, 55 P. 1060; *Smith v. Union Oil Co.*, 166 Cal. 217, 135 P. 900. To the proposition "that where a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others" *McGahey v. Forrest*, 109 Cal. 63, 41 P. 817, and *People v. Doyle*, 13 Cal. App. 611, 110 P. 458, are cited. *Matter of Zany*, 20 Cal. App. 360, 129 P. 295, is cited by respondent to the effect "that a statute should always be so construed as to give a sensible and intelligent meaning to every part to avoid absurd consequences, and if possible, so as to make every provision

thereof valid and effective. General terms should be so limited in their application as not to lead to an absurd consequence. *People v. Earl*, 19 Cal. App. 69, 124 P. 887. To arrive at the legislative intent in the interpretation of statutes, the original purpose and object of the legislation must be considered. *Mackey v. Mott*, 25 Cal. App. 110, 142 P. 1082. Statutes must be read and considered in conjunction with the legislative intent, and then be liberally construed with the object in view of giving effect to such intent. *Odell v. Rihn*, 19 Cal. App. 713, 127 P. 802. A construction or conclusion plainly not contemplated by the Legislature should not be given to a statute if it can be avoided. When a statute is fairly susceptible of two constructions, one leading inevitably to mischief or absurdity and the other consisting of sound sense and wise policy, the former should be rejected and the latter adopted. *San Joaquin & K. R. C. & I. Co. v. Stevinson*, 164 Cal. 221, 128 P. 924.

[3, 4] Absurd or unjust results will never be ascribed to the Legislature, and it will not be presumed to have used inconsistent provisions as to the same subject in the immediate context. The courts will be astute to avoid such results. *Wells Fargo & Co. v. Mayor, etc., of Jersey City (D. C.)* 207 F. 871. In the interpretation of statutes, courts are not bound by grammatical rules, and may ascertain the meaning of words by the context. *Cavender v. Hewitt*, 145 Tenn. 471, 239 S. W. 767, 22 A. L. R. 755.

"The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the Legislature apparent by the statute; and if the words are sufficiently flexible to admit of some other construction it is to be adopted to effectuate that intention. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. 'While the intention of the Legislature must be ascertained from the words used to express it, the manifest reason and the obvious purpose of the law should not be sacrificed to a literal interpretation of such words.' Words or clauses may be enlarged or restricted to effectuate the intention or to harmonize them with other expressed provisions. Where general language construed in a broad sense would lead to absurdity, it may be restrained. The particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense they were intended to be used as they are found in the act." *Lewis v. Sutherland*, *Statutory Construction* (2d Ed.) § 376, p. 721.

The Code of Civil Procedure provides:

Section 1858: "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction

is, if possible, to be adopted as will give effect to all."

Section 1859: "In the construction of a statute the intention of the Legislature, * * * is to be pursued, if possible; and when a general and [a] particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it."

Section 4 of the Penal Code reads:

"The rule of the common law, that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice."

Concerning the latter section, petitioner contends that "although by section 4 of the Penal Code, the rule of liberal construction of statutes applies to penal statutes, nevertheless, the rule of liberal construction does not mean the enlargement of plain provisions of law."

To this respondent replies:

"In arriving at a proper construction of the statute it is, of course, helpful to recall that the ancient rule that penal statutes are to be strictly construed has no application to the provisions of our Penal Code. *People v. Soto*, 49 Cal. 67; *Snell v. Bradbury*, 139 Cal. 379, 73 P. 150. This consideration should serve to dispel any lingering doubt which might be entertained as to the propriety of modification of the literal effect of the words of the enactment by resorting to the history of legislation upon the subject treated, and the general legislative intent relating to that and matters of a similar nature."

The first and second drafts of the amendment under review applied to felony and misdemeanor prisoners. We agree with petitioner that by the final amendment substituting "who is" for "or" between the words "felony" and "confined" as they occurred in the second draft it was intended that the clause "who is" should refer back to the antecedent noun—"Every prisoner charged with or convicted of a felony." And if the section were limited to clauses 1, 4, and 7, and the succeeding words—"who is" in clauses 2 and 3 were not prefaced by the disjunctive "or" denoting classification and exclusion we would be called upon to hold that escapes or attempted escapes of misdemeanor prisoners did not come within the terms of section 107. But, as we shall show, the amendment of the second draft does not exclude from the operation of the clauses 2 and 3 escapes or attempted escapes by misdemeanor prisoners.

The detailed history of the legislation is as follows: On February 1, 1923, Assemblymen Emme and Graves introduced Assembly Bill No. 939. It was read the first time and referred to the committee on judiciary.

Journal of the Assembly 1923, p. 338. The printed bill as introduced is as follows:

"An act to amend section one hundred seven of the Penal Code, relating to attempts to escape and escapes from county jails and city jails and from the custody of the sheriff while at work on any county work.

"The people of the state of California do enact as follows:

"[1] Section 1. Section one hundred seven of the Penal Code [2] is hereby amended to read as follows:

"[3] 107. Every prisoner confined in any jail or prison other [4] than the state prison, and every prisoner who is engaged on [5] any county road or other county work, who escapes or [6] attempts to escape from such jail or other prison, or from [7] the custody of the sheriff while engaged on or going to or [8] returning from such work is guilty of a felony."

On April 3, 1923, by "amendment number one" the title was modified and by "amendment number two" the act was amended as follows:

"On page 1 of the printed bill strike out line 3 following the period, lines 4 to 8, both inclusive, and in lieu thereof insert the following: [3] 'Every prisoner charged with or convicted of a felony [4] or confined in any jail or prison or an inmate of any public [5] training school or reformatory or county hospital, or who is [6] engaged on any county road or other county work or who is [7] in the lawful custody of any officer or person, who escapes or [8] attempts to escape from such jail, prison, public training [9] school, reformatory or county hospital, or from the custody of [10] the officer or person in charge of him while engaged on or [11] going to or returning from such county work or from the [12] custody of any officer or person in whose lawful custody he [13] is, is guilty of a felony and is punishable as provided in section [14] one hundred eight of the Penal Code.'" Journal of the Assembly 1923, p. 835.

On April 9, 1923, a motion was made and carried as follows:

"On page 1, line 4, of the printed bill, strike out the word 'or,' preceding the word 'confined' and in lieu thereof insert the words 'who is.'" Id. p. 1012.

The substitution was accordingly made and this was the version of the bill when it passed the Assembly and was ordered transmitted to the Senate. Id. p. 1142. The Senate passed the bill as thus amended with an amendment of the title. Id. p. 1488.

We will now proceed to analyze the amended section. First, as to the question of punctuation. If a comma or colon had been inserted after the words "every prisoner" or a semicolon following the words "county hospital," as those quoted phrases appear in clause 1, there would be no difficulty in construing the terms of section 107 to apply to both felony and misdemeanor prisoners. Clause 1, we have conceded, is confined to felony pris-

oners; clause 2 just as clearly applies to misdemeanor prisoners; clause 3 includes both classes of prisoners; clause 4 applies either to felony or misdemeanor prisoners for it includes escapes or attempted escapes from "jail," where misdemeanants may be serving a sentence, as well as from the state prison; clause 5 is the counterpart of clause 2 and like that clause refers exclusively to misdemeanor prisoners; clause 6 uses the expression—from the custody of *any* officer or person—and hence covers both classes of prisoners, and clause 7 makes a violation of any of the other clauses a felony and, under sections 107, 108, 13, and 18a of the Penal Code, imprisonment in the penitentiary may be for any term from 6 months to 10 years and by fine in any amount not exceeding \$10,000.

In conceding that clause 1 refers to felony prisoners, we have in mind that such prisoners, unless admitted to bail, are confined in the county jail pending trial after indictment or preliminary examination and after conviction and final judgment until removal to the state prison; or when they are held by other process connected with a felony. But misdemeanor prisoners, other than those punished by fine alone, after conviction and final judgment must be committed to the county jail (see sections 17 and 19, Pen. Code) in execution of the judgment.

While section 107 contains the only provision we have found in reference to the detention of felony prisoners in "any public training school," it is probable that the Legislature had in view prisoners confined in the state reform schools. Minors between 18 and 21 years of age accused by indictment or information of a felony or misdemeanor or convicted thereof may be committed to the Preston School of Industry or to the Whittier State School, or if the offender be a female, to the California School for Girls, as in the statute provided. Juvenile Court Law (St. 1915, p. 1225). For amendments thereto, see Gen. Laws 1923, p. 1536. The statute authorizes the establishment of a reformatory department in the Preston School of Industry wherein regular public school work and employment in useful and productive labor are prescribed. St. 1921, p. 809. According to the statutes of 1913, the girls' department of the Whittier State School was turned over to the board of trustees of the California School for Girls (St. 1913, p. 857), which school is now located in Ventura, Ventura county.

Either adult or minor felony prisoners may, in cases of sickness or injury, be temporarily confined in a county hospital. But with respect to clause 2 we are satisfied there is no provision of law authorizing the employment of felony prisoners "on any county road or other county work." Section 1613 of the Penal Code, however, authorizes boards of supervisors of counties to require prisoners

confined in the county jail under a judgment of imprisonment to perform labor on the public works or ways in the county. This clearly refers to misdemeanants, for none other would be confined in a county jail "under a judgment of imprisonment."

Section 1613 was adopted in 1872. In 1911 (St. 1911, p. 688) section 273h was enacted wherein it is provided that offenders sentenced to the county jail in prosecutions under sections 270, 270a, 270b, 271, and 271a of the Penal Code shall be compelled to work upon the public roads or highways or any other public work in the county where such conviction is had. The policy of the law with respect to minors is further shown by the provisions of section 1388 of the same Code, which reads in part:

"Final judgment may be suspended on any conviction, charge, or prosecution of a minor, for misdemeanor or felony, where in the judgment of the court in which such proceeding is pending there is reasonable ground to believe that such minor may be reformed, and that a commitment to prison would work manifest injury in the premises. Such suspension may be for as long a period as the circumstances of the case may seem to warrant, and subject to the following further provisions"—that such minor may be committed to the custody of officers or managers of any strictly nonsectarian charitable corporation conducted for the purpose of reclaiming criminal minors.

This section refers to felony or misdemeanor prisoners, and it may be that the Legislature intended that escapes or attempts to escape from the lawful custody of such officers or managers might in certain cases constitute a violation of section 107. That section refers to "reformatory" in clauses 1 and 4 and "from the custody of any officer or person" in clauses 3 and 6. It may be mentioned in this general connection that the act of 1921 (St. 1921, p. 1621, § 14) relating to the establishment and administration of industrial farms or industrial road camps in the counties of the state and the commitment thereto and the discipline of persons charged with or convicted of public offenses, provided that such farms or camps shall be considered a county jail "for all purposes not inconsistent with the provisions and purposes hereof" and provided (section 13) that persons who escape or attempt to escape therefrom shall upon conviction be imprisoned in a state prison for not less than one year nor more than five years, or in the county jail or industrial farm for not to exceed one year.

It is clear from the foregoing that if section 107 may be construed as having a comma or colon after the words "every prisoner," and a semicolon after the words "county hospital" in clause 1, and clauses 2 and 5 are confined to misdemeanor prisoners, the conclusion is inescapable that the section contemplates escapes or attempted escapes by both felony and misdemeanor prisoners. But

without regard to the suggested punctuation, we think the amendment is not open to any construction other than that section 107 as amended covers escapes and attempted escapes of felony and misdemeanor prisoners. Petitioner insists, however, that the action of the Legislature in amending the section clearly shows an intention to confine its provisions to escapes or attempts to escape of felony prisoners.

It will be observed that there is a repetition in clauses 2 and 3 of the words "who is," as used in clause 1, thus indicating a further classification of prisoners—(1) felony prisoners; (2) misdemeanor prisoners; and (3) both classes of prisoners. The same classification is preserved in defining the criminal acts—clause 4 being the counterpart of clause 1, clause 5 of clause 2, and clause 6 of clause 3. Thus considered it is plain that the substitution of the words "who is" for the word "or" between the words "felony" and "confined" in clause 1 had the effect of limiting that clause to felony prisoners, and, as already suggested, if the section were limited to clauses 1, 4 and 7, petitioner's contention would prevail; but in the face of the succeeding provisions, and notably those of clauses 2 and 5, the section considered in its entirety and giving force and meaning to all its provisions is no susceptible of the construction that punishment for escapes or attempted escapes by felony prisoners was the sole purpose of the amendment.

Clause 1 includes escapes from either "jail" or "prison" and in our opinion those terms are to be read distributively throughout the section, for, while felony prisoners may be confined temporarily in a county jail, misdemeanants sentenced to imprisonment must serve their sentence in a county jail, unless lawfully required to do outside work for the county.

Section 1600 of the Penal Code refers to the detention of both classes of prisoners. That section reads:

"A prisoner committed to the county jail for trial or for examination, or upon conviction for a public offense, must be actually confined in the jail until he is legally discharged; and if he is permitted to go at large out of the jail except by virtue of a legal order or process, it is an escape."

Moreover, sections 105 and 106 cover fully the escape of felony prisoners while undergoing punishment or being conveyed to or from the prison, and it cannot be questioned that section 107 was intended, in the contemplation of the Legislature, to take care of all other classifications of escapes or attempted escapes. It is apparent the Legislature realized that felony prisoners would escape or attempt to escape under other conditions than those embraced in sections 105 and 106. Accordingly provision was made in section 107 for such escapes or attempted escapes.

No reasonable theory has been advanced why the Legislature would entirely preclude the conviction and punishment of escapes or attempted escapes by misdemeanor prisoners. To so hold would be to ignore the provisions of the section, especially clauses 2 and 5 thereof. We again repeat that clause 1, read alone, is confined to felony prisoners, for while the sentence of such prisoners must be served in the penitentiary, yet owing to the youth, the illness, or the injury of such prisoners they may be confined in any of the institutions named. But because of the language that follows, particularly that of clauses 2 and 5, it cannot, upon any accepted canon of construction, be held to be limited to persons charged with or convicted of a felony. The repetition of the words "or who is" as they appear in clause 2 in our opinion clearly indicates an intention to limit that clause to prisoners engaged on "any county road or other county work," and the said clause is entitled to the same independent classification as that of clause 1, clause 5, as already suggested, complementing clause 2.

The words "or who is" are also repeated in clause 3, thus indicating a further classification applying to both classes of prisoners. As already stated, we have found no statutory provision under which a felony prisoner, whether charged with or convicted of a felony, may be engaged on county road or other county work, and the conclusion must therefore follow that the provision is directed alone to misdemeanor prisoners. A person charged with a felony is, prior to conviction, presumed to be innocent, and it would appear to be violative of such presumption to exact service pending the determination of the question of guilt. And if a person charged with a felony is convicted and the judgment of conviction becomes final his place is in the penitentiary, not in the county jail. In any event, such service could not, except upon statutory warrant, be exacted from such a prisoner. The result of accepting petitioner's construction of clauses 2 and 5 would therefore be to place the authorization for such work on judicial mandate rather than on statute.

[5-9] In thus interpreting section 107, we have, in our opinion, strictly conformed to the rules of construction found in the provisions of the Codes and as set forth in the respective contentions. A statute "should always be so construed as to give a sensible and intelligent meaning to every part * * * so as to make every provision thereof valid and effective." This we have done in giving effect to clauses 2 and 5. It is plain from those clauses that the Legislature did not fail to provide for misdemeanor prisoners; and the intent being shown the statute must "then be liberally construed with the object in view of giving effect to such in-

tent." Even if the statute might be held to be susceptible of either construction, we are justified in the public interest in adopting the one favoring the punishment of all escaping prisoners. The courts will be astute to avoid a result contrary to sound sense and wise policy. As was declared in the text-book from which we have quoted:

"While the intention of the Legislature must be ascertained from the words used to express it, the manifest reason and the obvious purpose of the law should not be sacrificed to a literal interpretation of such words." Lewis' Sutherland, Statutory Construction, *supra*.

It cannot be maintained, particularly in view of clause 2, that the section is, when viewed in the light of the interpretation urged upon us by petitioner, "free from ambiguity," for by the language of that clause an obstacle is at once encountered in the provision for escapes or attempts to escape while engaged on county work, thus precluding the conclusion that it was intended to apply to felony prisoners.

Viewed from the angle of petitioner's contentions the section cannot, therefore, be regarded as of "plain and obvious import," because that clause, like the others, must, if possible, be given effect. The freedom from ambiguity and the plain and obvious import ascribed to the section by petitioner cannot be said to inhere in its terms except upon the theory that they apply to both classes of prisoners. And while the substitution of "who is" for "or" in clause 1 does have the effect of confining its operation to felony prisoners, the limitation does not extend to the succeeding clause for the reason that such prisoners would not be engaged on a county road or on other county work, and hence could not commit a breach of custody connected with such work. The point is made that if the Legislature intended that section 107 should apply to misdemeanor prisoners some such phrase as "charged with or convicted of a misdemeanor" would have been employed in the way felony prisoners are described in clause 1. Undoubtedly the soundness of the interpretation we have given to section 107 would be more readily apparent if an expression corresponding with that used in clause 1 had been employed with respect to prisoners charged with or convicted of misdemeanor; but the omission to identify both classes of prisoners by corresponding phrases will not be held controlling if from the context of the statute it clearly appears, as we believe it does, that misdemeanor as well as felony prisoners were intended to come within its provisions.

[10] Petitioner also "contends that there is a strong reason why the Legislature should feel that a misdemeanor prisoner, if he escapes or attempts to escape, should not be guilty of a felony, which would be a greater crime, and subject to a greater penalty, than

that for which he is held." It is true that every violation of section 107 is a felony punishable by confinement in the penitentiary. Breach of prison, either by felons or misdemeanants, has always been regarded as a grave offense. The gravity of the original offense is not the only test of suitable punishment for escapes or attempted escapes. A misdemeanor prisoner escaping from a county jail or road camp after conviction of even a minor offense might cause more demoralization among his fellow prisoners than one escaping from the penitentiary. Accordingly, by affixing a minimum term of six months and a maximum term of ten years and a fine in any sum not exceeding \$10,000 for escapes or attempted escapes of either class of prisoners, the Legislature has made it possible to regulate the quantity of punishment to meet the needs of every case. It cannot be laid down as a rule binding on the Legislature that a misdemeanor prisoner who escapes or attempts to escape should not be given felonious punishment. The kind of punishment presents a legislative and not a judicial question; it is for the courts or the state board of prison directors, as the case may be, to determine, within the limits fixed by the Legislature, the extent of punishment.

The writ of habeas corpus is discharged, and the prisoner remanded.

We concur: MYERS, C. J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; WASTE, J.; LENNON, J.

195 Cal. 623

PEOPLE v. PERRY et al. (Cr. 2712.)

(Supreme Court of California. March 20, 1925. Rehearing Denied April 16, 1925.)

1. Criminal law § 622(1)—Separate trial of defendants jointly charged, in sound discretion of trial court.

Motion for separate trial of defendants jointly charged with any crime is, under Pen. Code, § 1098, as amended by St. 1921, p. 90, addressed to the sound discretion of trial court.

2. Criminal law § 622(1), 1166(6)—Refusal of separate trial where one defendant confessed held not abuse of discretion or miscarriage of justice.

Under circumstances, refusal of separate trial in murder case, notwithstanding confession of one defendant, held not abuse of discretion, and, even if erroneous, not to have resulted in a miscarriage of justice.

3. Criminal law § 369(3)—Evidence tending to connect defendant with crime charged, admissible, though tending to connect with another offense.

Evidence as to theft of an automobile, as tending to connect defendants with the crime

charged, murder in the attempt to rob a bank, held admissible, though it tended to connect them with a distinct unconnected offense.

4. Criminal law § 532(2), 1153(6) — Trial court has wide discretion in passing on voluntariness of confession.

The trial court has wide discretion in passing on question of confession having been freely and voluntarily made, and its ruling cannot be interfered with in the absence of a showing of abuse.

5. Criminal law § 531(3)—Evidence of confession properly admitted.

Evidence of defendant's confession held properly admitted, in absence of showing of coercive measures or inducements, despite defendant's claim that he was imposed on by officers especially in view of evidence to contrary and instruction to disregard confession if not freely and voluntarily made.

6. Homicide § 29—For killing, though accidentally, by one of several while attempting to rob, all guilty of first degree murder.

Under Pen. Code, § 189, if a homicide is committed, though accidentally, by one of several while jointly engaged in an attempt to rob, all are guilty of first degree murder.

7. Criminal law § 773(4)—Instruction as to legal standard of mentality for accountability proper, where evidence of mental infirmity offered.

It is proper to give an instruction as to legal standard of mentality for accountability, where evidence of mental infirmity is offered by defendant with the object of mitigating his punishment and as a defense, though insanity is not claimed; the jury's right to consider mental weakness in mitigation of punishment being preserved.

8. Homicide § 311—Instruction as to jury's discretion in finding punishment for first degree murder held not erroneous.

Instruction that jury's discretion as to fixing punishment for first degree murder is not arbitrary, and is to be employed only when they are satisfied that the lighter punishment should be imposed, held not erroneous.

9. Criminal law § 823(1)—Any vice in instruction as to jury's discretion in fixing punishment held rendered harmless by other instruction.

Were there any vice in an instruction that jury's discretion in fixing punishment for first degree murder was not arbitrary, etc., held, that it was rendered harmless by the closing paragraph of another instruction, that in the exercise of their discretion as to which punishment should be inflicted they were entirely free to act according to their own judgment.

10. Criminal law § 773(4)—Inclusion in instruction on accountability of part of Code definition of persons of sound mind not error.

Inclusion, in instruction on accountability to the law, of that part of Pen. Code, § 21, pro-

viding that "all persons are of sound mind who are neither idiots nor lunatics nor affected with insanity," *held* not error.

11. Homicide ⚡314—Simple verdict of guilty of first degree held proper to carry death penalty.

A simple verdict of guilty of first degree murder is proper to carry death penalty, the jury having been told that such a verdict would have such effect, and that, if in their judgment any defendant should be relieved of such penalty, verdict should impose life imprisonment.

12. Infants ⚡68—Under evidence, held implied finding that defendant was 18 years of age could not be disturbed.

Under the evidence, *held*, that the implied finding that defendant in homicide was 18 years old when the murder was committed, and so not exempt from death penalty, under Pen. Code, § 190, could not be disturbed.

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Lewis Perry, Ed. Montijo, and Tom Bailey were convicted of murder, and denied new trials, and they appeal. Affirmed.

Kirby, Holland & Kirby, Guy Eddie, William T. Aggeler, and F. H. Vercoe, all of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

SEAWELL, J. The defendants were jointly accused by the grand jury of the county of Los Angeles with the offense of having, on February 20, 1924, in said county of Los Angeles, murdered Glen E. Bond, a police officer of the city of Los Angeles. They were thereafter jointly tried and convicted of said crime of murder as by the indictment charged the jury having returned a simple verdict against each defendant of murder of the first degree. The court thereupon pronounced the judgment which the law in such cases prescribes, which is the death penalty. The appeal is from the orders denying the motions for new trials made jointly by Perry and Bailey and separately by defendant Montijo, and from the judgments of conviction.

The defendants, all of whom are young men with blemished records, and who were known by various false names, preconceived on the day prior to the day on which the murder occurred, and agreed upon, a plan by which they were to undertake to rob a branch of the Merchants' National Bank, situate on the corner of Seventh and Hoover streets, in said city of Los Angeles. The hour set by the defendants for the commission of the crime was 12 o'clock, meridian, February 20, 1924. Pursuant to their said agreement and understanding, the defendants entered said bank a few minutes before

the appointed hour, armed with loaded revolvers or pistols, with the clear intent and purpose of executing their plan to rob said bank of its moneys and valuable personal property by means of force and fear to be exercised upon the officers and employees of said bank and upon such other persons as should be present in said bank. In accordance with the prearranged plan, the defendant Montijo, upon entering the bank, took a position near the front entrance the better to guard the entrance to the bank against such persons as might attempt to enter during the robbery and to exercise surveillance over persons occupying the front portion of the room. Defendants Perry and Bailey, with drawn arms, made their way from the front entrance to the central and to the rear portions of said bank, commanding as they went the officers and employees of said bank, and the two or three customers who were transacting business therein, to hold up their hands, and directing certain of the employees to occupy designated positions and to maintain silence. The bank contained the usual lobby for the use of the public. Certain floor space therein was divided into teller's and clerk's cages and into compartments for the private use of the patrons of the bank and its officers. Two police officers, Glen E. Bond, the deceased, and F. W. Forbes, members of the Los Angeles city police department, who had previously been detailed as guards at the bank, were seated in one of these compartments. The door leading therein was partly open. The police officers were taken by surprise as defendant Perry came to the door of the compartment which they were occupying and commanded them to remain quiet. He then ordered Paul A. Terry, a bank clerk, and Assistant Manager George W. Thompson to enter the same compartment occupied by the police officers. In the meantime W. E. Zimmerman, the manager of the bank, had been held at bay at his desk by defendant Bailey, who held a pistol leveled at his body. During the time that Perry was occupied in conducting Terry and Thompson to their respective stations, Officers Bond and Forbes had changed their positions, and Bond, at least, had drawn his pistol and was standing in a crouching position near the door as Perry returned conducting Terry and Thompson to the compartment occupied by the police officers. Immediately upon Perry appearing at the door, three pistol shots rang out in rapid succession. Whether Officer Bond or the defendant Perry fired the first shot the witnesses were unable to state. At any rate, Bond fell mortally wounded from the fire of Perry's pistol. Two bullets entered his body and he expired soon thereafter. Shortly after Bond had fallen mortally wounded, Forbes, who had dropped to the floor and was crawling out of the

compartment through another door, was struck on the head by a bullet which inflicted a scalp wound. He was probably shot by Bailey. Several other shots were fired by Perry and Bailey. They assumed crouching or stooping positions and while making their way toward the front exit, brandishing their revolvers in a menacing manner, Officer Forbes, as he lay wounded upon the floor, fired a shot at Perry and exclaimed as he shot, "I got him." Montijo retreated from the bank a little ahead of the other two defendants, and all of the defendants made their escape from the building. They obtained nothing of value. A red Buick automobile, sport model, which will be hereafter referred to, played a part in the crime. Without doubt the defendants used this car, which had been stolen by them or by a fourth person who also appears to have been a confederate for the purpose of making a reconnoitering survey of the bank and its surrounding locality preliminarily to the attempted robbery. This automobile was parked at a convenient place near the scene of the crime immediately prior to the attempted robbery. It was hurriedly driven away immediately after the attempted robbery, but by a miscarriage of plans none of the defendants, possibly with the exception of Perry, was able to obtain passage in it. According to the confessions received in evidence, Oscar Perry, a brother of defendant Lewis Perry, was the driver of the car.

Dr. H. Gordon Bayless, a physician and surgeon, was called by Oscar Perry to attend his brother, defendant Lewis Perry, for a gunshot wound, at 1 o'clock on the afternoon of the attempted robbery. This was but one hour following the shooting at the bank. The defendant was then at the Olive Inn, 337 Olive street, suffering from a gunshot wound. He made no explanation to the physician as to how he came by his wounds. Oscar informed the physician that Lewis had accidentally shot himself. The bullet had passed through the defendant's body, piercing the right lung in its course. The surface wound upon the chest was larger than the wound in the back, which would indicate that the bullet entered the back and passed out through the chest-wall. The shot was probably fired by Forbes as Perry was retreating from the bank. Defendant Perry, his brother Oscar, and perhaps one other of the defendants, became suspicious that the physician would report the case to the police, and the defendant Perry was removed from the Olive Inn to Oscar's home at 2025 E. Fourth street. At 9 o'clock that evening, defendant Lewis Perry was arrested and subsequently taken to the receiving hospital. He informed the officers that he had shot himself accidentally, in some sort of a scuffle. There were no indications of powder burns or other evidence that the shot had been fired at short range. Two loaded revolvers

and cartridges were taken from the premises occupied by defendant Perry. Articles of clothing which he had worn were also taken and afterwards exhibited to the identifying witnesses at the trial.

Defendant Bailey was arrested at about 6 o'clock on the afternoon of the robbery. According to his confession, immediately after his flight from the bank he changed his wearing apparel to elude identification. He threw his revolver into Westlake Park in the progress of his flight. Defendant Montijo was arrested at San Diego three days thereafter. Both Montijo and Bailey made complete confessions of their participation in the crime, which, of course, incriminated Lewis Perry. While Oscar Perry did not directly participate in the offense of robbery which resulted fatally to Officer Bond, the confessions of Montijo and Bailey implicated him as the driver of the automobile which conveyed the defendants to the scene of the crime and which disappeared shortly after the defendants fled from the bank.

The positive identification made of the defendants by certain employees of the bank and by the two or three persons who by chance were transacting business with the bank at the time of the attempted robbery, considered in connection with other corroboratory evidence, established the guilty participation of the three defendants in the commission of the crime charged against them beyond a reasonable doubt. Defendants Montijo and Bailey made confessions and each gave in detail accounts of the preparation made by the three defendants and Oscar Perry for the commission of the crime as well as the part each defendant actually took in its commission. Bailey took the officers over the route the defendants traveled in going to the bank and the course he took in his flight. Taken to the bank by the officers, he pointed out the positions occupied by the several defendants, the bank employees, and the customers. In fact, he identified certain of the employees and passed a few words with them as to how certain ones acted under the stress of the situation. His description as to what took place and the sequence of events narrated by him made it morally certain that he had been an actor in the tragedy. Both Montijo and Bailey made mention of physical facts which made it certain that their statements connecting themselves with the offense were true.

[1, 2] The insufficiency of the evidence to sustain the judgment is not, and in the light of the facts of this case could not well be, urged as a sufficient ground to justify a reversal of the case. It is urged that the court committed reversible error by refusing to grant the motions of defendants Perry and Bailey, in which Montijo did not join, for separate trials. These motions were placed upon the ground that it was believed by the other defendants that Montijo had made a

confession which was to be introduced in evidence by the prosecution, incriminating both Perry and Bailey and that any extrajudicial confession made by any one of the defendants not in the presence of either of the others was not admissible against either of the parties not present and who were in no way a party thereto. Further, that if the three defendants were tried jointly, the confession of Montijo would inevitably be considered by the jury that was also to pass upon the guilt or innocence of the other two defendants. Clearly Bailey was not prejudiced by any confession that Montijo may have made, as he, too, had made a confession that was practically demonstrative of his guilt and which was more damaging to him than anything that Montijo had said or done. As to Perry, he had been unmistakably identified by several persons as a participant in the crime and within one hour after the shooting was found bearing bullet wounds freshly made upon his body. Identified clothing worn by him, revolvers, cartridges, and other physical facts, had lain the weight of guilt heavily upon him. Montijo, of course, like Bailey, could not get away from his own confession, if it was legally receivable in evidence. We have said this much preliminarily to a consideration of the objection made, to show that if it should be conceded that the court erred as to a matter of procedure the error did not result in a miscarriage of justice. With the confession complained of wholly eliminated from the jury's consideration, the evidence was amply sufficient to justify the conviction of all or any one of the defendants. We are of the opinion, however, that we cannot hold, as a matter of law, that the court abused its discretion by refusing to order a separate trial as to either Perry or Bailey.

Section 1098, Penal Code, as amended in 1921 (St. 1921, p. 90), provides as follows:

"Defendants jointly charged must be jointly tried. When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials or may order a separate trial for each defendant. * * *

The remainder of the section regulates the number of challenges that each defendant shall be entitled to if the trial be joint, and is not germane to the point under consideration.

The motion for a separate trial for each defendant was presented at a seasonable time before the trial began and was based upon an affidavit made by the attorney for the moving defendants upon information and

belief. It was averred that a confession had been made by Montijo which was to be offered in evidence by the prosecution, and that the confession incriminated and implicated both Perry and Bailey in the commission of the crime charged. There was no averment or reference made to the fact that Bailey had also made a confession incriminating Perry and Montijo. The confession of Montijo, it was averred, would be highly prejudicial to defendants Perry and Bailey, and even though limited by the court to the confessor alone, it would make an ineffaceable impression upon the jury which could not be disregarded by it, and that it would influence the jury to the extent that said defendants would be substantially denied a fair and impartial trial. Prior to the amendment of 1921, each defendant jointly charged with the commission of a felony was entitled to be separately tried upon request made by him for a separate trial. At common law a defendant jointly charged with others was not, as a matter of right, entitled to a separate trial. Our Code section as it now stands is declaratory of the common-law rule. There is no decision of this court which disposes of the precise question here presented. The question, however, is not a new one. It has received the attention of the Massachusetts Supreme Court and the United States Supreme Court upon several occasions. *People v. Borasky*, 214 Mass. 313, 101 N. E. 377, presents the precise situation we have before us. The facts of that case are stated in the opinion from which we quote:

"The indictment charged the defendant and one Antone Kolek with having committed the crime of murder by killing Rose Amansky. Both were convicted, but Kolek has deceased. It does not appear to have been disputed at the trial that the woman was murdered.

"Borasky seasonably filed a motion that he should have a separate trial on the grounds that there would probably be introduced in evidence a written confession made by Kolek, which implicated both defendants, and that, as he had been unable to obtain a copy, the court should order the commonwealth to furnish a copy, in order that it might be annexed to his motion. At the argument in support of the motion the judge was requested to examine the confession in the presence of the district attorney, and in the absence of the defendant Borasky or his counsel. There was no error in the denial of the motion. Whether two defendants indicted jointly shall be tried together is discretionary with the trial court. This has been decided many times respecting the trial of crimes involving a punishment less than capital. [Citing Massachusetts cases.] In *Com. v. James*, 99 Mass. 438, it was stated, in the course of a trial for murder heard by the full court sitting in banc for the trial of two defendants jointly indicted for murder, that 'the general rule is that persons jointly indicted should be tried together.' The confession was there regarded as presenting 'an ex-

ceptional case' and it was intimated that a separate trial would be granted if the commonwealth intended to offer the confession. It was not offered and was withdrawn by the commonwealth, and a joint trial was had. It does not appear that the intimation there was thrown out in any other way than as the exercise of discretion. That such a motion is not to be granted as of right but rests in the sound judicial discretion of the trial court, even in capital cases, is the rule in the federal courts. *United States v. Marchant*, 12 Wheat. 480, 6 L. Ed. 700; *U. S. v. Ball*, 163 U. S. 662, 672, 16 Sup. Ct. 1192, 41 L. Ed. 300. There is nothing in the case at bar to indicate any abuse of discretion. Plainly, the court was not required to examine the alleged confession in the presence of the district attorney and in the absence of counsel for the defendant. During the trial the court was scrupulously to advise the jury, whenever any statements made by Kolek in the absence of Borasky implicating the latter were offered in evidence, that they were not to be considered against Borasky."

So, too, in the instant case, the jury was scrupulously admonished by the court, whenever the confessions made by either Montijo or Bailey were referred to, that such confession could not be taken as evidence against the party who had not made it, and it must be disregarded as to all the other persons. Not only was the admonition repeated time after time during the progress of the trial, but again in the final charge to the jury.

In almost every criminal trial in which two or more persons are jointly charged with the commission of an offense, some fact, or facts, are developed against one of the defendants which cannot be regarded as evidence against the other. In the prosecution of criminal conspiracies, or that class of cases which require more than one to execute the crime, it quite frequently happens that damaging testimony admissible against one defendant, but not admissible against the others, is received in the case, but limited in its application to the one to which it is referable. Such evidence may carry with it an unfavorable effect equal in its harm to a confession. Yet it is not the rule in those jurisdictions in which the common law prevails, or in states which have statutes similar to our own, that the defendants are entitled to a separate trial for that reason alone. The motion for severance in the case at bar was submitted to the sound discretion of the trial court, and, considered with respect to the evident reason for the amendment and the circumstances of the instant case, we cannot say that it was error to deny the motion. What we have said applies also to the separate request of Montijo, whose request was not supported by the same showing as was made in behalf of the other defendants.

[3] It is next urged that error was com-

mitted in overruling objections made by the defendant to testimony offered tending to identify a certain red, five-passenger Buick automobile, sport model, 1923, disc wheels, tan top, red upholstery, which, it is claimed, had been stolen, and was used by the defendants in the perpetration of the crime. A young lady owned such a car which was stolen from her home, at about 8:30 o'clock, the evening before the crime was committed. Montijo, in his confession, described the machine used by Oscar Perry in conveying the defendants on the next forenoon to the vicinity of the bank building on a reconnoitering tour. His description corresponded generally with the machine stolen, to wit, a red Buick, five-passenger, sport model car. The witness William J. Brennan, a chauffeur, stopped his car a few minutes before 12 o'clock on February 20, 1924, on Hoover street at the corner of Seventh street, to permit the traffic to pass. While thus abiding his time to cross Seventh street, he heard the shots in the bank, and saw three persons come out of the bank. The first backed out with a pistol in his hand. The second also backed out. Both ran north on Benton boulevard. The third came out a short time later and ran across a parkway or square between Benton and Hoover streets. At that time a red Buick touring car left the corner of Seventh and Hoover streets and turned into Sunset place. The third person ran in the direction of this car, passing through Sunset place. The witness could not see whether the party he observed running after the car got into it. The last he saw he was running after the car with a "gun" in his hand. Five minutes afterwards he saw a car which he took to be the same car above referred to on the corner of Fourth and Westmoreland avenue. Two persons occupied the front seat. The witness described one of the occupants as a "light haired fellow, and he seemed to be either lying down or stooped over. * * * He seemed to be stretched out, with his head on the back of the cushion—the top of the seat." Keeping in view the fact that Perry was the farthest from the front door of the bank and probably the last to leave the bank, and had been severely wounded, leaves little room for doubt that the person described was Perry. The witness described the car as being red, five-passenger Buick, red disc wheels, yellow top. The witness testified that the car first described by him resembled in all respects the car seen five minutes thereafter and the inference is that it was the same car. The last time it was observed by him it was traveling at a rapid rate of speed and was about three-quarters of a mile from the bank building. The description of the car as given by witness Brennan agreed quite well with the car that had been stolen the evening before. Between the hours of 1

and 2 o'clock p. m. on the afternoon of the day of the crime, Officer Theodore E. Robinson discovered the automobile in which Perry had undoubtedly been taken from the scene of the crime, as described by witness Brennan, abandoned at 338 South Grand avenue. It corresponded in detail to the machine that had been stolen. The motor was still warm, and on the seat which a companion of the driver would have occupied, there were clots of fluid which had the appearance of being blood. The car was about a block from Olive Inn, at which place Perry had been rooming under the fictitious name of W. L. Grant. He was identified by the landlady as a guest at her rooming house. The officer watched the car until darkness came on, but no one came to claim it. The room assigned to Perry in Olive Inn was No. 8, but after receiving the wound he returned to the inn surreptitiously and occupied another room, to wit, room No. 12, as the blood stains on the bedclothing gave evidence. Dr. Bayless testified that he visited him in room 12. In his own room, however, a cartridge clip containing a few cartridges of .44 caliber was found. They sustained an evidentiary value in the case by comparison with the pistols and other cartridges introduced in evidence. Upon motion of counsel for the defendants, the court struck from the record all of the testimony elicited from the owner of the car as to it having disappeared from her possession the night before the crime was committed, in a manner that indicated a theft of the car. Counsel assigned the reception of this testimony although afterwards stricken from the record, as reversible error. Although this testimony had a tendency to connect the defendants with the theft of the automobile, it was clearly admissible. It was rendered admissible as against Montijo and Bailey by their confessions in which they described the red machine driven by Oscar Perry which conveyed them to the scene of the crime. It was in this machine, when en route to the bank, that Bailey was handed by either defendant Perry or Montijo a .45-caliber automatic pistol. The evidence was admissible as against Perry for the reason that it was shown independent and extrinsic to the confession of any one of the defendants that the stolen machine carried him away after he was wounded. His brother was the driver. The fact that the machine had been stolen did not render it inadmissible. Its movements were in obedience to a plan outlined for the commission of the crime, and it was proper that all the evidence or pertinent facts tending to connect the defendants or any of them with its use should have been submitted to the jury. Whether the machine was stolen or not by the defendants was of no great moment; the important question being, did these defendants commit the crime and did the automobile in-

cident tend to connect them with its commission? The rule is too firmly established that evidence tending to connect a defendant with the commission of a crime charged against him is not to be excluded on the ground that it tends to connect him with an offense not included in the charge, to require the citation of a long list of authorities. *People v. Sanders*, 114 Cal. 230, 46 P. 153; *People v. Argentos*, 156 Cal. 720, 106 P. 65; *People v. Clark* (Cal. App.) 233 P. 980. No error would have been committed had the testimony been allowed to stand, and certainly none was committed by the court in expunging it from the case.

[4, 5] The confessions of Montijo and Bailey appear to have been freely and voluntarily made. The trial court so determined, and there is absolutely nothing in the record to raise a doubt as to the correctness of its ruling. The witnesses who gave testimony as to the confessions were examined at great length on their voir dire, and counsel for the defendants were not able to show that any threats, force, or coercive measures were employed or that any inducements or hope of reward were held out by those in authority, or by any other person, to procure said statements or confessions to be made. The court is vested with a wide discretion in passing upon this issue, and its ruling cannot be interfered with in the absence of a showing of abuse. *People v. Loper*, 159 Cal. 6, 112 P. 720, Ann. Cas. 1912B, 1193; *People v. Siemsen*, 153 Cal. 387, 95 P. 863; *People v. Tugwell*, 28 Cal. App. 348, 152 P. 740; *People v. Castello et al.* (Cal. Sup.) 229 P. 855. In resisting the introduction of the confession, Bailey made the claim that he had been imposed upon by the officers, who represented to him that his pal (Perry) had died and in his dying confession had implicated him in the crime. He further said that the officers, in an attempt to prove to him that Perry was dead, took him at 2 o'clock on the morning following the shooting to the Emergency Hospital, where Perry was lying on a bed with his eyes closed and that he presented the appearance of death. He observed him and believed him to be dead. This exhibition, together with the statement that Perry had implicated him, influenced him, according to his testimony, to make the confession offered against him. Bailey was, in fact, taken to Perry's bedside at the hour stated, but the several persons, who were present at all of the times mentioned by Bailey, stated that absolutely no such statements or representations as stated by Bailey were made. Perry was aroused when Bailey was brought into his presence, and a conversation occurred between the officers and Bailey, and the officers and Perry, in turn, in the presence and hearing of Perry. The court properly admitted the confession and in its final charge went to the extent of instructing the jury that it was

its right and duty to determine whether the confession of either Montijo or Bailey was obtained under promise of reward, immunity from punishment, or influenced by promises, duress, violence, force, or fraud, and whether said confessions were freely and voluntarily made, and, if they should find that they were obtained by the employment of any of the methods enumerated, it was the duty of the jury to disregard said confession in its consideration of the case.

[6] Specifications of error Nos. 7, 8, and 9 may be treated together, as they raise the same point and are attacks upon the instructions of the court based upon the construction of section 189 of the Penal Code. That portion of the section which is germane to the point made is as follows:

"All murder which is perpetrated by means of poison * * * or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree; and all other kinds of murders are of the second degree."

The purport of these instructions is that if a human being is killed by any one of several persons jointly engaged at the time of such killing in the perpetration of or an attempt to perpetrate the crime of robbery, whether such killing is intentional or unintentional, or accidental, each and all of such persons so jointly engaged in the perpetration of, or attempt to perpetrate, such crime of robbery, are guilty of murder of the first degree. This is not only the clear meaning and effect of the statute, but it is fortified by a number of the decisions of this court. If a homicide is committed by one of the confederates while engaged in an attempt to perpetrate the crime of robbery in furtherance of a common purpose, the person or persons so engaged, but who did not actually do the killing, are as accountable to the law as though their own hands had intentionally fired the fatal shot or given the fatal blow, and such killing is murder of the first degree. The jury has no option but to return a verdict of murder of the first degree whether the killing was intentionally or accidentally done, and it is proper to so instruct the jury. *People v. Olsen*, 80 Cal. 122, 22 P. 125; *People v. Milton*, 145 Cal. 169, 78 P. 549; *People v. Bostic*, 167 Cal. 754, 141 P. 380; *People v. Raber*, 168 Cal. 316, 143 P. 317; *People v. Witt*, 170 Cal. 104, 148 P. 928; *People v. Hadley*, 175 Cal. 118, 165 P. 442; *People v. Manriquez*, 188 Cal. 602, 206 P. 63, 20 A. L. R. 1441; 13 Cal. Jur. 600.

[7-11] It is urged by the appellants that the court erred in giving the jury any enlightenment whatever on the subject of insanity. None of the instructions is challenged as being incorrect statements of the law, but it is insisted that no instructions

whatever should have been given defining mental unsoundness for the reason that no claim was made that any one of the defendants was insane. It is, perhaps, true that no specific use was made of the word "insanity" by counsel, but five alienists, or psychologists, were called by the defense and gave testimony bearing directly on the mental deficiency of the defendant Montijo. His father was called to the stand to relate the story of his life. He recalled an injury which the defendant had received in his youth upon his head; also his incorrigibility as a youth, which resulted in his commitment to a reformatory; his roving inclinations and occasional nervous seizures to which he was subject, and mental peculiarities and obtuseness were brought into the case by the father's testimony. It was also shown that he had been a user of narcotics, and some reference was made to a blood taint. The experts testified that his intellectual quotient, as gauged by the Binet-Simon test, Leland Stanford, Jr., University Revision, was no higher than that which a normal boy should register at the age of 11 years. But the law does not substitute mental standardization in place of actual age as the sole test of responsibility for the commission of crime. None of the experts claimed that the defendant did not measure up to the law's standard of accountability, which succinctly stated, is: Did he know the nature and quality of the act that he was committing, and, if so, did he know that it was an act forbidden and punishable by law and that it was wrong to commit it? The testimony offered as to the mental status unquestionably furnished a basis for the contention that the defendant by reason of mental unsoundness, superinduced by injury, or caused by disease—acquired or transmitted—or brought about by the use of drugs, rendered him irresponsible, and that he ought not be required to suffer the penalties prescribed as punishments for the violation of the law. Appellant's contention plainly stated, is that the evidence offered on the issue of mental capacity should be considered as a mitigating circumstance and, perhaps, as a complete defense, and it was error for the court to have instructed the jury as to what mental infirmities will relieve an accused of punishment. We know of no decision, and none has been cited, which holds that if a person offers evidence in his own behalf as to his mental infirmity with the object of mitigating his punishment, the court thereby becomes powerless to instruct the jury as to the legal standard by which accountability is to be determined. Insanity is a broad subject and includes many forms of mental disorders and degrees of mental weaknesses, and the kind and degree that will excuse crime is definitely settled by many decisions of this court. So far as accountability to the law is concerned, there

is no middle ground. The verdict of the jury must be guilty of the offense charged, or not guilty by reason of the insanity of the accused, or a plain verdict of not guilty. It is the jury's right and duty to consider and weigh all the facts and circumstances attending the commission of the offense, and from these and such reasons as may appear to it upon a consideration of the whole situation, determine whether or not, in the exercise of its discretion, life imprisonment should be imposed rather than the infliction of the death penalty. As a matter of fact, the right of the jury in the instant case to consider mental weakness as a mitigating circumstance was not infringed in the slightest degree by anything said in the instructions. The instructions throughout dealt with the broad question of responsibility to the law, and not at all with the jury's right to exercise its discretion with reference to any issue in the case. The jury was repeatedly told that if it should entertain a reasonable doubt as to whether the death penalty or life imprisonment should be imposed, it could not, so long as it held such doubt, impose the extreme penalty. The following admonition is a fair example of the many instructions given on this subject:

"If the jury should be in doubt as to the proper penalty to inflict the jury should resolve that doubt in favor of the defendant and fix the lesser penalty, that is, confinement in the state prison for life."

This instruction appears so frequently in the charge as to make it certain that the jury was under no misapprehension as to its duty. It is true that an instruction was given which has its inception in our earlier decisions and which has been carried through the reports, drawing an occasional criticism as to its soundness, by which the jury are told that while the law vests it with a discretion as to whether a defendant shall suffer death or confinement in the state prison for life, this discretion is not an arbitrary one, and is to be employed only when the jury is satisfied that the lighter penalty should be imposed. The precise instruction given in the instant case was considered in the very recent cases of *People v. Casade* (Cal. Sup.) 230 P. 9; *People v. Wolfgang*, 192 Cal. 754, 221 P. 907; and other cases. The objection may be disposed of by a quotation from *People v. Rogers*, 163 Cal. 476, 126 P. 143, carried forward in the *Casade* Case, which is as follows:

"The law of the state thus appears to be thoroughly settled to the effect that the instruction in question is not erroneous."

But if it could be said that there was any vice in the instruction, it was rendered harm-

less in the instant case by the closing paragraph of another instruction, which reads:

"In the exercise of your discretion as to which punishment shall be inflicted, you are entirely free to act according to your own judgment."

Objection, without argument to support it, is made to the inclusion of that portion of section 21 of the Penal Code, which is probably given in a great majority of the criminal cases tried in this state, and which reads as follows:

"* * * All persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity."

The foregoing is a portion of the Code section defining intent, and we are unable to find any valid ground of objection thereto. Objection is also made to the form of the verdict. It is contended that if the jury intended to impose the death penalty, it should have been required to return a verdict expressly declaring such intent. This would be a departure from the settled form of procedure. The jury was repeatedly told that if it should return a simple verdict of guilty of murder of the first degree, such a verdict would carry with it the death penalty, and, if in their judgment any one or all of the defendants should be relieved of the death penalty, a verdict imposing life imprisonment should be returned. We see no merit whatever in appellant's objection to the forms of the verdicts.

[12] Lastly, it is urged that the evidence does not justify the implied finding of the jury that the defendant Perry had arrived at the age of 18 years on the day the murder was committed. Section 190, Penal Code, in part, provides as follows:

"* * * Provided, however, that the death penalty shall not be imposed or inflicted upon any person for murder committed before such person shall have reached the age of eighteen years; provided, further, that the burden of proof as to the age of said person shall be upon the defendant."

Defendant's brother, Oscar Perry, who was shown by convincing evidence to have been particeps criminis with the others in the commission of the crime, testified that Lewis Perry was a few days under the age of 18 at the time the murder was committed. At one stage of the proceedings the matter was referred to a juvenile court to determine the defendant's age and pass upon his fitness for consideration by that court. The court made no finding as to his age, but expressed the opinion that he was over the age of 18 years, and remitted him to the superior court for trial on the ground that his case was not a proper one for that court to pro-

ceed with. At that proceeding the defendant testified that he was born at Dallas, Tex., and was 17 years of age. He claimed that his birthday was February 12. This would have made him eight days under the statutory age. He also admitted that he was committed to the Preston School of Industry from Los Angeles county in the forepart of January, 1923. He admitted that he testified at the proceeding before the juvenile court during the forepart of January, 1923, and made representations to others that his birthday was January 5, 1922, and that he was 17 on the day last above mentioned. According to this statement, made in the superior court sitting as a juvenile court, the defendant was more than a month past 19 years of age at the time the murder was committed. The defendant attempted an explanation as to serious discrepancies concerning his age and said that he had set it forward in order to have the benefit of a jury trial on the charge pending against him, thereby ousting the juvenile court of jurisdiction of his person. His attention being called to the fact that he had not placed his age sufficiently high to bring him within the right to be dealt with in the superior court as an adult, he replied by stating that he understood the law to be the same here as it was in Texas, which provided that a person of 17 years of age was entitled to have his case heard and determined in the superior court. There was then pending in Texas a charge of burglary against the defendant. One witness testified that the defendant had the appearance of being more than 18 years of age. The jury evidently was not impressed with the testimony of either Lewis Perry or his brother, Oscar, as to the question of age. As between the defendant and his brother, it was not made definite as to whether Lewis Perry was born in January, February, or March. Neither do the days of the month agree. All three of the months above mentioned are stated to be his birth months. The defendant was in the presence of the jury during a long trial, and it had ample opportunity to make physical and mental observations of him. His connection with and the part he took in the crime and his demeanor thereafter furnished evidence of his maturity or immaturity, all of which was, no doubt, considered by the jury. On the issue of age, the burden being upon the defendant, the implied finding that he had not sustained the burden which the law casts upon a defendant cannot be disturbed under the evidence.

The order and judgment appealed from in each is hereby affirmed.

We concur: MYERS, C. J.; LAWLOR, J.; RICHARDS, J.; SHENK, J.; WASTE, J.; LENNON, J.

In re MALTMAN'S ESTATE.

TITLE GUARANTEE & TRUST CO. v. RILEY, State Controller, et al.

(L. A. 8257.)

(Supreme Court of California. March 20, 1925.)

1. Perpetuities $\S$ 6(7)—Devise in trust for son and all children during their lives held void as a perpetuity.

Testamentary trust for son and his children, held intended to continue until death of last child born or to be born, and hence void under Civ. Code, $\S$ 715, 716, as to suspension of power of alienation, in view of section 749.

2. Perpetuities $\S$ 6(11)—Power of sale held not to take trust out of statute against perpetuities; "suspension."

Power of trustee to sell and reinvest proceeds of trust res, held not to take it out of statute against perpetuities, in view of Civ. Code, $\S$ 771, providing that "suspension" of all power to alienate, other than to sell and reinvest proceeds to be held upon same trust, is "suspension" within meaning of section 715.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Suspend—Suspension.]

3. Wills $\S$ 81—Trust of entire estate, for benefit of son and daughter equally, which was invalid as to son, held invalid as to daughter.

Devise of entire estate in trust to pay one-half of income to son and all his children for their lives, and one-half to daughter and her child for life, which was invalid as to son as violating statute against perpetuities, held invalid as to daughter also, since to declare trust invalid as to son only would require distribution of one-half to both, and thereby violate testator's intention of equal division.

4. Wills $\S$ 81—Trust violating rule against perpetuities not upheld as to beneficiaries actually in being at time of creation.

Trust violative of rule against perpetuities, in that class of beneficiaries might be increased by members still unborn, will not be upheld as to beneficiaries actually in being at time of creation.

In Bank.

Appeal from Superior Court, Los Angeles County; John Perry Wood, Judge.

Proceeding for the distribution of the estate of John S. Maltman, deceased, in which Ray C. Riley, State Controller, filed objections. From an order decreeing distribution to John W. Maltman and another, the Title Guarantee & Trust Company, executor and trustee, appeals. Affirmed.

John F. Keogh, of Los Angeles, and Frank H. Snyder, of Glendale, for appellant.

U. S. Webb, Atty. Gen., Erwin P. Werner, of Los Angeles, Adrian C. Stanton, of Sacramento, George S. Dennison and D. H. Lau-

bersheimer, both of Los Angeles, and John H. Riordan, of San Francisco, for respondents.

RICHARDS, J. This appeal is from an order and decree of distribution. The decedent, a widower, died testate, leaving surviving him as his only heirs at law two children, his son, John W. Maltman, and his daughter, Teresa Maltman Kennard. His said son at the time of the making of the decedent's will was married and had two children. Subsequent to the execution of his father's will, another child was born to his said son, and he, his wife, and children, were living at the time of the father's death. The daughter of the deceased was also married at the date of the father's will and had one child, a daughter, and the husband, mother, and daughter were alive when the testator died. By the terms of his will he devised his entire estate of which he should die seized to the Title Guarantee & Trust Company of Los Angeles, a corporation—

"to be held by it upon the following trusts and not otherwise, to wit. Said Trustee shall manage and care for all such estate, and collect the income thereof, and is hereby given full power to sell and convey all said estate, or any part thereof, at any time, without any order of court whatsoever, and to reinvest the proceeds. I request that such estate be sold and turned into good interest bearing securities, as soon as the market favors such sales. I make the following bequests as a token of high appreciation of their most kind, devoted and valuable service to me in time of my distress and need. To Dick Sutton of said county and state, one thousand (1000) dollars. To Mrs. Agnes H. Pleasance of said county and state, one thousand (1000) dollars. After paying the expenses of said trust, the up-keep of said estate and said bequests, the trustee shall pay the net balance of the income derived, from time to time, to my said two children share and share alike, so long they shall live; all such payments to be made quarterly, namely, every three months. Upon the death of said Teresa, leaving her husband E. H. Kennard and her daughter, or either of them surviving, then her said share is to be paid quarterly, share and share alike to such husband and daughter, and to the survivor of them, so long as they or either of them shall live. Upon the death of said John leaving a wife and children or any of them surviving, then his said share is to be paid quarterly, share and share alike, to such wife and children and to the survivors and survivor of them, so long as they, or either of them shall live. It is my will that said trust shall cease and terminate as follows, to wit, first on one half of the remainder of said estate; then on the other half of said estate, that is to say, when said Teresa and husband and child shall have died, said trust shall cease and terminate on one half of such estate, and thereupon be distributed according to the laws of the state of California; and so when said John and his wife and all his children shall have died, said trust shall cease and terminate on one half of said estate, meaning the other half if said Teresa, her husband and child shall have

died and said trust had terminated on one half. Meaning and intending that said trust shall wholly terminate on the entire estate when said Teresa and John and their said families shall have died, and that all the remainder of said estate shall be distributed in accordance with the law of inheritance of the state of California. Said trustee shall be the sole judge of what constitutes one half of said estate, and what half shall first be sold or prepared and distributed as above provided. I particularly request and direct that such legatees shall not anticipate their income by any bargain and sale, or pledge to secure advances or loans on same, and that said trustee shall make payment to each one in person, whenever practical, and not to their order. Any attempt to break this my last will and testament or contest any of its provisions shall operate to extinguish all rights and share of my estate, in and to such contestant or contestants, and any and all such contestants shall have no part thereof. I request and direct that my body be cremated and the ashes thereof be deposited in an urn and placed in the Maltman family plot in Rosedale Cemetery, in the City of Los Angeles. I hereby nominate and appoint the said Title Guarantee and Trust Company as executor of this my last will and testament."

[1] The said will of the testator was duly admitted to probate and was duly administered upon up to the time when the estate was practically ready for final settlement and distribution, whereupon the inheritance tax appraiser filed his report and appraisal in said estate, wherein he based his estimate of the amount of inheritance tax upon his contention, as expressed therein, that the trust provided for in the said will was invalid as in violation of the provisions of section 715 of the Civil Code. The final account and petition for distribution of said estate were filed shortly thereafter, and to said account and petition the state controller filed his written objections based upon the same ground as that embraced in the report of the inheritance tax appraiser, and it was stipulated between the parties, through their respective counsel, that the hearing upon the said report of the inheritance tax appraiser be had at the time of the hearing upon the petition for final distribution and of the objections of the state controller thereto. These matters were accordingly heard together, and the decision upon both was embraced in the body of the order and decree of distribution wherein the court adopted the report of the inheritance tax appraiser, sustained the objections of the state controller to the form of the final account and petition for distribution as filed, holding the trust void in toto, and directing that the entire estate, after the payment of the special bequests, be distributed under the laws of succession, one-half to the son, John W. Maltman, and one-half to the daughter, Teresa Maltman Kennard, and that the inheritance taxes be computed upon the basis of such succession. The trust company, both in its

capacity as executor and as trustee under the said will, has appealed from said order and decree of distribution, thus presenting for our determination the question as to whether said will, except as to said special bequests, is void as creating a perpetuity in violation of the provisions of said section of the Civil Code. An examination of the trust provisions of said will as above set forth discloses that a trust is thereby created, by the terms of which one-half of the residue of the testator's estate was to be distributed to the trustee named for the benefit of his daughter, Teresa Maltman Kennard, and her daughter, and the other one-half of said estate was to be distributed to the same trustee for the benefit of his son, John W. Maltman, and his children. We shall consider the latter first in the light of the respondent's contention that a perpetuity was thereby created in contravention of the provisions of section 715 of the Civil Code. The language of this latter provision of said will is not ambiguous or uncertain so as to require resort to other sources than the language of said will itself for its interpretation. In this portion of said will the testator devises one-half of his estate to said trustee upon the trust to manage, conserve, sell, and invest the proceeds of the same in good interest-bearing securities, and to pay the net balance of the income derived therefrom to his said son so long as he should live. The will proceeds:

"Upon the death of said John leaving a wife and children or any of them surviving, then his said share is to be paid quarterly, share and share alike, to such wife and children and to the survivors and survivor of them, so long as they, or either of them shall live * * * and so when said John and his wife and all his children shall have died, said trust shall cease and terminate on one half of said estate, meaning the other half if said Teresa, her husband and child shall have died and said trust had terminated on one half. Meaning and intending that said trust shall wholly terminate on the entire estate when said Teresa and John and their said families shall have died."

Section 715 of the Civil Code provides as follows:

"Except in the single case mentioned in section seven hundred seventy-two, the absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than as follows:

"1. During the continuance of the lives of persons in being at the creation of the limitation or condition; or

"2. For a period not to exceed twenty-five years from the time of the creation of the suspension."

Section 716 of the same Code reads:

"Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power

of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed."

It is not necessary to again indulge in an elaborate review of the history or proper interpretation of these two sections of the Civil Code. That was done at much length and with great learning in the leading case of *Estate of Walkerly*, 108 Cal. 627, 41 P. 772, 49 Am. St. Rep. 97, from the reasoning of which there has been no material departure since its decision 30 years ago. Two particular clauses found in these sections of the Civil Code have been given more exact definition in later cases. One of these is the clause found in both of these sections referring to the "creation" of the limitation, condition, estate, or interest affected by the inhibition of these Code provisions. In *Estate of Whitney*, 176 Cal. 12, 167 P. 399, it was held that the time of the death of the testator whose will contained provisions for the creation of such condition, limitation, estate, or interest was the date fixed by these Code sections for the purpose of determining their validity. Civ. Code, § 749. The court in that case quoted approvingly from *Estate of Steele*, 124 Cal. 533, 537, 57 P. 564. The language of the court in that case to the effect that:

"The statute does not permit us to wait and see whether events may not so transpire that in fact no perpetuity results, but if under the terms of the deed or will creating the trust, when properly construed, the instrument 'by any possibility may suspend' the absolute power of alienation beyond the continuance of lives in being, the instrument, whether a deed or will, is void, and no trust is created nor any estate vested in the trustees."

We thus have also a judicial interpretation of the other clause in said section of the Code, viz. "by any possibility." It is important that each of those particular clauses of these sections of the Civil Code should be borne in mind as we approach the interpretation of the provision of the will of the decedent in so far as it relates to the trust attempted to be created in favor of his son John and his descendants. It is also to be borne in mind that it is a conceded fact in this case that at the date of the execution of his father's said will, and also at the date of his death, John W. Maltman was married; that his wife was living; that he was the father by her of two children at the time said will was executed, and that a third child was born to these parents between that date and the date of the death of the testator, and that at all of these times these parents were capable of begetting and bearing other children. Turning to the provisions of the will having particular reference to the trust proposed to be created for the benefit of John W. Maltman, his wife, and his children, we find therein no limitation nor any apparent attempt to limit the

trust estate to the lives of those in being either at the date of said will or at the date of the death of the testator. The will provides that during the life of the testator's son, John, one half the net income arising from the investment of the substance of his estate by his said trustee shall be paid to his son John, and that:

"Upon the death of said John leaving a wife and children or any of them surviving, then his said share is to be paid quarterly, share and share alike, to such wife and children and to the survivors and survivor of them, so long as they, or either of them shall live."

The will continues:

"And so when said John and his wife and all his children shall have died, said trust shall cease and terminate."

[2] This language in the testator's will is so clear and explicit as to seem to leave no doubt in our minds that, considering the foregoing provisions of said will by themselves, they can be given no other interpretation than that of evincing his intention that the trust created by his said will as to this half of his estate should continue until the death of the last child born or to be born to his son, John, and his said or any wife. If the aid of authority is needed to enforce this conclusion, it is to be found in the decision of this court in *Estate of Van Wyck*, 185 Cal. 49, 196 P. 50, between which and the instant case, in every material respect, no distinction can be drawn. It is, however, the appellant's contention that in determining the meaning to be given to this particular portion of the testator's will, the entire will is to be taken into consideration, with a view to determining the testator's intent in the use of the particular language used in the portion of it under immediate review, and that, if we should hold that as to the portion of said will which purported to create a trust in favor of his daughter, Teresa, and of "her daughter," the testator did not create an estate beyond the lives of those in being, he is not to be held to have intended to do so in the creation of the trust in favor of John and "his children." While it is true that the principle of interpretation of instruments invoked by the appellant is correct in its application to those portions of such instruments in which the language used by the testator is of doubtful meaning, it does not go to the extent of controlling the meaning to be given to those particular provisions of the instrument wherever the language used by the testator in dealing with the immediate subject conveys no doubtful meaning, and hence requires no recourse to other portions of the instrument to determine the interpretation to be given to its plain and unmistakable terms. Aside from this, however, if the interpretation for which the appellant contends should be given to the portion of the testator's said will creating a

trust in favor of his son, John, and "his children," and continuing said trust in force and effect, until the death of his said son, John, and his wife and "all his children," it would have the effect of imputing to the testator the intent of limiting his benefaction to the children of his son, John, in being at the time of the execution of his said will to the exclusion, not only of the child born to his said son after the date of said instrument, but prior to the testator's death, and also to the exclusion of any later children born to him after the decease of his father. The imputation of such an intent does violence to the manifest intent of the testator that his son, John, his wife, and all his children should have an equal share in the benefits to be derived from the execution of said trust so long as any of them should live. Such an interpretation, to use the language of this court in the case of *Estate of Van Wyck*, supra, applied to a precisely similar situation, would be "an unnatural and unreasonable provision, and one contrary to the natural meaning of the language used." Our conclusion therefore is that, as to the provisions in said will which purport to create a trust in favor of John W. Maltman, his wife, and his children, they are obnoxious to the terms of section 715 of the Civil Code, relating to perpetuities and are void. In so holding we have in mind the contention of the appellant herein that the provision in said will empowering the said trustee to sell and convey all of the real estate bequeathed to it in such trust and to reinvest the proceeds in interest-bearing securities would have the effect of relieving such trust from the inhibitions of said section of the Civil Code, but we consider that this contention is fully met by the provisions of section 771 of the Civil Code, which reads as follows:

"The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust, or to sell it and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of section seven hundred and fifteen."

[3] The next question presented for our consideration is that relating to those portions of the testator's will which purport to create a trust affecting the other one-half of his estate in favor of his daughter, Teresa Maltman Kennard, and "her daughter." It will be at once perceived that an entirely different intent is here manifested on the part of said testator. The specific persons for whose benefit this portion of said trust is created are defined. There is no room for a conclusion that the testator in attempting to create this particular portion of said trust intended it to apply to any other person or persons then in being or thereafter to come into being than the two designated beneficiaries thereof, viz. his daughter Teresa, and

"her daughter." The fact that he does not mention the latter by name conveys no reasonable implication that he intended to embrace within the designation "her daughter" other offspring than the one already borne by his said daughter, Teresa, and in being at the date of his will. We would have no hesitancy, therefore, in holding this portion of said trust to be valid, were it not for the difficulty in so doing which springs from our conclusion that the provisions of said will relating to the trust sought to be created in favor of the son of the testator and "his children" are void. This conclusion compels us to a determination of the question as to whether the entire trust must not therefore be held void for the reason that the two portions or provisions thereof are inseparable. Reading the will of the testator as a whole, there can be no doubt that it was his intention thereby to divide his estate and the income thereof equally between his two children, and that an equal one-half thereof should pass through the medium of the trust sought to be created to the offspring of each. But if, as we have held, the trust attempted to be imposed upon the one-half of his said estate for the benefit of his son John and "his children" is for the reasons stated void, and if, for the further reasons stated, the trust sought to be created for the benefit of his daughter, Teresa, and "her daughter" were to be held valid, it is unavoidably apparent that this intent on the part of the testator would be subverted, and this for the reason that, the bequest to the trustee of the one-half of said estate intended for the benefit of John and his children having failed, that portion of the estate would remain undivided, and hence would pass to the heirs of the ancestor under the laws of succession, in which event his natural heirs, John and Teresa, would be entitled to share equally in said undivided portion of their ancestor's estate, by which division thereof upon the distribution of said estate Teresa would receive, not only the benefit, as a cestui que trust, of the one-half thereof devised to the trustee, but would also be entitled to receive one-half of the remaining undivided portion of said estate under the laws of succession. This would have the result of distributing three-fourths of the ancestor's estate directly and indirectly to Teresa, and one-fourth thereof to John, a consequence clearly in violation of the intent of the testator in making said will. We are thus driven to the conclusion that the provisions of said will, in so far as they purport to create a single trust for the management and conduct of the testator's entire estate, sale of its properties, and investment of its funds for the expressed purpose of having his son and daughter have each an equal share in the income thereof during each of their lives, and of having their respective offspring also share equally in the respective portion there-

of held in trust for their parents' benefit respectively, and of having each one-half of his said estate distributed under the law of inheritance upon the eventual termination of said trust, are so far inseparable that the holding of the one portion thereof void, as in violation of the statute against perpetuities, invalidates the entire trust. We are not without authority in arriving at this conclusion. In *Estate of Van Wyck*, supra, in which a much similar situation was presented, this court said:

"The real question presented where a will contains both valid and invalid provisions is whether the two are so parts of a single plan or scheme, or otherwise so dependent one upon the other, that, by avoiding the invalid provisions and allowing the valid to stand, there will result a disposition of the estate so different from what the testator contemplated or so unreasonable that it must be presumed that the testator would not have made the valid provisions if he had been aware of the invalidity of the others. The rule in fact is frequently stated more strongly against allowing the valid provisions to stand than we have just stated it. Thus, in *Estate of Fair*, 132 Cal. 540 [84 Am. St. Rep. 70, 60 Pac. 549], it is said: 'The question whether the valid clauses can stand depends upon whether or not the invalid ones are so interwoven with them that they cannot be eliminated without interfering with and changing the main scheme of the testator. In *Darling v. Rogers*, 22 Wend. (N. Y.) 495, Senator Verplanck correctly stated the rule as follows: "When a will is good in part and bad in part, the part otherwise valid is void if it works such a distribution of the estate as, from the whole testament taken together, was evidently never the design of the testator."
* * * " "

It is clear to our minds in the light of the foregoing authorities that our holding that the portion of the testator's said will purporting to create a trust in an undivided one-half of his estate for the benefit of his son, John, and his children is void as in contravention of the statute against perpetuities, so far destroys the scheme and purpose of the testator in the creation of said trust affecting his entire estate that said trust must be declared invalid in toto, notwithstanding the fact that it might otherwise have been declared valid in so far as its provisions affected the rights of his daughter, Teresa, in the portion of said estate upon which said trust was imposed for her benefit.

[4] The appellant makes the further point that, even though it should be held that said trust is void in whole or part as violative of the statute against perpetuities, it may still be upheld as to the beneficiaries thereof actually in being at the time of the creation of said trust; but this contention will be found to be sufficiently disposed of by what this court has said in *Estate of Van Wyck*, supra, wherein the same contention was urged.

The order and decree appealed from are and each of them is affirmed.

We concur: MYERS, C. J.; SEAWELL, J.; WASTE, J.; LAWLOR, J.; SHENCK, J.; LENNON, J.

71 Cal. App. 204

UNIT CONST. CO. v. FOSS et al.
(Civ. 2888.)

(District Court of Appeal, Third District, California. Feb. 7, 1925. Hearing Denied by Supreme Court April 6, 1925.)

1. Attachment §333—When cause of action on bond to release accrues stated.

Cause of action against sureties on bond to release attachment accrues when, after judgment against defendant in the attachment action, he refuses to redeliver the property on demand, and execution is returned unsatisfied.

2. Attachment §333—Obligation of sureties on bond for release not discharged by offer to redeliver property with mechanics' liens thereon reduced to judgment.

In view of Const. art. 1, § 13, relative to due process, and Code Civ. Proc. § 1186, relative to mechanics' liens, it is no defense to action against sureties on bond for release of real estate from attachment that they offered to return the property, where mechanics' liens thereon, filed after giving of the bond, for work commenced before the attachment, were already reduced to judgment, depriving plaintiff of opportunity to attack their validity.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by the Unit Construction Company against Howard N. Foss and others. From judgment for plaintiff, the named defendant and two others appeal. Affirmed.

Everts, Ewing & Wild and Charles A. Tuttle, all of Fresno, for appellants.

Courtney L. Moore, of San Francisco, for respondent.

FINCH, P. J. The defendants Foss, Craycroft, and Millark prosecute this appeal from the judgment entered herein against all the defendants.

The action was instituted to enforce the obligation of defendants on an undertaking executed by them for the release of an attachment of money and real property in an action prosecuted by plaintiff herein against the Fresno Dehydrated Products Company, the owner of such property. The undertaking recited the seizure of the property by the sheriff under the writ of attachment and provided that, "in consideration of the release from the attachment of the property attached," the sureties "do hereby, jointly and severally, undertake in the sum of \$10,-

000, and promise in case the said plaintiff recover judgment in this said action, the said defendant will on demand redeliver such attached property so released to the proper officer to be applied to the payment of the judgment; and that in default thereof said defendant and sureties will on demand pay to said plaintiff the full value of the property released, not exceeding the amount of said judgment." It is admitted that the value of such property was in excess of \$10,000. January 7, 1922, judgment was entered in the attachment suit against the defendant therein for the sum of \$7,259.32, together with certain additional sums as interest. In the meantime the defendant in the attachment suit had been adjudged a bankrupt, and the aforesaid judgment directed that it "be enforced solely out of the property attached or out of any and all bonds or undertakings given for the possession thereof or for the release thereof."

At the time of the execution of the undertaking there was a building in course of construction upon said real property, and several persons had theretofore performed services and furnished materials in the construction thereof. These persons subsequently duly filed claims of lien, and late prosecuted the same to judgment.

More than six months after the execution of the undertaking, the Fresno Dehydrated Products Company filed its petition in bankruptcy and was thereupon adjudged a bankrupt. January 13, 1922, in the bankruptcy proceedings, the interest of the bankrupt in said real property was duly sold and conveyed to C. A. Tuttle.

January 14, 1922, plaintiff demanded of defendant in the attachment suit that it redeliver to the sheriff the property which had been attached, but the defendant refused. On the same day the plaintiff demanded of the defendants herein that they perform the obligation of their undertaking, but they refused. January 16, 1922, execution was issued and placed in the hands of the sheriff, but the same was returned by him "wholly unsatisfied" on the 27th of January, 1922. February 23, 1922, this action was commenced. March 6, 1922, the defendants filed their demurrer to the complaint. March 27, 1922, they tendered to the plaintiff the amount of money which had been attached and interest thereon, and a deed executed by C. A. Tuttle conveying said real property to plaintiff. The plaintiff refused to accept the property so tendered. At the time of the tender the real property was incumbered by the aforesaid liens, or the judgments recovered thereon, and a lien for taxes. The defendants did not offer to pay any of these liens or to pay plaintiff's costs incurred up to that time in the prosecution of this action. The liens aggregated more than \$6,000.

[1] Respondent contends that the offer to redeliver the property was not a performance of the obligation of the sureties for several reasons: First, that it was too late, being made after suit upon the undertaking had been properly commenced; second, that the tender of the property was not made "to the proper officer to be applied to the payment of the judgment," but to the plaintiff; third, that at the time of the tender the real property was incumbered with the aforesaid liens for labor and materials and the judgments based thereon; fourth, that the defendants did not offer to discharge such liens or to pay the costs incurred by the plaintiff in the prosecution of this action up to the time of the tender. It is not necessary to consider all of these contentions. The plaintiff's cause of action against the sureties accrued immediately upon the refusal of the defendant in the attachment suit to redeliver the property on demand and the return of the execution unsatisfied. *Metrovich v. Jovovich*, 58 Cal. 341, 344; *Gardner v. Donnelly*, 86 Cal. 367, 372, 24 P. 1072; *Brownlee v. Riffenburg*, 95 Cal. 447, 449, 30 P. 587. In view of the conclusion reached upon respondent's third contention, it need not be determined whether the sureties might have discharged their obligation by a proper redelivery of the property after the commencement of this action.

[2] Appellants contend that the judgments upon the liens "related back to the time of the commencement of the building, and * * * were prior liens to the attachment of this plaintiff"; and that therefore "the property was sought to be returned to the plaintiff in exactly the same condition that it was at the date of the attachment." Section 1186 of the Code of Civil Procedure, relating to liens of mechanics and materialmen, provides:

"The liens provided for in this chapter are preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished."

Had the property remained under attachment, it is undoubtedly true that such liens would have taken precedence over the lien of plaintiff's attachment. In that case, however, the plaintiff would have had the right to intervene in any action to enforce such preferred liens and to contest the validity or the amount thereof. Plaintiff's attachment lien ceased upon the release of the property. *Rosenthal v. Perkins*, 123 Cal. 240, 243, 55 P. 804. He thereafter had no standing to appear in the actions wherein the preferred liens were prosecuted to judgment. If he is bound to accept redelivery of the property incumbered with the liens of the judgments entered in such actions, then the security which he obtained by levy of the writ of at-

tachment, and the undertaking for release thereof, has been impaired by suits to which he was not and could not have become a party. Such security is a property right.

"No person shall * * * be deprived of * * * property without due process of law." Const. art. 1, § 13.

"The meaning of this is that no one can be deprived thereof without notice and an opportunity for a hearing before some tribunal authorized to determine the question." *Suckow v. Alderson*, 182 Cal. 247, 249, 187 P. 965.

The judgments entered upon the preferred liens are binding upon the property, and would have remained so if the plaintiff had accepted it when the tender was made. He could have attacked their validity, after acceptance, only upon the limited grounds upon which final judgments may be attacked. Their validity cannot be determined collaterally in a suit upon the undertaking of the sureties. His inability to protect his rights under the attachment against the suits on the preferred liens was brought about by the act of the sureties in procuring the release of the property. The offer to redeliver the property under the circumstances stated is no defense. What the rule would be if the preferred liens had not been reduced to judgment and the plaintiff still had the right to contest them is a question not involved on this appeal.

No case has been discovered in which the precise question presented here is considered. There are, however, cases analogous in principle wherein it is held that conflicting claims to property released from attachment cannot be determined collaterally in a suit upon the undertaking given to secure such release. In *Rosenthal v. Perkins*, 123 Cal. 240, 55 P. 804, the undertaking was to the same effect as that in the instant case. After the release of the attachment, and in less than a month after the levy, the defendant filed his voluntary petition in insolvency, and his property was conveyed to the assignee appointed in that proceeding. The effect thereof under Insolvency Act of 1880, § 17 (Stats. 1880, p. 86), was to "dissolve any attachment made within one month next preceding the commencement of the insolvency proceedings." The court said:

"Defendants contend that the effect of this provision was to dissolve the attachment * * * and render impossible the return of the released property to the attaching officer, and hence to destroy the obligation of their undertaking. * * * It is clear, for reasons which need not be enlarged upon, that if at the time the proceeding in bankruptcy is instituted there is no attachment in force on which the proceeding can operate, if the attachment lien has already been discharged by a bond for that purpose, then the liability of sureties on the bond is not affected by the subsequent bankruptcy of their principal."

In *McCormick v. National Surety Co.*, 134 Cal. 510, 66 P. 741, the plaintiff in the attachment suit involved had procured an attachment to be levied on certain property as the property of the two defendants in that action. The surety company executed an undertaking for the release of the property. The undertaking contained the same provisions as that in the instant case. Judgment in the attachment suit was entered against only one of the defendants therein. In the action against the surety the trial court found that the property attached belonged to the defendant against whom no judgment was recovered. The Supreme Court said:

"The actual ownership of the property attached is no concern of the surety. He can meddle with such property and remove it beyond the reach of the attaching creditor only by undertaking that if the plaintiff recover judgment in the action, it—the identical property attached and released—shall be restored to the attaching officer. Whether it belongs to a third party, or for any reason is not legally subject to the attachment, is a question to be litigated between plaintiff and the adverse claimant, and in no way affects the surety's express covenant to restore."

See, also, *Passow & Sons v. United States F. & G. Co.*, 177 Cal. 31, 38, 170 P. 1124; *Tormey v. Miller*, 31 Cal. App. 469, 472, 160 P. 858, and *S. F. Sulphur Co. v. Aetna Indem. Co.*, 11 Cal. App. 695, 699, 106 P. 111. The question discussed is decisive of the case against the appellants, and there is therefore no need to consider any other contentions made.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

71 Cal. App. 150

PEOPLE v. MILLER. (Cr. 1174.)

(District Court of Appeal, First District, Division 1, California. Feb. 5, 1925.)

1. Burglary $\S$ 10—That person was sleeping in room entered held to establish burglary in first degree.

That person was asleep in room, which accused entered and took therefrom clothes containing property, established burglary in first degree, regardless of lack of proof that accused was armed, or that he committed assault while perpetrating offense.

2. Criminal law $\S$ 829(3, 18)—Refusal to give instruction fully covered by other instructions not error.

In prosecution for burglary, refusal to give instructions as to reasonable doubt, intent, and that accused was not on trial for larceny, fully covered by other instructions, was not error.

3. Criminal law $\S$ 829(3) — Refusal to give statement in instruction already in effect given therein held not error.

In prosecution for burglary, where instruction stated that accused was only being tried for burglary and not for larceny, refusal to give concluding statement that, even if he was guilty of larceny, he could not be convicted of burglary, unless it was proven beyond reasonable doubt, was not error.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

John Miller was convicted of burglary in the first degree, and he appeals. Affirmed.

John Miller, in pro. per.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

KNIGHT, J. The defendant, John Miller, was convicted by a jury of the crime of first degree burglary, and has appealed from the judgment of conviction therein, and from the order denying his motion for a new trial.

The record discloses the following facts: On the night of August 24, 1923, Bert Richter, a locomotive fireman, while sleeping in one of the bedrooms of a lodging house situated on Seventh street, Oakland, was awakened about midnight by the electric light in the hall shining through the doorway leading from said hall into his room. Looking up, he observed the form of a man passing out of his room through said doorway into the hall. He then heard the man proceed up the hall toward the rear of the house to the bathroom. Richter immediately reached out to a chair, which was standing at the head of his bed, to ascertain if his clothes, which he had placed there upon retiring, had been disturbed; finding that his overalls, which contained his watch and other personal belongings had been stolen, he arose from the bed, put on his trousers and stood at the doorway just inside of his room awaiting the return of this person from the bathroom. The defendant, who was a stranger and not a roomer in the house, soon came down the hall from the bathroom, and opening the door to Richter's room quietly was just about to enter, when Richter grabbed him, charged him with the theft, and demanded the return of his (Richter's) watch. The defendant denied having been in the room or having possession of the watch. Richter thereupon took the defendant across the hall, into a room occupied by another locomotive fireman, and in the presence of defendant and the other fireman, again charged defendant with the theft and demanded the return of said watch. Again the defendant denied his guilt or that he had the watch. Richter then told defendant that if the watch was not surrendered he (Richter) would take it away from him; whereupon

defendant produced the watch and handed it to Richter. The latter then asked defendant where the overalls were and defendant replied that they were in the bathroom. Richter then accompanied defendant to the bathroom, where Richter's switch key and the other articles belonging to him were found. Soon afterwards the defendant was turned over to the police, to whom he admitted his guilt, and attempted to explain his conduct upon the ground that he was intoxicated. This latter assertion, however, was disputed by other witnesses. When the defendant was searched at the prison, a railroad watch inspector's card, belonging to Richter, and which had been taken from the overalls, was found in defendant's pocket. No defense was offered at the trial by the defendant.

[1] The first contention made upon the appeal is that there is no evidence to prove that the room burglarized was at the time inhabited or that defendant, while engaged in the perpetration of the crime, committed any assault upon any person or was armed; that therefore there was insufficient evidence upon which to base a verdict of burglary of the first degree. The point is wholly without merit. While there was no evidence to prove that the defendant was armed, or that he committed any assault while perpetrating the crime, it was established, without question, that Richter was asleep in this particular room, when the defendant entered and took therefrom Richter's overalls containing his watch and other belongings.

[2,3] Defendant's second contention is that the court erred in refusing to give three instructions and in modifying a fourth one, proposed by defendant. The refusal to give the instructions in question was justified, however, because the subject-matter thereof was fully covered by other instructions which the court gave. For instance, defendant's proposed instruction No. 28, which was refused (erroneously designated in appellant's brief as No. 26) related to the doctrine of reasonable doubt, in connection with circumstantial evidence. That doctrine was several times alluded to and elaborated upon in the court's charge, particularly as set forth on pages 28, 30, and 31 of the clerk's transcript. Defendant's proposed instruction numbered 38, also refused, set forth that the defendant was charged with burglary, and it concluded with this sentence:

"The crime of larceny is not included in the charge."

The very next instruction, however, No. 39, proposed by defendant, and which the court gave, covered the entire matter. It is as follows:

"The defendant is not on trial for larceny or for any offense other than burglary. Burglary

is the only charge he is required to meet upon this trial, and, unless you are satisfied beyond all reasonable doubt from the evidence in this case that he committed the crime of burglary as charged in this information, you must find him not guilty."

When originally proposed this last instruction contained the additional sentence: "This will be so even though you believe that he has been guilty of larceny," which the court refused to give, and rightly so, because the effect of the sentence stricken out was incorporated in defendant's instruction No. 39 above quoted.

Defendant has not specified in his brief which of the two instructions appearing on page 24 of the clerk's transcript he claims it was error for the court to refuse. The first one relates to the element of intent essential to constitute burglary; the other, to the fact that defendant was not on trial for larceny. We have examined both instructions, however, and find that each was properly refused. The matter of intent was abundantly covered by the court in its charge, and, as already pointed out, the proposition that the defendant was not on trial for, nor answerable to, the charge of larceny, was made perfectly clear.

The record is free from error, and therefore the judgment and order appealed from are affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

71 Cal. App. 129

In re CHAPELLE.

(District Court of Appeal, Second District, Division 2, California. Feb. 2, 1925.)

1. Attorney and client ☞7—Courts have inherent power to determine what persons shall be admitted to bar.

Courts have inherent power to determine what persons shall be admitted to the bar.

2. Constitutional law ☞56—Legislature may prescribe reasonable rules and regulations for admissions to the bar.

Legislature may prescribe reasonable rules and regulations for admission to the bar, so long as such regulations do not deprive judicial branch of its powers to prescribe additional conditions under which applicants shall be admitted, nor take from courts right and duty of actually making orders admitting them.

3. Attorney and client ☞1—Constitutional law ☞56—Statutes held to constitute proper exercise of control by Legislature on admissions to the bar and not invasive of province of courts.

Code Civ. Proc. §§ 276, 276a, 277, relating to board of bar examiners and prescribing conditions for admissions to the bar, held to constitute proper exercise of control by Legislature, and not to invade province of court;

and hence applicant could not be admitted without submitting himself to state board of bar examiners for examination.

In the matter of the application of Albert Chapelle for admission to the bar without examination. Application denied.

Albert Chapelle, Milton M. Cohen, W. H. Dehm, and Paul Schenck, all of Los Angeles, for applicant.

Lawrence L. Larrabee and G. R. Crump, both of Los Angeles, for respondent Los Angeles County Bar Association.

John E. Biby, of Los Angeles, for respondent State Board of Bar Examiners.

WORKS, J. Applicant petitions for admission to the bar. He has never been admitted to the bar in any jurisdiction. His application shows that he has engaged in the study of the law for 15 years in Michigan, in Illinois, and in this state, and that he has read certain specified text-books upon various branches of the law. He applies for an admission without examination as to his qualifications and presents certificates from trial judges and lawyers of this state to the effect that he is possessed of the learning in the law necessary to qualify him for admission. The certificates presented by the lawyers further show that they find him qualified after having carefully and diligently examined him as to his attainments.

Petitioner contends that this court enjoys the inherent power to admit him without examination. He also asserts that this inherent power is so firmly, completely, and irrevocably fixed that it is not subject to regulation by the Legislature. He says that the matter of the admission of persons to the bar is so much a matter of judicial cognizance and is so far a matter for judicial determination that for the Legislature to attempt to regulate it would be for the legislative branch of government to throw down that barrier which the Constitutions of this country, including our own state Constitution, have erected between that branch and the judicial branch. As a corollary to this assertion, he makes the specific contention that the enactment of the Legislature providing for a state board of bar examiners and prescribing its functions is unconstitutional and void. This enactment is incorporated in various sections of the Code of Civil Procedure, which, so far as they are pertinent to the inquiry made necessary by petitioner's position, read as follows:

"Sec. 276. Every applicant for admission * * * must present to the district court of appeal * * * satisfactory proof that for at least three years he has diligently and in good faith studied law in such manner, upon such subjects and under such conditions as the Supreme Court or the board of bar examiners shall have prescribed. Before being admitted he must produce a certificate showing that he has satisfactorily passed an examina-

tion conducted by the board of bar examiners. * * *

"Sec. 276a. The Supreme Court is empowered to appoint three competent attorneys to examine applicants for admission as attorneys and counselors at law. Such persons shall constitute the board of bar examiners. The said board shall hold examinations for admission to the bar of applicants who have regularly filed their applications. * * * Said board shall issue a certificate to each of said applicants who shall satisfactorily pass such examination. * * * Nothing herein shall be construed as preventing the district courts of appeal from further examining any applicant where deemed proper. * * *

"Sec. 277. Upon presentation to it of the evidence required by section two hundred seventy-six, any District Court of Appeal shall admit the applicant as an attorney and counselor at law in all the courts of this state, and shall direct an order to be entered to that effect upon its records, and that a certificate of such admission be given to him by the clerk of the court, which certificate shall be his license. * * *

[1,2] The courts undoubtedly enjoy the inherent power to determine what persons shall be admitted to the bar (6 C. J. 571), but if we concede that such questions may be determined without the taking of evidence by the courts upon which to base conclusions reached, a point which we do not decide, we are yet left with the query whether the statute concerning the board of bar examiners is constitutional. Notwithstanding the inherent power of the courts to admit applicants for licenses to practice law, "it has been generally conceded that the Legislature may, in the exercise of the police power, prescribe reasonable rules and regulations for admissions to the bar which will be followed by the courts." 6 C. J. 572. See, also, *Vernon County Bar Ass'n v. McKibbin*, 153 Wis. 350, 141 N. W. 283; *In re Bruen*, 102 Wash. 472, 172 P. 1152; *Keeley v. Evans* (D. C.) 271 F. 520; *In re Ellis*, 118 Wash. 484, 203 P. 957; *In re Crum*, 103 Or. 296, 204 P. 948. "The manner, terms, and conditions of their [attorneys'] admission to practice, * * * as well as their powers, duties and privileges, are proper subjects of legislative control to the same extent and subject to the same limitations as in the case of any other profession or business that is created or regulated by statute." *Ex parte Yale*, 24 Cal. 241, 85 Am. Dec. 62. The only restraints upon the exercise of this power by the Legislature are that the regulations prescribed by that branch of the government shall be reasonable and shall not deprive the judicial branch of its power to prescribe additional conditions under which applicants shall be admitted, nor take from the courts the right and duty of actually making orders admitting them. 6 C. J. 572; *In re Platz*, 42 Utah, 439, 132 P. 390; *In re Bruen*, supra. In some jurisdictions it has been determined, it is true, that the power to regulate the ma-

chinery governing admissions to the bar is strictly judicial and that the legislative branch cannot be concerned with it (see 6 C. J. 572), but in our opinion such a view is consonant neither with reason nor with the weight of authority.

[3] Do the sections of the Code of Civil Procedure relating to the board of bar examiners exhibit a proper exercise of the control which the Legislature may justly impose upon the matter of admissions to the bar? We think they do. Bar examiners, or law examiners, as they are termed in some states, have been provided for in many jurisdictions as aids to the courts in the discharge of the duty of ordering admissions to the bar. These bodies are so helpful to the courts, and the laws concerning them trench so little upon the rightful exercise of the judicial power to admit, that the new instrumentality practically everywhere has been put into operation without apparent thought as to an unconstitutionality upon the grounds suggested by the present applicant. The examining bodies have found recognition as effective aids in the better discharge of an onerous duty in *Musgrave's Case*, 216 Pa. 598, 66 A. 84; *In re New York Law School*, 190 N. Y. 215, 83 N. E. 17; *Mitchell v. State Board of Law Examiners*, 155 Mich. 452, 119 N. W. 587; *In re Alexander*, 167 Mich. 495, 133 N. W. 491; *Ex parte Grier* (S. C.), 80 S. E. 705; *In re Bergeron*, 220 Mass. 472, 107 N. E. 1007, Ann. Cas. 1917A, 549; *In re Bowers*, 137 Tenn. 189, 194 S. W. 1093; *In re Bowers*, 137 Tenn. 193, 192 S. W. 919; *In re Bowers*, 138 Tenn. 662, 200 S. W. 821; *In re Adkins*, 83 W. Va. 673, 98 S. E. 888; *In re Frank*, 293 Ill. 263, 127 N. E. 640; *In re Ellis*, supra. So many cases—and there are others of a similar character—yielding tacit assent to the constitutionality of the laws creating such bodies, give some weight to the view that the present assault upon the California law on the subject is without merit. This condition is of course far from controlling, but we are not without some authority directly bearing upon the point. In an interesting case which involved the constitutionality of a statute providing for "law examiners," the Supreme Court of Washington determined that parts of the law should stand, but that other parts of it must fall. The court said, in part:

"The courts are jealous of their own prerogatives and, at the same time, studiously careful and sedulously determined that neither the executive nor legislative department shall usurp the powers of the other, or of the courts. Now, it is evident that, under our Constitution, this board may exercise such delegated legislative powers as have been granted to it, which are the examination of applicants for admission to the bar and the prescribing of certain rules; and they are competent to exercise the administrative powers conferred upon them

of investigating the conduct of attorneys who have been admitted, to ascertain whether or not they should be permitted to continue to practice their profession, in order that the mischiefs sought to be remedied by the legislature may be remedied and prevented, and may initiate complaints in such cases and hear the evidence, and make reports and findings thereon. But the board is not a court and cannot exercise the functions of a court, except the limited function of passing upon evidence received by them and reporting it. They can make no order striking the name of an attorney from the rolls or disbarring him from practice." *In re Bruen*, supra.

If there were not authority upon the subject, we should not hesitate to declare constitutional our statute creating and providing for the functions of the state board of bar examiners. The law appears to us to exhibit a proper legislative regulation of the machinery for admissions to the bar. In our opinion it does not invade the judicial realm. The applicant cannot therefore be admitted to the bar without first submitting himself to the board for examination.

Petition denied.

We concur: FINLAYSON, P. J.; CRAIG, J.

71 Cal. App. 295

EHRHART v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 5141.)

(District Court of Appeal, First District, Division 1, California. Feb. 16, 1925.)

1. Master and servant §403 — Burden on claimant to show compensable injury.

Burden is on claimant, under Workmen's Compensation Law, to show injury occurred in course and arose out of employment.

2. Master and servant §405(4)—Finding of injury by frolicking sustained.

Evidence held to sustain finding of Industrial Accident Commission that injuries to petitioner received from passing automobile, when he was near his employer's truck which he drove, did not arise out of his employment, but resulted from frolicking with a companion.

Proceeding under the Workmen's Compensation Act (St. 1913, p. 279), by Vernon P. Ehrhart, claimant, by his guardian ad litem, T. J. Ehrhart, opposed by the Stockton Delivery Company, employer, and the Columbia Casualty Company, as insurance carrier. The Industrial Accident Commission entered an order denying compensation, and claimant applies for certiorari to review such order. Affirmed.

Nutter, Hancock & Rutherford, of Stockton, for petitioner.

Warren H. Pillsbury, of San Francisco, for Respondent Industrial Accident Commission.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for other respondents.

TYLER, P. J. Certiorari to review the action of the Industrial Accident Commission in denying benefits to V. P. Ehrhart, an employee of the respondent Stockton Delivery Company. The other respondent, Columbia Casualty Company, is interested by reason of being the insurance carrier for its correspondent.

Petitioner is a minor, and has instituted the proceedings by his guardian ad litem for the purpose of having determined the lawfulness of the original award made in favor of respondent denying compensation to the petitioner on account of an accident resulting in a compound fracture of both bones of the left leg, sustained on April 11, 1924, at Stockton, Cal., while petitioner was in the employ of respondent Stockton Delivery Company.

The petition shows that the respondent employer maintains a delivery service in the city of Stockton, and that petitioner at the time of the accident was employed by it as a truck driver, and was about to depart from the place of business of a certain grocery firm, one of the patrons of the company, with a truckload of groceries for delivery to the customers of that firm. While going to the front of his truck for the purpose of cranking the same, so it is alleged, petitioner was struck and injured by a passing automobile belonging to a third party. Thereafter he duly filed his application with the Industrial Accident Commission. Answer was made by defendants, respondents herein, denying that the injury arose out of the course of the employment or was proximately caused thereby, and they set up as a further defense that it was proximately caused by "skylarking" of said applicant. The application came on for hearing and was submitted. On the 19th day of September, 1924, the Commission made its award, finding that the applicant received the injuries while in the employ of defendant employer, but that the evidence was insufficient to establish as a fact that the injuries arose out of or were proximately caused by the employment.

In accordance with the findings the award was that applicant take nothing by reason of his claim.

A petition for rehearing was filed upon the ground that the evidence did not justify the findings; that the findings of fact did not support the order or award, in that there were no findings of fact upon the subject of the course of employment or proximate causation, the findings being merely conclusions of law; that the Commission acted without or in excess of its powers in making the award, there being no evidence whatever upon which to base the same. The petition was denied.

It is here claimed that the Commission acted without and in excess of its powers; that its order is unreasonable; and that the find-

ings of fact are not supported by the evidence.

[1,2] There was a sharp conflict therein before the Commission as to the manner in which the accident occurred. Petitioner testified that just before the happening of the same he had been fooling and scuffling with a friend, and that as he left the sidewalk to crank his car he had thrown a piece of paper at him, but that at the time of the accident he was not skylarking. He claimed that he approached his auto truck at his customary speed, and while doing so he was struck by a passing automobile. It is conceded that if such were the fact applicant would be entitled to compensation. The insurance company contended that the applicant had been frolicking with a companion and had thrown a piece of paper at him, whereupon the latter undertook to chase him, that applicant then ran from the sidewalk out into the street and was struck by the passing car, causing the injuries complained of. It is admitted by applicant that just before the accident he had been fooling and scuffling with his companion, and that he had thrown a piece of paper at him, but denied that he was running to escape from him, and asserted that he was hurrying to crank his car in order to proceed with his deliveries.

Upon this question there is a decided conflict in the testimony. The driver of the passing car which struck applicant testified that both boys ran out together very suddenly against his car as he was passing, and that at the time he was under the impression that he had struck them both. He further testified that when he took petitioner to the hospital he admitted to him that boys were chasing him. The employer of petitioner also testified that in making inquiry of the boys immediately after the accident for the purpose of ascertaining the cause of the injury, and making a report to the Industrial Accident Commission and the insurance company, petitioner admitted to him that his companion started to chase him and he ran out into the street to escape. The testimony of police officers was to the same effect. The Commission therefore had ample evidence before it to sustain its finding that the injury did not arise out of the employment, but was due to skylarking. *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, 158 P. 212, L. R. A. 1916F, 1164. The burden of proof was upon the applicant to prove to the satisfaction of the Commission that the injury occurred in the course of and arose out of the employment. *Eastman v. Ind. Acc. Comm.*, 186 Cal. 593, 200 P. 17. This burden he did not sustain. On the contrary, respondents alleged and proved that the injuries were due to skylarking, and that they did not therefore arise out of the employment.

The award is affirmed.

We concur: ST. SURE, J.; KNIGHT, J.

71 Cal. App. 155

KEOWN v. TRUDO. (Civ. 4602.)

(District Court of Appeal, Second District, Division 2, California. Feb. 5, 1925.)

1. Motions $\hookrightarrow$ 21—Notice of motion, not specifying grounds, held insufficient.

Under Code Civ. Proc. § 1010, notice of motion which did not specify grounds upon which it was to be made *held* insufficient.

2. Judgment $\hookrightarrow$ 153(2)—Motion to set aside default, not made within six months after entry thereof, too late.

Under Code Civ. Proc. § 473, failure to file notice of motion or make motion to set aside default within six months after entry thereof, as positively required by statute, *held* to render motion too late.

3. Appeal and error $\hookrightarrow$ 339(2)—Attempt to present question of ruling on demurrer over three years after judgment held abortive.

Where demurrer to complaint was sustained in November, 1919, notice of appeal filed in June, 1923, attempting to question ruling on demurrer and jurisdiction to enter judgment pending appeal from order on demurrer *held* abortive, in view of Code Civ. Proc. § 939, terminating right of appeal 60 days after entry of judgment.

4. Costs $\hookrightarrow$ 263—Fine for prosecuting frivolous appeal imposed.

Where appellant, attorney at law, interposed frivolous appeal, it appearing that he had told judge that case would take 10 years to try and action had survived 7 years, fine of \$250 was authorized.

Appeal from Superior Court, Los Angeles County; John W. Summerfield, Judge.

Action by James A. Keown against Mary E. Trudo, alias Mary E. Keown. From an order refusing to set aside default judgment entered against him, plaintiff appeals. Affirmed.

James E. Keown, in pro. per.

W. H. Dehm, of Los Angeles, for respondent.

WORKS, J. This is an appeal from an order refusing to set aside a default and also from the judgment entered pursuant to such default.

[1] The default arose by reason of the failure of appellant to file a third amended complaint within the time allowed by the trial court for such filing, after demurrer was sustained to the second amended complaint. The order sustaining the demurrer was entered April 14, 1919, and appellant was thereupon and on the same day allowed 15 days within which to amend. No amended pleading having been filed by him, an order to enter his default for failure to amend within time was filed November 12, 1919, 6½ months after the expiration of the

time within which he was permitted to amend under the order of the court made in that behalf. On April 9, 1923, 3 years and 5 months after the entry of the default, appellant filed his notice of motion to set it aside. The notice specified no grounds upon which the motion was to be made and was therefore insufficient (Code Civ. Proc. § 1010); but, as this point is not pressed by respondent, we shall dispose of the appeal from the order refusing to set aside the default upon other considerations. The grounds upon which appellant sought to set aside the default are indicated in an affidavit filed with his notice of motion to set it aside and are elaborated in his brief on appeal. It is averred in the affidavit that appellant was not present in court, either in person or by counsel, at the hearing on the demurrer to the second amended complaint; that he was "absent in the East" at the time, and that, "when notice of the action on the demurrer reached the plaintiff in Massachusetts, it was too late to amend and have his amended complaint filed even if he wished to do so"; that he prosecuted an appeal from the order sustaining the demurrer, but that in his absence, and in the absence of counsel for him, the appeal was dismissed on the ground, as he is informed and believes, that the appeal was premature, no judgment having been entered on the ruling on demurrer; that he "thereafter had no knowledge, actual or constructive, of any action being taken in the case until on or about November 9, 1922, which was the first day he had been in California since the first hearing in the case more than three years previously"; that on that day "he discovered for the first time that the case had been dismissed without notice or opportunity to be heard"; that "no notice of the dismissal or notice of the motion to dismiss has ever reached the plaintiff directly or indirectly until November 9, 1922, and he believes that none was given or sent by the defendant or her attorney, and he is informed and believes that the record discloses none being given, sent or received"; that "the matter contained in the complaint is of the utmost importance and the property therein mentioned represents the plaintiff's entire life savings"; that he "is practically destitute of money or property"; that he has at all times intended to prosecute the action in good faith, and that he believes he has a "good" cause of action; that "the defendant is neglecting and wasting the property" and has failed to pay certain taxes upon it which are delinquent; that while appellant "concedes that more than six months has elapsed between the judgment of dismissal, taken without notice or opportunity to be heard, he maintains that section 473 of the Code of Civil Pro-

cedure does not apply to this matter, or if it does it should be construed as commencing to run from the time he had actual knowledge of the said dismissal"; and that "six months has not elapsed since he discovered November 9, 1923[2], the action of the court taken in the case as aforesaid, and the reason for not moving sooner after the discovery was because of poverty caused by the misconduct of the defendant and her agent and servants as set up in the complaint and continued to greatly accentuate to the present time and his inability to maintain himself or remain in California because of the aforesaid poverty." The affidavit was made on April 9, 1923.

[2] The substance of appellant's affidavit, stating, as it does, both matter of fact and matter of argument, is set forth so fully for the reason that the document carries within itself ample and apparent refutation of appellant's contentions. Passing by, however, the manifest inaccuracies and contradictions of the paper without further comment, we must also say that the motion presented by appellant to the trial court was not within the terms of section 473 of the Code of Civil Procedure, as the notice of motion was not filed, nor was the motion made, within six months after the entry of the default, as positively required by that enactment. It is also to be observed that if the motion can be viewed as having been made upon some other ground than those allowed by section 473, a point which we are far from deciding, it came too late. *Smith v. Jones*, 174 Cal. 513, 163 P. 890; *Wheelock v. Superior Court* (Cal. App.) 227 P. 931. We find nothing to aid appellant in *Consolidated Const. Co. v. Pacific Elec. Ry. Co.*, 184 Cal. 244, 193 P. 238.

[3] Upon the appeal from the judgment appellant attempts to present the question whether the demurrer to the second amended complaint was properly sustained, but that branch of the appeal is abortive. The judgment was entered November 17, 1919. The notice of appeal was filed June 7, 1923.

No right of appeal from the judgment existed after the expiration of the 60 days following its entry. Code Civ. Proc. § 939.

As stated in the affidavit of appellant, the substance of which is above set forth, he appealed long ago from the order sustaining the demurrer to his second amended complaint. The appeal was dismissed on the ground that no appeal lies from such an order. The judgment from which the present appeal is prosecuted was entered after the filing of the notice of appeal from the order on demurrer and before that appeal was dismissed. It is now contended that the trial court had no jurisdiction to enter judgment pending the appeal from the order on demurrer. For the reasons stated in the last preceding paragraph, the point cannot be considered.

[4] The fact that the present appeal is futile cannot be laid, altogether, to the ignorance of appellant. He is an attorney at law. Also, as shown by an affidavit in the record, he once wrote a letter to respondent's counsel in which he said concerning the present litigation:

"Nearly two years ago I told a Mass. judge that this case would take ten years. I have not been at it quite two as yet."

Appellant does not deny the writing of this letter. Under all the circumstances shown by the record, a fine should be imposed upon appellant for prosecuting a frivolous appeal. Under that infliction he may not be unduly exuberant in his joy over the fact that the action, his own child, has survived nearly seven years—for the complaint was filed on July 22, 1918—even if it has not lived out its allotted span of ten years.

Judgment and order affirmed. Appellant is fined \$250 for the prosecution of a frivolous appeal.

We concur: FINLAYSON, P. J.;
CRAIG, J.

71 Cal. App. 298

**ARNOLD et al. v. SUPERIOR COURT IN
AND FOR THE CITY AND COUNTY
OF SAN FRANCISCO et al.**
(Civ. 5054.)

(District Court of Appeal, First District, Division 2, California. Feb. 16, 1925.)

New trial  165—Order sustaining motion to amend order granting new trial held void as being beyond trial court's jurisdiction.

In view of Code Civ. Proc. § 473, order sustaining motion to amend order granting new trial held void as being beyond trial court's jurisdiction, where the order granting new trial was regular, and notice of motion to set it aside was not served on adverse party, and movant did not produce any evidence establishing any infirmity in order granting new trial.

Writ of Review to Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Application for certiorari by Max Arnold and another, directed against the Superior Court in and for the City and County of San Francisco and others, to review an order of respondent court. Order annulled.

Samuel Hamburg and G. C. Ringole, both of San Francisco, for petitioners.

Rudolph J. Scholz, of San Francisco, for respondents.

STURTEVANT, J. This is an application for a writ of review. An understanding of the application requires a consideration of the following facts: M. E. Geary, as plaintiff, commenced an action against Chris Stafford to obtain the possession of a certain automobile. When he commenced his action the plaintiff executed an affidavit and undertaking, and, together with P. G. Jacobus, Jr., and Gus C. Ringole, as sureties, executed an undertaking and caused the sheriff to take into his possession the said automobile. The defendant Chris Stafford appeared and answered and at the same time filed a cross-complaint. In the cross-complaint Stafford set forth that on the 7th day of April, 1923, G. B. Skinner was in the lawful possession of the automobile and requested Stafford to make alterations and repairs, that he did so, and that the cost of the alterations and repairs was \$849.51, and that at the time of the commencement of the action he held possession of the automobile to secure his lien for the sum mentioned. He also pleaded that he did said work for M. E. Geary, G. B. Skinner, Max Arnold, and Richard Roe. He also pleaded a stated account. The cross-complaint was answered by M. E. Geary, G. B. Skinner, Max Arnold, and Richard Roe. The answer purported to deny each of the allegations of the cross-complaint.

A trial was had by the court sitting without a jury. The trial court made findings in

favor of Stafford sustaining his lien. It also found that Max Arnold and G. C. Ringole were the owners of the automobile, that the alterations and repairs were made for them, and that Skinner acted as the agent of the owners. Thereupon the trial court directed judgment in favor of Stafford and against Arnold and Ringole. The attorney for Stafford prepared a judgment accordingly, but proceeded to add to what the court had ordered. Among other things, he added that the record showed the giving of the undertaking above mentioned, that Jacobus and Ringole signed the same as sureties, and that unless the mechanic's lien were fully satisfied that Stafford should have judgment against Jacobus and Ringole for the amount of the lien found by the court to be \$638.90. Thereafter M. E. Geary, G. B. Skinner, Max Arnold, and Richard Roe served a notice of intention to move for a new trial. Thereafter they served a notice that their motion for a new trial would be made on the 18th day of April, 1924. Thereafter said motion was presented to the court, and some days later, May 13, 1924, the judge of the trial court signed an order which was worded as follows:

"The motion for a new trial in the above-entitled cause having been duly made, argued, and submitted, and the court being fully advised, it is hereby ordered that the said motion be, and the same is hereby, granted upon the statutory grounds and a new trial of the above-entitled cause and the whole thereof is hereby ordered."

Thereafter Stafford's attorney did, on June 17, 1924, sign and file a notice that on the 27th day of June, 1924, he "would move the court to set aside the order granting a new trial." The notice recited that the motion would be made upon the ground that no proper notice of intention to move for a new trial was served upon him and that no notice of intention to move for a new trial or motion for a new trial had been served by Jacobus. The record does not show whether that notice was served. The record does not show that the notice was supported by any affidavit or any other showing whatsoever. Neither does the record show whether said motion was ever made. However, the record contains another notice of motion dated September 26, 1924, which gives notice of the making of a similar motion in these words:

"Said motion will be made upon these further grounds, which grounds were not noted in the notice of motion dated June 17, 1924, in the above-entitled matter, that the order granting a new trial heretofore made and dated the — day of —, 1924, was signed by the court through an inadvertence and that the said court was not at the time fully advised of the contents of said order."

The record does not show that said notice of motion was ever served except a memoran-

dum "Served September 26, 1924, R. J. Scholz," who at that time was attorney for the moving party. The record does not show that said motion was supported by any affidavit or other paper or record of any kind or nature. Thereafter an order was presented to the trial court by Stafford's attorney and appears to have been signed on the 6th day of October, 1924. It recites,

"The motion of defendant and cross-complainant Chris Stafford coming on regularly for hearing, and the matter being duly argued in open court, and it appearing to the court that the order heretofore made, granting a new trial, and dated the 13th day of May, 1924, was inadvertently, improvidently made, and that the court was not fully advised of the contents of said order, it is hereby ordered, adjudged and decreed that the order granting a new trial heretofore made and dated the 13th day of May, 1924, is hereby vacated, set aside, and made of no avail whatsoever, and that the judgment heretofore rendered is in full force and effect, excepting as to P. G. Jacobus, Jr., and G. C. Ringole, sureties in the above-entitled cause and as to them said judgment is vacated and set aside."

Soon after the order last mentioned was signed, the petitioners applied to this court for the writ of review, hereinabove referred to, alleging that the respondent court had exceeded its jurisdiction in entering the purported order dated October 6, 1924.

In the case of *United Railroads v. Superior Court*, 170 Cal. 755, 151 P. 129, 132, Ann. Cas. 1916E, 199, at page 760, the court said:

"Nothing is more firmly settled in this state than the doctrine that the superior court may not revoke, modify, or otherwise disturb its judgments and orders regularly made in pursuance of plain statutory provision, where the statute prescribes the method by which such judgments and orders may be reviewed, except as authorized by statute. [Citing cases.]"

One method provided by statute for reviewing its own orders and the only one which is possibly applicable in the present case is contained in section 473 of the Code of Civil Procedure. In the case of *Scamman v. Bonsett*, 118 Cal. 93, 97, 50 P. 272, 274, 62 Am. St. Rep. 226, the court said:

"Any error or defect in a record occurring through acts of omission or commission of the clerk in entering or failing to properly enter of record the judgment or proceedings of the court—in short, what may be termed clerical misprisions—may, the record affording the evidence thereof, be corrected at any time by the court upon its own motion, or on motion of an interested party either with or without notice. Where, however, an inspection of the record does not show the error, and resort must be had to evidence aliunde, courts will require notice to be given of a motion to amend a judgment to the parties to be affected thereby, and a motion for the amendment of a judgment in

such last-mentioned case must, under section 473 of the Code of Civil Procedure, be made within six months, except in cases where personal service of summons has not been had, in which cases the court may grant relief within one year after the entry of judgment. *People v. Greene*, 74 Cal. 400, 5 Am. St. Rep. 448; *Hegeler v. Henckell*, 27 Cal. 495; *Bostwick v. McEvoy*, 62 Cal. 502; *Wharton v. Harlan*, 68 Cal. 422."

Glancing back over the record before us, it is patent that the order granting the motion for a new trial was entirely regular and proper on its face. Without notice to the adverse parties, Stafford moved to set aside the order granting a new trial, and did not produce any evidence showing any infirmity in the order granting a new trial. Under these circumstances the trial court had no jurisdiction to grant Stafford's motion in whole or in part.

It follows that the order of the trial court dated October 6, 1924, and which purported to amend the order granting a new trial, was void, and the said order dated October 6, 1924, is therefore annulled.

We concur: LANGDON, P. J.; NOURSE, J.

71 Cal. App. 192

KINNEY v. KINNEY (GROSS et al., Interveners). (Civ. 5095.)

(District Court of Appeal, First District, Division 2, California. Feb. 6, 1925.)

Evidence 429—Testimony of grantor that he never acquired title held admissible in suit by third parties claiming title.

Where husband deeded his property to his wife, and thereafter husband's brothers and sisters claimed an undivided portion of such property as heirs of their mother, *held* that husband, notwithstanding he was grantor of property, could testify that deed of property from the mother to himself was never delivered during his mother's lifetime, thus showing that he was never vested with absolute title.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by George F. Kinney against Susan Jane Kinney, in which Jane A. Gross and others intervened. From a judgment against them, interveners appeal. Reversed.

Harry I. Stafford and W. F. Stafford, both of San Francisco, for appellants.

Henry B. Lister, of San Francisco, for plaintiff respondent.

Wm. T. Eckhoff, of San Francisco, for defendant respondent.

LANGDON, P. J. This is an appeal by the interveners from a judgment against them. The plaintiff and defendant are husband and wife, between whom divorce pro-

ceedings were pending at the time of the trial of this action. The plaintiff, George F. Kinney, commenced an action against the defendant, Susan Jane Kinney, alleging that on December 7, 1920, he had deeded to her certain real property in the city and county of San Francisco, with the understanding that the said deed should not be recorded nor become operative unless plaintiff died or became seriously ill, and with the further understanding that said deed should be kept in a tin box in the home of plaintiff and defendant and accessible to both parties, and that plaintiff might destroy said deed at any time if he so desired; that said deed remained in said box as agreed between the parties until July 28, 1922, when the defendant abandoned and deserted the plaintiff, and in violation of said agreement between them caused said deed to be duly recorded. It was prayed that said deed be declared void, and that the title to said property be declared vested in plaintiff.

Defendant answered and denied that any agreement, as alleged, was entered into between the parties, and asserted that the property had been deeded to her by her husband as a gift, without any conditions or limitations whatsoever.

The interveners and appellants, sisters and brothers of plaintiff, then entered upon the scene with a complaint in intervention, setting forth that the real property was owned by their mother, Caroline Kinney, at the date of her death, March 18, 1919; that she died intestate, leaving interveners and plaintiff, George F. Kinney, as her only heirs at law, each of whom became the owner of an undivided one-fifth interest in said property; that shortly after the death of their said mother, Caroline Kinney, George F. Kinney caused to be recorded a deed of gift from Caroline Kinney to himself, conveying this property; that said deed so recorded had never been delivered to George F. Kinney by his said mother and was void therefore, and of no effect. That thereafter George F. Kinney executed a deed to defendant Susan Jane Kinney, purporting to convey said real property to her. Interveners pray that they each be adjudged the owner of an undivided one-fifth interest in said real property.

George F. Kinney failed to answer the complaint in intervention, and his default was entered. The trial court found against him upon the issue raised between himself and the defendant with reference to the limitation upon the deed given to her, and, as the evidence upon this question was conflicting, we are not concerned with that issue. The interveners, in attempting to prove their case, called George F. Kinney as a witness. He did not attempt to contradict the terms of his conveyance to de-

fendant, but upon being questioned as to the source of his own title, stated that his mother, Caroline Kinney, had executed a deed to him, but had never delivered it to him; that he never saw it until about a week after her death, when he opened a tin box which had belonged to his mother and there found the deed which he recorded; that no one told him to open this box, and that he had never had access to it during the lifetime of his mother; that he had thought at the time of recording said deed and at the time of making the deed to Susan J. Kinney that the undelivered deed of Caroline Kinney vested title in him to said property. There is nothing in the record to contradict, in any manner, this testimony regarding the nondelivery of said deed from Caroline to George Kinney and, had it remained in the record, the trial court must have found in accordance with the allegations of the complaint in intervention. However, the foregoing testimony was objected to upon the ground that it was an attempt to disparage the title of George Kinney, which he had conveyed to defendant. The objection was overruled and the testimony admitted, but later, upon the renewal of the objection, the testimony was stricken out, and the court found that the deed from Caroline Kinney to George Kinney had been delivered, doubtless upon the theory that, there being no testimony upon the subject in the record, the finding must be against the party having the burden of proof, or that the presumption of delivery would follow from the possession of the deed by the grantee.

Thus the record presents but one legal question: As to the admissibility of this testimony. In support of the action of the trial court respondent relies upon several cases. We think they are not in point. In *Frink v. Roe*, 70 Cal. 296, 11 P. 820, the rule is laid down that parol testimony cannot be introduced to vary the terms of a written instrument conveying an interest in real property. The question was stated as follows:

"In such an action (action of ejectment) can it be shown that A., who presents a patent from the government to land, has declared such patent to mean something different from what is expressed in it, and thus defeat the title conveyed thereby? Or that a power of attorney to A., authorizing him to lease or repair, was intended to empower, and therefore did empower, him to sell and convey an indefeasible title?"

As stated in the case just cited, "the negative of these propositions is too apparent to need argument."

But the question involved in the instant case bears no resemblance in principle to the foregoing questions. Here George Kinney's testimony did not seek to change the terms of his conveyance to the defendant,

(234 P.)

nor to impeach its force and effect, if it had anything upon which to operate. He was examined, on behalf of interveners, who were not parties to any conveyance made by him, as to the source of his title, and testified to a physical fact not evidenced by any instrument in writing executed by him. Assuredly, if George Kinney had retained the record title to the property, he might have been examined as to the delivery of the deed from their mother in an action by interveners to establish their interest in the property. The defendant is in privity of estate with him, and took her title without valuable consideration. Could George Kinney have defeated the right of his brothers and sisters to examine him as to the delivery of the deed from their mother by transferring the title to his wife without consideration when he and his wife were living together with their interests harmonious? If not, the circumstance of the quarrel and separation of the husband and wife has no legal significance in the problem we are considering. The rights of the interveners cannot be affected by reason of the fact that George Kinney has transferred the record title to another without consideration. We find no authority for such a contention, and it is contrary to reason and to the theory and purpose of the general rule respondent seeks to invoke; i. e., that a grantor may not, by parol evidence, contradict the averments of his deed—a solemn contract. This cannot mean that, when one purports to grant real property, third persons are precluded from proving by him any facts necessary to establish their chain of title to the same. If it were otherwise, one might effectively divest an innocent person of title to his property by securing a purported conveyance from a person who was the only one familiar with the facts upon which the title of such innocent person could be established.

In the case of *Williams v. Kidd*, 170 Cal. 631, 151 P. 1, Ann. Cas. 1916E, 703, relied upon by respondent, the question was as to the delivery of a deed by a grantor prior to his death. Evidence of various facts and circumstances was offered upon this question; some of these matters, having to do with acts and statements of the grantor after the alleged date of delivery, were objected to upon the theory that they were in disparagement of the title to the property with which the grantor had parted. Upon appeal it was pointed out that the rule invoked had no application to the facts of the case; the court saying:

"But here the very question was whether Williams had ever parted with title to the property. This was the main issue in the case; the claim of respondents being that there had been no delivery of the deed with intent on the part of

Williams to do so. The conduct and declarations of Williams covered a period subsequent to the making of the deed and, while Kidd held it as a depositary, and we are satisfied that such acts, conduct, and declarations of Williams with reference to the property during that period were properly admissible as bearing on the issue as to whether there had been a delivery of the deed."

The case from which we have just quoted is certainly not authority for the exclusion of the testimony we are considering in the instant case. Neither are the cases of *Emons v. Barton*, 109 Cal. 662, 42 P. 303; *Ord v. Ord*, 99 Cal. 523, 34 P. 83; *Bury v. Young*, 98 Cal. 446, 33 P. 338, 35 Am. St. Rep. 186, and *Ferguson v. Basin Consolidated Mines*, 152 Cal. 712, 93 P. 867, all relied upon by respondent.

None of these cases holds that third parties are prevented from showing, by any evidence which is relevant and material, that the grantor of the holder of a record title did not himself have title to the property sought to be conveyed.

In so far as the one-fifth undivided interest of George Kinney in the property is concerned, his deed, of course, would carry what interest he had, even though that interest be less than the interest purported to be conveyed; but it cannot carry an interest which he did not have, and the rules of evidence do not accomplish so inequitable a result by excluding the proof stricken out by the trial court.

The judgment is reversed.

We concur: NOURSE, J.; STURTEVANT, J.

71 Cal. App. 320

HAMMOND LUMBER CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION
et al. (Civ. 5138.)

(District Court of Appeal, First District, Division 2, California. Feb. 17, 1925. Rehearing Denied March 9, 1925.)

Master and servant $\Rightarrow$ 405(5)—Evidence held to show widow and child were total dependents.

Evidence based on wife's answers to interrogatories held to support finding and award of Industrial Commission that wife and infant daughter of deceased employee, residing in Italy, were totally dependent on deceased employee for support.

Proceeding under the Workmen's Compensation Act by Maria Marsili, claimant, for death of Silvio Marsili, her husband, opposed by the Hammond Lumber Company, employer, and others. The Industrial Accident Commission awarded compensation, and the employer and others apply for certiorari to review the award. Award affirmed.

R. P. Wisecarver, of San Francisco, for petitioners.

Warren H. Pillsbury, of San Francisco, for respondents.

LANGDON, P. J. This record is before us upon the return to a writ of review. Petitioners are objecting to an award of the Industrial Accident Commission by which the surviving wife and child of Silvio Marsili, deceased, were allowed full death benefit, amounting to \$3,300, because of the death of said Silvio Marsili, which was brought about by an industrial accident. It is not contended that the facts do not present a case for compensation, nor that the petitioners are not liable for the payment of the same. The controversy between the parties is as to whether the allowance should be made upon the basis of total or partial dependency of said wife and child.

Maria Marsili, the wife, and her infant daughter live in Italy, and the deceased had been sending them money each month for their support. The evidence upon which the findings and award of the Commission are based consists of answers to interrogatories sent to Maria Marsili by the Commission and by the petitioners. The portions of this testimony which give rise to petitioners' contention are as follows: Maria Marsili was asked if she did any work since her marriage. She replied that she did none, except housework and caring for her child. She was asked:

"Do you own the home in which you live? A. No.

"Q. If not, who does own it; and, if you are required to pay rent, what is the amount of rent which you are paying per month? A. The owner is my father, and I don't pay rent. * * *

"Q. Since Silvio Marsili left Italy, have you been living in your own home? A. Yes.

"Q. If not, with whom have you been living, and what relations do these persons bear to you or to your husband? A. Living with father, four brothers, and three sisters."

She then states that her husband sent her money from the time he came to America until his death, and it appears from the record that he sent the equivalent of \$435 in nine months. She stated that this money was to support her child and herself. The questions and answers then continue:

"What person or persons other than Silvio Marsili supported or assisted you in your support of yourself and your child since Silvio Marsili left Italy? A. No.

"Q. To what extent did these other persons assist in your support? A. None.

"Q. What income did you have since your husband left Italy? A. None. * * *

"Q. At what amount do you estimate the average monthly cost of maintaining yourself and your child, including cost of food, clothing, and shelter? A. The average is 70 lire a day (\$3.00)."

In answer to further interrogatories, the witness stated that she lived in her father's house. She was asked:

"Q. State whether or not any members of your family, brothers, sisters, or other relatives, contributed to your support at any time during the three years preceding the injury of the employee, and, if so, state each amount and dates. A. I did not have any help.

"Q. Give the amount and date of each contribution by each member of the family (other than that made by the employee) towards the family expenses during the year ending June 1, 1923. A. I paid my expenses with the money that my husband sent me, and now I am obliged to go into debt."

She also stated:

"I have never received any contribution, neither from any person, nor from any institution, nor from any private source."

"What is the monthly amount of your living expenses at the present time? A. About three hundred lire a month.

"Q. How much of this goes for rent; how much for food; how much for clothing? A. That is for my support alone."

In answer to another interrogatory, the witness again stated:

"I did not receive any help from anybody except from my husband."

The Industrial Accident Commission upon this evidence has found that Maria Marsili and her child were totally dependent upon deceased for their support. While there are some conflicts in the testimony, if taken absolutely literally, especially that portion of it which has reference of the amount required for the support of the dependents, we fail to see how the Commission could have found otherwise than it did. The argument against the finding is based upon the fact that Maria Marsili stated that she lived in her father's house and did not pay rent. From this petitioner asks us to conclude that she received her rental free. And, as she stated that it cost \$90 a month for the support of herself and her child and that the money sent by her husband was barely enough for her support, petitioners ask us to conclude that the rental which she received without charge was of the value of \$40 a month. The entire testimony of the witness must be taken as a whole and reconciled, if possible. It is also to be remembered that the questions were translated into Italian, and answers translated from Italian into English, and this fact may account for the lack of precision in some parts. We think the entire testimony, fairly considered together, shows that the witness was entirely supported by her husband, that she used his remittances to pay all expenses of herself and her child. She lived in a home with her father and brothers and sisters, and as she did not pay out a specific item for rent, she stated that she did not pay rent, as such. It is not to be expected that she would an-

swer the questions as a student of economics would answer them, and that she would reply that in paying for her entire support, in paying into the household her proportion of the entire expense of maintaining the same out of the money sent to her by her husband, she was, in effect, paying rent. Her answers are such as a woman of her class would naturally make. She repeatedly said that she received nothing of value from any one but her husband; that she used the money he sent to her to pay the expenses of herself and child; that she lived in the family with her father and brothers and sisters. It is unlikely that a peasant family living in a small province in Italy would set apart a separate apartment for this mother and her child, and it is fair to assume from the entire record that this woman and her child shared with the family their home and food and other necessities and in return paid into the family funds the money her husband sent to her, which was sufficient and only sufficient to pay her proportionate amount of the entire expense of maintaining the family.

The award of the Industrial Accident Commission is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

71 Cal. App. 133

PEOPLE v. EWING. (Cr. 1229.)

(District Court of Appeal, First District, Division 1, California. Feb. 4, 1925. Rehearing Denied March 5, 1925. Hearing Denied by Supreme Court April 2, 1925.)

1. Infants ⇐20—Corpus delicti may be established by circumstantial evidence.

In prosecution for committing lewd acts on female child in violation of Pen. Code, § 288, in view of secrecy surrounding commission of such crime, all that is required in proof of charge is that corpus delicti be proved beyond reasonable doubt, which may be by circumstantial evidence.

2. Criminal law ⇐535(1)—Corpus delicti must be proved independent of extrajudicial admissions.

No person can be convicted of a crime on extrajudicial admissions alone, but corpus delicti must be proved independent of such admissions.

3. Infants ⇐20—Evidence held sufficient to prove corpus delicti.

In prosecution for committing lewd acts on female child in violation of Pen. Code, § 288, evidence held sufficient to prove corpus delicti.

4. Infants ⇐20—Proof of recent complaint by prosecutrix admissible.

In prosecution for committing lewd acts on female child in violation of Pen. Code, § 288, proof of complaint made by prosecutrix to another, if recent, may be shown, and rule

applies whether there was actual resistance or where nonconsent is inferred.

5. Infants ⇐20—Admission of details of complaint made by prosecutrix held error.

In prosecution for committing lewd acts on female infant in violation of Pen. Code, § 288, where child was incompetent as a witness, admission of details of complaint made by prosecutrix to her mother was error, and fact that mother was cross-examined upon such subject did not justify its admission.

6. Criminal law ⇐419, 420(5)—Witnesses ⇐227—Hearsay evidence of declarations of child without capacity to be sworn inadmissible, and such child not to be examined without oath.

Hearsay evidence cannot be given of declarations of a child who has not capacity to be sworn, nor can such child be examined in court without oath.

7. Criminal law ⇐1169(2)—Erroneous admission of details of complaint made by prosecutrix held not to require reversal, where other evidence sufficient to establish corpus delicti.

In prosecution for committing lewd acts on body of infant child, offense in violation of Pen. Code, § 288, erroneous admission of details of complaint made by prosecutrix to her mother held not to require reversal, where there was sufficient other evidence to prove corpus delicti.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Harry Ewing was convicted of committing lewd and lascivious acts on body of female child, and he appeals. Affirmed.

Spencer G. Prime and William F. Herrin, both of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

TYLER, P. J. The defendant was charged with the offense denounced by section 288 of the Penal Code, it being alleged that he committed certain lewd and lascivious acts upon the body of one Florence Wells, a female child of the age of six years. He was tried and convicted. Motion for a new trial was made and denied, and this is an appeal from the judgment and from the order denying the motion.

It is contended that there is no evidence in the record tending to show the commission of the crime charged or of any other crime, except the unsworn and hearsay declaration of the prosecutrix, who was not permitted to testify at the trial; she having been held incompetent after an exhaustive examination by the trial judge by reason of her inability to receive just impressions of facts or to relate them truly.

[1] At the outset it may be said that there is no direct evidence of the commission of

the offense. Rigorous proof, however, of the corpus delicti in cases of this character is sometimes unattainable, and it is not necessary that the offense should be proved by direct and positive testimony. Such crimes are committed in secrecy, and tribunals must often act upon such indications of an offense as the surrounding circumstances present. All that is required in the proof of these charges is that the corpus delicti be proved beyond a reasonable doubt; that the evidence may be merely circumstantial is immaterial.

The evidence in the case may be summarized as follows: Agnes Wells, the mother of the prosecutrix, testified in substance that on the afternoon of the day when the offense is alleged to have been committed her little girl had gone out to play. Directly across the street from the Wells home was situated a private garage occupied by defendant. Mrs. Wells had occasion to call her daughter, and after some delay the child emerged from the garage, where the defendant at that time was working, and crossed the street to her home in response to her mother's call. About the same time the defendant came out through a side door of the garage into a passageway leading thereto. As soon as the child reached her mother, she was taken into the house and given a spanking, after which she was asked by her mother what defendant had done to her, and she replied that he had kissed her. Thereupon Mrs. Wells went to the front door and called defendant and upbraided him for his conduct, and informed him that when her husband came home she was going to have him thrash defendant. The mother then re-entered her home. At the same time defendant crossed the street and, opening the door of the Wells home, followed Mrs. Wells down the hall, who thereupon accused him of having "a bad name for handling little children," to which the defendant answered: "Don't tell my mother what I have done. I was only kissing your little girl and fooling around her." Mrs. Wells then ordered defendant out of her house and took her daughter into a back room and further questioned her concerning the acts of defendant; the child replied that he had unbuttoned her underwear and inserted his finger in her private parts. The mother then made an examination of the clothing and person of her child, and found several spots upon her dress and undergarments. The spots were wet and white in color. She also examined the vaginal regions of the child and found them to be red and inflamed, and a woman neighbor, who was present at the examination, also testified to this abnormal condition. About this time the defendant again entered Mrs. Wells' home and asked her forgiveness, and stated to her, "It is bad, but not as bad as you think it is." This statement was also made in the presence of the witness last referred to. The record further shows that the child

was examined by a physician, who found the same inflamed condition testified to by the mother.

Defendant took the stand in his own behalf and denied that he had ever touched the child, except that when she came into his garage he took her in his arms and put her out, fearing that she might get hurt, but that she returned and left a few minutes later when her mother called her.

This, in substance, is the entire evidence had at the trial, and counsel for the appellant claims that aside from the hearsay declarations of the child it is destitute of any showing either that defendant committed the crime charged or that any crime in fact had been committed.

[2] It is a well-established doctrine that no person can be convicted of a crime on extrajudicial admissions alone; the corpus delicti must be proven independent of admissions. *People v. Frey*, 165 Cal. 140, 131 P. 127; *People v. Vertrees*, 169 Cal. 404, 146 P. 890; *People v. Frank*, 2 Cal. App. 283, 83 P. 578.

[3] The character of the case does not invite a recapitulation of the facts, but we are of the opinion that the evidence, leaving entirely out of consideration the hearsay testimony hereafter discussed, sufficiently proves the corpus delicti. During the course of the trial, as above indicated, over the objection of defendant, the mother was permitted to testify to what her daughter had told her. The admission of this evidence is assigned as error. The prosecution seeks to justify its admission upon the ground that defendant himself had invited it. Under her direct examination Mrs. Wells, the mother, was asked whether or not her daughter had made any complaint. On cross-examination the defendant went into the matter of the first statement of the child, and then asked Mrs. Wells if she was not in the habit of accusing her neighbors of improper acts with her children, to which question an objection was sustained. The evidence was then admitted of the subsequent statement of the child to rebut the inference that might arise from the question that no complaint had in fact been made by the child.

[4] The rule is that in prosecutions of this character proof of complaint of the act while it is recent may be shown by the prosecutrix and also by the person to whom the complaint was made. While such evidence is in the nature of hearsay, its admission is justified upon the ground that in such cases, when restricted to the fact of complaint alone, it is in the strictest sense original evidence. The rule also applies to complaint on the part of one under legal age, there being no distinction between cases where there was actual resistance and those in which nonconsent is inferred. *People v. Baldwin*, 117 Cal. 244, 251, 49 P. 186; *People v. Wilmot*, 139 Cal. 103, 72 P. 838. Here, however,

the original statement made to the mother was one not in the nature of a complaint, but was elicited from the child only after a spanking had been administered to her, and later, and after the mother had interviewed defendant, the further declaration was made by the child inculcating him.

[5-7] This is not the character of complaint contemplated by the rule. It is purely hearsay, and the rule does not extend to the details of the acts complained of. The cross-examination of Mrs. Wells upon this subject did not justify the admission of this incompetent evidence, and it was no more admissible on redirect examination than it would have been in chief. *Wagner v. People*, 30 Mich. 384; *State v. McDonough*, 232 Mo. 219, 134 S. W. 545; *People v. Flaherty*, 162 N. Y. 532, 57 N. E. 73; 4 Wigmore on Evidence, § 2119. The error is even more apparent when it is considered that the child was not sworn, she being incompetent as a witness. Hearsay evidence cannot be given of the declarations of a child who has not the capacity to be sworn, nor can such child be examined in court without oath. 4 Blackstone's Com. chap. 15, § 3. There can be no doubt but what the admission of this evidence constituted error; but the question then arises whether the error was of so prejudicial a character as to require the reversal of the judgment. A careful consideration of this question leads us to the conclusion that it is not. The case does not present a situation where a defendant is at the mercy of the charges of a prosecutrix. The jury could have inferred from the evidence of the defendant's own admissions that he was guilty of the very character of acts denounced by the section of the Penal Code referred to; and having found a verdict of guilty, and there being, as we have seen, sufficient evidence apart from the hearsay declarations of the child erroneously admitted, to prove the corpus delicti, the case is not one in which we can say that the error complained of has resulted in a miscarriage of justice.

For reasons given the judgment is affirmed.

We concur: ST. SURE, J.; KNIGHT, J.

71 Cal. App. 355

STUKEY v. MIHARA et al. (Civ. 4250.)

(District Court of Appeal, Second District, Division 1, California. Feb. 19, 1925.)

Estoppel — Assignee of auto sales contract held estopped to deny title of subsequent innocent purchaser from assignor.

Where assignee of contract for conditional sale of auto truck permitted assignor and buyer to keep certificate of registration in their names as "legal owner" and "owner," he is estopped to deny title of subsequent innocent purchaser of truck from assignor after buyer's default, and cannot recover possession

thereof from such purchaser in claim and delivery.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Action by M. C. Stukev against S. Mihara and another. Judgment for defendants, and plaintiff appeals. Affirmed.

W. W. Hindman, of Los Angeles, for appellant.

Van Lee Hood, of Los Angeles, for respondents.

HOUSER, J. Plaintiff brought an action in claim and delivery against defendants for the possession of an auto truck. From a judgment in favor of defendants, plaintiff appeals.

The facts appear to be that Los Angeles Auto Sales Company sold the truck to one Inui on a conditional sales contract, and immediately thereupon assigned its interest in the contract to plaintiff. Inui defaulted in his payments on the truck, and after a short time it was returned to Los Angeles Auto Sales Company, which for a period covering several following months kept up the payments as they fell due on the contract. Thereafter Los Angeles Sales Company sold the truck to defendant Mihara, likewise on a conditional sales contract, and thereupon assigned its interest in the Mihara contract to Angelus Investment Company, which, in turn, assigned to defendant Braley.

When the sale was made to Inui he caused the transaction to be registered in accordance with the provisions of the Motor Vehicle Act (Stats. 1919, p. 191), and a certificate was thereupon issued showing Los Angeles Auto Sales Company as "legal owner" and Inui as "owner" of the truck; but on the assignment of the conditional sales contract in that transaction no registration was made or certificate issued showing plaintiff's connection therewith. During all the time that the Los Angeles Auto Sales Company had the truck plaintiff knew that it was registered in the name of the Los Angeles Auto Sales Company as legal owner.

On the second sale of the truck being made—that is, the sale to defendant Mihara—he caused a registration to be made and a certificate to issue showing Los Angeles Auto Sales Company as "legal owner" and Mihara as "owner" of the truck. The application for change in the registration of the truck and the issuance of the last-mentioned certificate was signed by Mihara and Los Angeles Auto Sales Company.

Some time after the action was commenced, Angelus Investment Company, in order to have the truck registered in its name, gave a bond to the state of California to accomplish that purpose, whereupon a certificate issued showing Angelus Investment Company

as "legal owner" and Mihara as "owner." Thereafter the contract was assigned to defendant Braley.

The effect of the argument of counsel for appellant is that by the assignment of the first contract, Los Angeles Auto Sales Company passed all its interest in the truck under the contract to plaintiff; that no delivery of the truck to plaintiff was necessary; and that under the provisions of the Motor Vehicle Act neither the registration of the transfer nor the issuance of a certificate was required.

Whatever might be said in support of such contentions becomes of no moment in view of the recent decision by the Supreme Court in the case of *Parke v. Franciscus*, 228 P. 435, where the facts were strikingly similar to those in the instant case. It is there held (syllabus, 68 Cal. Dec. 133):

"In an action of claim and delivery for the possession of an automobile, where the plaintiffs permitted the conditional vendor and vendee of said automobile to keep the certificate of registration indorsed alone by the original owner, thus enabling them to dispose of the property to an innocent purchaser in the belief that he was obtaining valid title thereto, said plaintiffs are estopped to deny that such innocent purchaser had obtained such title, and, as the registration certificate was a prerequisite to the passing of title, and the plaintiffs failed to obtain such certificate and negligently allowed it to remain outstanding, they cannot recover possession of the automobile in an action for claim and delivery, since defendant, as an innocent purchaser, acquired lawful possession thereof."

And see, also, *Chucovich v. San Francisco Securities Corp.*, 60 Cal. App. 700, 214 P. 263; *Boles v. Stiles*, 188 Cal. 304, 204 P. 848.

The judgment is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

71 Cal. App. 247

PEOPLE v. PADEN. (Cr. 1179.)

(District Court of Appeal, First District, Division 2, California. Feb. 11, 1925.)

1. Perjury §21—Indictment designating name of action in which perjury was alleged to have been committed held sufficient.

Indictment for perjury under Pen. Code, § 966, alleged to have been committed in prosecution for crime defined as "obtaining money under false pretenses" rather than "obtaining money by false and fraudulent pretenses knowingly and designedly made with intent to defraud," held sufficient; designation by name of action involving controversy in which perjury was alleged to have been committed being enough.

2. Perjury §22—Indictment need only set forth general statement of jurisdiction in action in which perjury committed.

Indictment for perjury need only set forth general statement of jurisdiction in action in which perjury is alleged to have been committed, and need not set forth facts by virtue of which jurisdiction existed.

3. Perjury §12—Statement of witness as to whether he had been convicted of felony is statement of fact.

Statement as to whether witness had been convicted of felony held statement of fact, as recognized by Code Civ. Proc. § 2065, and not mere conclusion of law on which perjury charge could not be predicated.

4. Criminal law §144(1/2)—Refusal to grant motion to take depositions presumed proper.

Where record is silent as to proceedings upon hearing of motion to take depositions, refusal of trial court to allow taking will be presumed to have been because no proper showing was made.

5. Criminal law §392—Question as to why one accused of falsely denying former conviction did not produce testimony that prior conviction was sham held properly refused.

In prosecution for perjury in denying former conviction, question as to why accused did not bring witnesses who could testify that his prior conviction was sham so as to place him within prison as an investigator for department of justice held properly refused, where he had moved before trial to take depositions to that effect, and such motion was refused.

6. Perjury §33(1)—Evidence held to sustain conviction.

In prosecution for perjury, evidence held to sustain conviction.

7. Perjury §11(9)—Testimony of witness in criminal prosecution denying prior conviction held material.

Under Code Civ. Proc. §§ 2051, 2065, testimony of witness in criminal prosecution denying his prior conviction of felony held sufficiently material to predicate prosecution for perjury thereon.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

Charles E. Paden was convicted of perjury, and he appeals. Affirmed.

Walter F. Lynch and G. Edward Lyon, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal by the defendant from a judgment of conviction of a felony, to wit, perjury.

[1] The first attack is upon the sufficiency of the indictment. It charges that the offense was committed by false swearing in an action in which the plaintiff was the people of California and the defendant was Charles

Paden, which action was numbered 13171 of the records of the superior court of the state of California, in and for the city and county of San Francisco, and in which action the defendant therein was charged with a felony, to wit, obtaining money under false pretenses. Appellant's position is that the indictment in the perjury case should have stated that defendant was sworn in a criminal proceeding in which the defendant was charged with "obtaining money by false and fraudulent pretenses, knowingly and designedly made with intent to defraud," instead of defining the offense as "obtaining money under false pretenses." The objection is without merit. The case of *People v. Ah Bean*, 77 Cal. 12, 18 P. 815, considers an indictment for perjury under the provisions of section 966, Penal Code, and holds that the designation by name of the action involving the controversy with respect to which the perjury was committed is sufficient; the court saying: "The controversy in respect to which the offense was committed in this case was the case of *People v. Martine*." To the same effect are the cases of *People v. De Carlo*, 124 Cal. 462, 57 P. 383, and *People v. Carpenter*, 136 Cal. 391, 68 P. 1027.

[2] It is also urged that the indictment is faulty because it fails to aver that the court where the perjury is said to have been committed had jurisdiction, inasmuch as it is not shown whether the property claimed to have been obtained by false pretenses was obtained in the city and county of San Francisco. This objection is answered by the case of *People v. De Carlo*, supra, which holds that "the general statement of the jurisdiction is sufficient without setting forth the facts by virtue of which it exists." The case of *People v. Carpenter* is to the same effect.

The other objections to the indictment do not require consideration, as the indictment before us meets the requirements of section 966, Penal Code, and the aforementioned decisions construing said section.

[3] The perjury charge is predicated upon the statement of defendant in the former trial that he had never been convicted of a felony, and it is contended upon appeal that this statement is a conclusion of law and not a statement of fact, and that perjury cannot be predicated upon a statement of an opinion or a conclusion. Whether or not a man has been convicted of a felony is a statement of fact, and is recognized as such by section 2065, Code of Civil Procedure. We see no merit in this objection.

[4, 5] It is contended that error was committed in sustaining an objection to a question asked of defendant by his counsel, as follows: "Why did you not bring these witnesses here who could testify to that?" The word "that" in this question referred to the defendant's claim that his prior conviction

in the federal court of the crime of embezzlement was a "sham" conviction which was resorted to so as to place defendant within the walls of the federal prison at Leavenworth as an investigator for the department of justice. We think the objection to the question that it was incompetent, irrelevant, and immaterial was properly sustained under the facts of this case. Before the trial of this action the defendant made a motion to take depositions of persons in Washington, D. C., Wichita, Leavenworth, and Arkansas City, Kan., to sustain his defense, and such motion was denied. The record is silent as to the proceedings upon the hearing of that motion, and we must assume, in support of the action of the trial court, that no proper showing was made for the granting of the same. No point is made by the appellant that this ruling was not correct, and we must assume that, if the defendant had made a proper showing, he would have been permitted to take the depositions. Since he did not do so, it is quite immaterial why he did not bring the witnesses to California.

[6] It is contended that the evidence is insufficient to warrant a conviction in this case. We cannot agree with the appellant in this contention. The conviction in this case is supported by the testimony of several witnesses, by the admissions of appellant, and by the judgment roll in the action in which he was convicted of embezzlement in the United States district court.

[7] It is also urged that there is no sufficient showing of the materiality of the testimony alleged to have been false. Such testimony is recognized as material by sections 2051 and 2065 of the Code of Civil Procedure.

There are no other matters which require consideration, and the judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

71 Cal. App. 303

OWL DRUG CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 4824.)

(District Court of Appeal, Second District, Division 2, California. Feb. 16, 1925. Rehearing Denied March 17, 1925.)

1. Master and servant §417(7)—Findings of Industrial Commission conclusive if based on evidence.

Findings of Industrial Accident Commission will not be disturbed on appeal, if based on some evidence or on conflicting evidence, but where there is no evidence to support a finding review may be had on theory that Commission had no jurisdiction to make it.

2. Master and servant §388—Mother held not partial dependent of son.

Evidence that deceased employee for 2 years previous to his death had sent his mother but \$60, that at time of his death he was not de-

voting any amount to her support, and that mother was residing with married son or daughter and was earning but \$6 per week less than deceased son, held not to authorize award to mother as partial dependent.

Proceeding under the Workmen's Compensation Act by Lucinda Black, claimant, for the death of Johnson Black, her son, opposed by the Owl Drug Company, employer. The Industrial Accident Commission awarded compensation, and the employer applies for certiorari to review award. Award annulled and cause remanded, for further proceeding.

Donald Barker, of Los Angeles (Harry A. Keithly, of Los Angeles, of counsel), for petitioner.

Warren H. Pillsbury, of San Francisco, for respondents.

CRAIG, J. The petitioner is a Nevada corporation conducting a mercantile drug business in this state under the authority of our statutes. On the 25th day of October, 1923, one Johnson Black, an employee of petitioner, was killed by one of its trucks at Sixth and Main streets, in the city of Los Angeles. The respondent Lucinda Black thereafter instituted proceedings before said Commission as an alleged dependent of Johnson Black for compensation, and after hearing the evidence she was allowed the sum of \$640, \$100 of which was awarded on account of funeral expenses. Petitioner applied for a rehearing before said Commission upon the ground that the latter acted in excess of its authority in granting to said dependent more than the sum of \$100, which rehearing was denied, and, a petition for writ of certiorari for review of the proceedings before the respondent Commission having been filed in this court, an alternative writ issued.

The basis of petitioner's complaint is that the evidence does not justify any finding that Lucinda Black was entitled to more than the sum of \$100. It was alleged in the petition for adjustment of claim filed with the respondent Commission that Johnson Black, in the course of his employment, ran to and attempted to mount one of petitioner's trucks while in motion, that he fell to the ground and was crushed by the truck. The respondent corporation denied that Lucinda Black was at the time of the death of said Johnson Black, or during the period of his employment, wholly or to any extent dependent upon him for her support. It was stipulated that said employee was at the time of the accident receiving \$22.50 per week for six days' employment, and that there was no claim of misconduct on his part as a cause of his death; that said employee was accustomed to ride on the company's trucks, though not under instructions to do so.

Respondent Lucinda Black testified that

she was the mother of the deceased employee; that she came to Hartford, Conn., from Americus, Ga., in January, 1923; that during the thirty weeks from the latter part of March until the 25th of October, 1923, she had had employment for about twenty weeks at \$2.80 per day, six days per week, but that from January until March she worked at that rate but a few days a week; that previously to leaving Georgia she had steady employment at \$3 per week and her board; she roomed with a daughter in Georgia, and entered the home of a married son at Hartford, where she had resided since her arrival there. She testified:

"Q. Do you pay any board and room to your son where you live now? A. I don't pay any special amount, but I take care of my expenses. When he gets behind with his bills I drop in a little to help out.

"Q. Does any one aid you in buying your clothes? A. No; I buy everything myself.

"Q. Have you any other expenses besides buying your clothes and board and room? A. No more than keeping up my societies."

She said that between October 25, 1922, and October 25, 1923, she had received from the decedent \$80 in January, \$40 in April, and \$15 in August, or a total of \$135, that the last time he had written her was some time in September, but that he then made no mention of money. She did washing to compensate for her room rent, and when she received money she would put it in her trunk; if asked for a dollar or two she would give it to her children when needed, but she testified that with money sent her by the decedent she also bought two postal savings certificates, and that, although the amounts of her earnings and funds sent her by him constituted her only means of support, yet it appears that she paid, and was expected to pay, but little for her domestic accommodations at Hartford.

The Workmen's Compensation, Insurance, and Safety Act provides as follows:

"In case the deceased employee leaves no person wholly dependent upon him for support, but one or more persons partially dependent therefor, the said dependents shall be allowed the reasonable expense of his burial, not to exceed one hundred dollars, and, in addition thereto, a death benefit which shall amount to three times the annual amount devoted by the deceased to the support of the person or persons so partially dependent;" and that

"If the deceased employee leaves no person dependent upon him for support, the death benefit shall consist of the reasonable expense of his burial, not exceeding one hundred dollars and such other benefit as may be provided by law." St. 1917, p. 840, § 9, subd. c, pars. 2, 3, as amended by St. 1919, p. 917, § 4.

The respondent Commission based its award upon a finding that Johnson Black had contributed an annual rate of \$180 toward his mother's support; as we have seen, her own testimony shows but \$135 to have

been sent her during the year next preceding his demise, with which she said that she purchased postal savings certificates to the value of \$100.

[1] Findings of the Commission will not be disturbed by an appellate court if based upon some evidence, or upon conflicting evidence, but as said in *Pruitt v. Industrial Accident Commission*, 189 Cal. 459, 466, 209 P. 31, where there is no evidence to support a finding, a review may be had on the theory that the Commission had no jurisdiction to make it. Section 14 (b) of said act provides that the question of dependency "shall be determined in accordance with the fact, as the fact may be at the time of the injury of the employee." At the time of this accident Lucinda Black was receiving as wages \$16.80 per week, or but \$6 per week less than the decedent; she had been earning this amount for twenty weeks, and prior thereto she earned about \$84 in ten weeks. It appears from her testimony, without contradiction, that she had at all times resided with a married son or daughter, and that her total expenses for the year, including dues in three societies, amounted to \$104.80 less than her earnings. It appears that for a period of two years previously to his death Johnson Black had sent her but \$60, and that at the time he died he was not devoting any amount to her support, if he ever did so.

In *Spreckels Sugar Co. v. Industrial Accident Commission*, 186 Cal. 256, 199 P. 8, it was said:

"The whole theory of the Compensation Act as to death cases is that the dependents of the employee killed through some hazard of his employment shall be compensated for the loss of the support they were receiving from him at the time of his injury. This necessarily means that the death benefit must be computed on the *rate* of contribution at that time. It is the *rate* which is the measure of the loss, not the *gross* amount which the decedent has happened to pay through any past year, or through any other period of time." (*Italics supplied.*)

The Supreme Court there illustrates the application of the rule by a hypothetical situation, where a son commences to contribute to his partially dependent mother the sum of \$50 per month, which he continues to do for three months, or perhaps for but one month, when he is killed:

"Manifestly, the mother's loss of support is \$50 a month, or \$600 a year, regardless of how long that support has been continuing, and compensation for the loss must be upon that basis, and not upon the basis of what the son has actually contributed in the short time the condition of dependency has existed. In the present case, the facts as to dependency are merely reversed. A period of total dependency is succeeded by a short period of but partial dependency. During the first period the employee has contributed at the rate of \$145 a month, and during the second at the rate of only \$45 a month. It is plain that the loss of support to

the dependents incurred by the employee's death is the latter rate."

In *Great Western Power Co. v. Industrial Accident Commission*, 191 Cal. 724, 438, 218 P. 1009, it was also said:

"The statute in this state, differing in this respect from compensation acts in other jurisdictions, expressly provides that it is not the amount of contributions which shall be the basis of the computation, but it must be three times the annual amount devoted by the deceased to the support of the person or persons so partially dependent. It is the amount actually devoted by the employee to such support that fixes the compensation. The amount, it would seem, must not only be contributed for support, but it must be actually applied wholly to that purpose. It is very easy to conceive of a case, by way of illustration, in which only a small part or portion of what may be contributed will be devoted or applied to support; the rest being placed in bank or invested."

And quoting with approval from the dissenting opinion in *Milwaukee Basket Co. v. Wiecki*, 173 Wis. 391, 181 N. W. 308, the following apt language is incorporated:

We "cannot believe that it was the legislative intent that a father should be permitted to swell his investment account at the expense of an employer of his son, or at the public expense, if it instead of the employer ultimately bears the burden. Neither in popular nor in technical language does the word 'support' connote a meaning common to either 'investment' or 'savings,' and judicial construction should not change its meaning."

[2] The most that can be said in behalf of the respondents' position here is that Johnson Black on three occasions during 1923 took it upon himself to send a few dollars to his mother with which she might do as she saw fit. That she asked it, or was in any way dependent upon his contributions, or that he indicated any intention of establishing a precedent, does not appear; in fact, during much of that time she was earning more than five times as much as she had earned before. Aside from the fact that little could be left of the \$135 for her support after investing \$100 in government certificates and defraying the expenses of transportation from Georgia to Connecticut, she received from her son but \$15 in about six months, and there is no evidence whatever upon which to base a rate at the time of the injury.

It follows that Lucinda Black was not partially dependent, and the award is therefore annulled, and the cause remanded to the respondent Commission, for further proceedings in accordance with this opinion.

FINLAYSON, P. J.; WORKS, J.

On Rehearing.

PER CURIAM. Upon petition for rehearing it is contended that in the opinion of the

court there are certain inaccuracies in the statement of fact. If, for the sake of argument, it be conceded that this contention is correct, the conclusion reached by us would not thereby be affected.

The petition is denied.

71 Cal. App. 144

PEOPLE v. HULING. (Cr. 1134.)

(District Court of Appeal, Second District, Division 1, California. Feb. 4, 1925.)

1. Conspiracy — Express or implied agreement necessary foundation for existence of criminal conspiracy.

An agreement, either express or implied, must be the foundation for existence of a criminal conspiracy.

2. Criminal law — False pretenses — Defendant exonerated from charge of conspiracy to obtain money by false pretenses could be found individually guilty, and such verdict held not contradictory.

In prosecution for obtaining property by false pretenses in which one count of indictment charged conspiracy between defendant and another, even if evidence did not show such conspiracy, under Pen. Code, §§ 31, 971, and in view of distinction between a "conspirator" and an "aider and abettor," defendant could be convicted of aiding and abetting, and verdict exonerating defendant from charge of conspiracy, but convicting him of obtaining property by false pretenses, was not contradictory.

3. Criminal law — Jurisdiction of prosecution of one aiding and abetting is in county of aiding or abetting, and not in county where principal offense committed.

Under Pen. Code, § 791, jurisdiction of offense of aiding and abetting another to obtain money by false pretenses was in county where offense as an accessory was committed, notwithstanding principal offense was committed in another county, and court of county in which principal offense was committed was without jurisdiction.

Appeal from Superior Court, San Bernardino County; Jesse Olney, Judge.

John E. Huling was convicted of obtaining property and money by false pretenses, and he appeals. Reversed.

Wm. T. Kendrick, Jr., of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

HOUSER, J. In an indictment consisting of five counts, defendant and one F. E. Alford were jointly charged with the crime of obtaining money and property by false representations and pretenses. An information containing three counts also charged defendants with the commission of certain related offenses. A demurrer to the information was sustained as to the first count thereof. The third count of the information accused de-

fendant Huling of the crime of conspiring with defendant Alford to defraud the city of Ontario of the sum of \$2,800; and in the second count of the information, defendants Huling and Alford were charged with the offense of obtaining by false representations and pretenses the same money and property described in the charge of conspiracy mentioned in the third count, thereby defrauding the city of Ontario of the said sum of \$2,800.

For the purposes of the trial the several charges contained in the indictment and the remaining charges in the information were consolidated. The jury returned the following verdict:

"We, the jury in the above-entitled action, find the defendant, John E. Huling, guilty of the crime of obtaining property and money by false representations and pretenses, a felony, as charged in count 2 of the information, and not guilty of the crime of conspiracy to commit a felony, as charged in count 3 of the information, and not guilty of each and all of the offenses charged in the indictment."

Defendant appeals from the judgment and from an order denying his motion for a new trial.

Count 2 of the information charged in substance that said defendants presented a false claim in the name of E. S. O'Neal to the city of Ontario and thereby procured a warrant for the payment to said O'Neal of said claim, and that said warrant was subsequently paid. The evidence showed, among other things, that defendant Alford was the city manager of the city of Ontario, and that it was he who actually made the false representations in order to procure the issuance of the warrant. After obtaining the warrant, Alford sent it to Huling, who resided in the city of Los Angeles. Huling then induced E. S. O'Neal, who was his mother-in-law, to indorse the warrant, and thereafter Huling exchanged the warrant so indorsed for the private check of Fred Weddington, who was his brother-in-law, and which check defendant cashed at a bank, and, according to defendant's testimony, sent the greater part of the money so received to defendant Alford, retaining a small part thereof as a "loan" from defendant Alford. The warrant was thereafter paid.

Appellant's brief contains many specifications of alleged prejudicial error which he urges as reasons for a reversal of the judgment. We are convinced that but two of them require consideration by this court. They are: (1) That the verdict is contradictory; and (2) that the court was without jurisdiction as to defendant Huling.

Directing attention to the verdict as to the counts in the information, it will be noted that the verdict finds defendant Huling guilty of obtaining property and money by false representations and pretenses, as charged in count 2, and not guilty of the crime of con-

spiring to commit the same offense as charged in count three of the information.

[1, 2] An agreement, either express or implied, must be the foundation for the existence of a criminal conspiracy. The evidence shows that the only connection that defendant Huling had with the matter was in substance as hereinbefore set forth. If there was no agreement or understanding of any kind between defendants that in effect they would commit the offense, it might follow that defendant Huling's acts were innocent of any criminal intent. However, as distinguished from a "conspirator," if defendant Huling "aided and abetted" in the commission of the offense, he might still be criminally liable and the verdict be permitted to stand. In volume 5 of California Jurisprudence, at page 496, it is said:

"A 'conspirator' is one who is a participant in a conspiracy. * * * And a conspirator is not necessarily an aider and abettor. * * *

And in *People v. Bond*, 13 Cal. App. 175, 187, 109 P. 150, 156, the court said:

"Conspiracy" implies an agreement to commit the crime, while to 'aid and abet' requires actual participation in the act constituting the offense. It is therefore manifest that one may 'aid and abet' without having previously entered into a conspiracy to commit the crime."

See, also, *Jones v. State*, 174 Ala. 53, 57 So. 31.

By the provisions of both section 31 and section 971 of the Penal Code, any person concerned in the commission of a felony who "aids and abets" therein is a principal. It would therefore follow that, although the verdict by the jury exonerates defendant Huling from having "conspired" with defendant Alford to commit the offense with which they were jointly charged, the jury may have concluded that, without any agreement or understanding with defendant Alford that a crime should be committed, in view of the fact that a distinction apparently exists between "conspiring" and "aiding and abetting," defendant Huling, while innocent of the crime of criminal conspiracy as charged in the third count of the information, because of his having "aided and abetted" defendant Alford in the perpetration of the offense, was guilty of the crime charged in the third count, and consequently that, instead of Huling being a coconspirator with Alford, he was an "accessory" with him. In the cases of *People v. Outeveras*, 48 Cal. 19, and *People v. Rozelle*, 78 Cal. 84, 20 P. 36, an "accessory" is substantially defined as one who stands by and aids and abets and assists, or who counsels, advises, or encourages in the perpetration of a crime.

By section 971 of the Penal Code the distinction between an accessory before the fact and a principal is abrogated, and it is therein provided in effect that accessories shall be

"prosecuted, tried and punished as principals." However, with reference to the place of trial of an accessory, section 791 of the Penal Code provides that—

"In the case of an accessory in the commission of a public offense, the jurisdiction is in the county where the offense of the accessory was committed, notwithstanding the principal offense was committed in another county."

And in the case of *People v. Trim*, 39 Cal. 75, 79, it is said:

"The venue of the offense, in case of a principal, may be in one county, and that of an accessory before the fact, may, necessarily, be in another and different county."

In the case of *People v. Hodges*, 27 Cal. 340, it appears that one Pool was indicted jointly with three others for murder alleged to have been committed in the county of El Dorado, and it was further charged in the indictment that the defendant within said county incited, counseled, hired, and commanded the said Pool and others to commit the said murder. The evidence introduced at the trial showed that the acts wherewith Hodges stood charged were performed by him in the county of Santa Clara. In considering the point that the trial court had no jurisdiction of the offense charged against the defendant, the Supreme Court said:

"We consider the objection to be well taken. Section 93 of the Criminal Practice Act is as follows: 'In the case of an accessory before or after the fact in the commission of a public offense, the jurisdiction shall be in that county where the offense of the accessory was committed, notwithstanding the principal offense was committed in another county.' By section 255, all persons connected in the commission of a felony, whether they directly commit the act constituting the offense, or aid and assist in its commission, though not present, are to be indicted, tried, and punished, as principals. To that extent 'all distinction between an accessory before the fact and a principal, and between principals in the first and second degree,' is expressly abolished by the action."

"There is no conflict between these sections. The latter (section 255) requires that an accessory should be indicted, tried and punished in the same manner as principals; and section 93 fixes the place at or in which those events are to transpire."

"Though the common-law distinction between principal and accessory is in the main obliterated, yet it is retained for the purposes of venue. * * * Section 255 of the Criminal Practice Act relates to the frame of the indictment against an accessory, the method of trial, and the measure of punishment; and section 93 determines the forum having jurisdiction of the offense."

[3] The evidence in the instant case shows that defendant's acts in "aiding and abetting" in the crime committed by defendant Alford, or in being an "accessory" to such crime, were committed by him wholly in the county of Los Angeles. If, according to the verdict, defendant was not guilty of "con-

spiracy," his acts as an "accessory" in Los Angeles county could not be so connected with the initial or the final act or acts of Alford in the county of San Bernardino in the perpetration of the offense, as to give the court of that county jurisdiction. Such being the facts, according to the statute (section 791, Pen. Code) and the cases cited, the jurisdiction as to defendant Huling was in the county where his offense as an accessory was committed, "notwithstanding the principal offense was committed in another county."

In the case of *People v. Stakem*, 40 Cal. 599, where three defendants were jointly indicted for the crime of grand larceny committed in one county and where the evidence showed that the defendant on trial was not present in the county at the time of the theft and did not participate in the larceny, but subsequently, with a guilty knowledge that it was stolen, received the stolen property in another county and aided in disposing of the same for the joint benefit of himself and the perpetrator of the larceny, it was held that the defendant could not be convicted of larceny in the county where the crime was committed. In speaking of the matter the Supreme Court said:

"His offense, whatever it was, would, upon this hypothesis, appear to have been committed in the county of Yuba, and not in the county of Placer, and the courts of the latter county would consequently have no jurisdiction to inquire into the case."

The action herein having been tried in San Bernardino county, it follows that the court was without jurisdiction in the matter, and for that reason the judgment must be reversed.

Appellant directs attention to several other alleged prejudicial errors in the record; but in view of the fact that none of them is of such a character that a recurrence thereof is likely, it becomes unnecessary to devote attention thereto.

The judgment and the order denying the motion for a new trial are reversed.

We concur: CONREY, P. J.; CURTIS, J.

71 Cal. App. 197

DOLAN v. CARMEL CANNING CO.
(Civ. 4861.)

(District Court of Appeal, First District, Division 1, California. Feb. 7, 1925.)

1. Appeal and error — 1011(1)—Finding on conflicting evidence controlling.

Finding on conflicting evidence, as to whether labels printed and delivered conformed to the design approved, is controlling on appeal.

2. Evidence — 441(1)—Contemporaneous oral agreements inadmissible, except for fraud or mistake, to vary written contract.

In absence of fraud or mistake, contemporaneous oral agreements varying, modifying, or contradicting written contracts are inadmissible, and no additional force is added to the rule by inserting in the contract statement of the principle.

3. Appeal and error — 1050(2)—Admission of evidence of matter immaterial to issue held harmless.

The defense in action for price being that labels as manufactured were not in the form prescribed by defendant, admission of evidence, immaterial to such issue, that plaintiff agreed to assist in procuring registration of the label, was harmless.

4. Evidence — 412—Parol rule not violated by evidence of unauthorized alteration of writing.

Parol rule is not violated by showing unauthorized alteration of writing by plaintiff adding certain letters to label to be printed after defendant had in writing approved that submitted.

5. Trial — 66—Reopening case to permit proof in court's discretion.

Reopening case to permit evidence of a fact bearing on a separate defense of rescission is within sound discretion of trial court.

6. Sales — 359(1)—Defense of rescission held supported, notwithstanding defendant used an insignificant part of labels and delayed offer to return.

Defense of rescission of contract for purchase of labels to be printed according to approved design held supported by the evidence, though defendant used an insignificant part of the labels, and to accommodate plaintiff delayed offer to return them.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by G. E. Dolan against the Carmel Canning Company. Judgment for defendant, and plaintiff appeals. Affirmed.

L. W. Lovey and Walter E. Dorn, both of San Francisco, for appellant.

Goldman & Altman, of San Francisco, for respondent.

TYLER, P. J. Action by plaintiff to recover the sum of \$3,724.52 for goods alleged to have been sold and delivered to defendant.

The complaint, in substance, charges that plaintiff's assignor, the United States Printing & Lithograph Company, entered into a written contract with defendant for the manufacture of certain labels for which the defendant agreed to pay the amount sued for. Defendant denied the indebtedness, and as a separate and distinct defense alleged, in substance, that plaintiff's assignor promised

and agreed to manufacture and deliver to defendant canning company some 2,500,000 sardine labels at the agreed price of \$1.30 per 1,000 and promised and agreed that the labels were to contain a design of the trade-name to be thereafter selected by defendant; that subsequently the lithograph company notified defendant that a certain trade-mark was available for registration in the patent office and prepared and delivered to defendant a sketch of the same; that defendant, upon being so informed, advised the lithograph company not to proceed with the printing of the labels until the trade-mark had been registered, as it would be necessary for the defendant, in using them, to have the words "Registered U. S. Patent Office" printed thereon; that thereupon the lithograph company represented to defendant that it was only a matter of a short time when the registration would be granted and that it would proceed upon its own responsibility to do the printing so that the material would be available for use as soon as the trade-mark was registered. Further allegations are to the effect that this was done and the product tendered to defendant company bearing the legend "Reg. U. S. Pat. Off.," but that registration was not granted, in consequence of which the labels were of no value to defendant.

At the trial, to prove his case, plaintiff offered in evidence a document in the form of a written order, signed by the secretary of the defendant company and addressed to plaintiff's assignor, requesting the entry of an order and submission of proofs for approval for 2,500,000 sardine labels of a specified size and character. He also offered in evidence the design of a proposed label, upon which were written the letters "O. K.—R. J. W." Upon this design appeared the above-mentioned legend indicating its registration in the United States Patent Office, and it also appeared upon the labels tendered to defendant in purported execution of its order. Proof was also made that the design had been submitted to R. J. Walsh, the secretary of the company, and that he had initialed the same as evidence of his acceptance. Plaintiff then offered in evidence a printed form of label which Mr. Woods, a salesman of plaintiff's assignor, testified was in the identical form as approved by Mr. Walsh on behalf of defendant company. It further appeared in evidence that the finished product was shipped by the printer to the defendant company at Monterey, Cal., and at the same time samples thereof were forwarded to Mr. Walsh at his office. This officer was also a witness, and he testified, in substance, that upon receipt of the samples he discovered that a change had been made in the form of the label, and he immediately notified Mr. Woods of the lithograph company by telephone of his discovery, stating to him at the same time that the labels

were useless to the company with the words above referred to printed thereon. Mr. Woods thereupon visited the office of defendant and stated to Mr. Walsh, in the presence of witnesses, that he had added the words indicating trade-mark registration as the matter was pending in the patent office and the design would be allowed and approved within a few weeks; that if the matter was permitted to stand for a short time it would be all right. Mr. Walsh, as an accommodation and for the purpose of preventing a loss, agreed to hold the labels for a reasonable time pending the outcome of the application. Mr. Walsh also testified that the design which he approved did not contain the words "Reg. U. S. Pat. Off.," but that the same had been added thereto without his knowledge or consent. Other witnesses testified to the same effect. There was also testimony to show that, at the time the design was submitted to Mr. Walsh for his approval, he had requested that the lithograph company defer the printing of the label until it had been registered, but that Mr. Woods had replied that no prejudice could result, as the label did not contain any words indicating registration.

[1] The question whether or not plaintiff's assignor delivered the labels contracted for, i. e., whether they conformed to the approved design, was purely one of fact. It is manifest from what we have said with reference to the evidence upon the subject that it is controlled by the conflict of evidence rule. The finding of the trial court upon the subject is therefore controlling here.

Appellant complains of the admission of oral testimony concerning the execution of the contract contrary to its terms.

The instrument contained a provision, in substance, that, its approval and acceptance being based upon certain legal requirements, no verbal alteration or agreement between the buyer and salesman should be binding upon the lithograph company, and that that company was not to be held responsible for the text, size, or arrangement of any trade-mark, copyright, or other subject-matter required by law that was printed upon the materials ordered, notwithstanding that it or its representative may have been consulted thereon. During the course of the trial oral evidence was admitted to the effect that the lithograph company was to assist in the procurement of the trade-mark for a design, as was also oral evidence to the effect that the labels delivered did not conform to the approved design.

[2] The rule is universal that when parties have entered into a written contract their rights must be controlled thereby, and, in the absence of fraud or mistake, all evidence of contemporaneous oral agreements on the subject-matter, varying, modifying, or contradicting the written agreement, is inadmissible. The mere insertion of a state-

ment of this principle in the contract itself added no additional force to the rule.

[3, 4] Conceding that evidence of an agreement on the part of plaintiff's assignor to assist in procuring registration of the label was erroneously admitted, its admission in no manner constituted prejudicial error. Whether or not plaintiff's assignor had so agreed was immaterial to the question at issue, namely, were the labels as manufactured in the form prescribed by the defendant? That they were not was the main defense relied upon, the defendant contending that they did not correspond to the design approved by it by reason of the added legend "Reg. U. S. Pat. Off.," which rendered them useless and without value to it. Whether the plaintiff's assignor was to assist in the procurement of the labels could in no manner affect this question. Nor was it error to permit oral evidence of the defect in the design of the labels as printed. The effect of such evidence was not to vary or change the written instrument but to show its condition when executed. This evidence was pointed to the authenticity of the document itself. The rule invoked does not exclude parol evidence to show that an alteration of or addition to a writing has been made without authority. Where it is claimed that an instrument in evidence fails to express the true contract or agreement of the parties by reason of alterations therein, extrinsic evidence is always admissible to prove that contention. 22 Corp. Jur. 1147. The rule itself presupposes the existence and proof of a written contract. That being established, it cannot be varied by parol evidence. As already remarked, the evidence here complained of was directed to the point that the label as printed did not comply with the terms of the contract, inasmuch as it was not in the form approved by the defendant, differing therefrom through the addition of the phrase indicating that the body thereof had been registered in the United States Patent Office as a trade-mark.

[5] The further claim is made that the action of the trial court, in permitting defendant to reopen its case for the purpose of showing that it offered to return the goods, constituted error. Defendant had pleaded as a separate defense to the action a rescission of the contract on the ground of failure of consideration, in that the labels were rendered worthless by reason of the registration legend printed thereon, when in fact registration was denied and the use of the design prohibited. The matter of reopening the case to permit proof of this fact was within the sound discretion of the trial court. *Badover v. Guaranty Trust Co.*, 186 Cal. 775, 200 P. 638.

[6] In this connection it is also urged that the defense of rescission finds no support in the evidence because of the fact that the de-

fendant dealt with the labels as though they were its own, and its offer to return the same was not seasonably made. There is evidence in the record to show that the defendant did use an insignificant number of the labels in an interstate shipment before it offered to return them. It further appears, however, that the shipment and use of the labels was for the purpose of satisfying the requirements of the patent office that before application for registration could be made there must be shown some use of the label in interstate commerce. There is also evidence that the delay in offering to return the labels was due to the fact that the defendant was willing to hold them as a matter of accommodation to plaintiff's assignor until such time as the right of registration was definitely determined. Defendant did, however, offer to return them immediately upon discovering the alteration. There is therefore no merit in these contentions.

The finding of the trial court that the contract declared upon was not performed by plaintiff's assignor finds full and ample support in the evidence.

The judgment is affirmed.

We concur: ST. SURE, J.; KNIGHT, J.

71 Cal. App. 221

MITSUDA v. ISBELL et al. (Civ. 2793.)

(District Court of Appeal, Third District, California. Feb. 10, 1925.)

1. Appeal and error ⚡1011(1)—**Determination of triers of fact on conflicting evidence conclusive, unless evidence shows decision to be erroneous as matter of law.**

Where evidence is conflicting, determination of triers of fact is binding on appellate court, unless whole testimony shows that decision is erroneous as matter of law.

2. Highways ⚡179—**Statute, permitting repairs of vehicle on highway, permits necessary repairs only if practicable to remedy difficulty within reasonable time.**

State Vehicle Act, § 20, subd. W, permitting repairing, on traveled portion of highways, vehicle so disabled as to make it impracticable to remove it until repairs have been made, must be reasonably construed to permit vehicle to remain on highway only if practicable to remedy difficulty within reasonable time, and with as little inconvenience and hazard to others using highway as is practicably possible.

3. Highways ⚡184(3)—**Whether repairing vehicle on traveled portion of highway is necessary is for triers of fact, unless evidence shows on its face that it is reasonably necessary.**

Under state Vehicle Act, § 20, subd. W, unless testimony shows on its face that time required to repair vehicle disabled on traveled portion of highway is reasonable, determination of such issue is for triers of fact.

4. Highways ⚡184(2)—Evidence held to warrant finding that defendants failed to exercise proper diligence to remove or repair disabled wagon left in highway over night.

Evidence held to warrant finding that defendants failed to exercise proper diligence to remove or repair heavily loaded and disabled wagon left on highway over night, with which plaintiff's automobile collided, causing death of his wife, injuries to plaintiff, and damages to automobile.

5. Highways ⚡179—Defendant's negligence in leaving wagon in highway held proximate cause of collision.

Where plaintiff's vision was so obscured by cloud of dust caused, when another automobile which he was following swerved and left paved portion of highway to avoid heavily loaded and disabled wagon left on highway over night by defendants, that plaintiff could not see wagon, held that proximate cause of collision with wagon was defendant's negligence in leaving it on highway, in violation of state Vehicle Act, § 20, subd. W, and not cloud of dust, which was merely condition resulting from defendant's negligence.

6. Highways ⚡184(3)—Evidence as to whether automobile driver, who collided with wagon left in highway at night, was contributorily negligent, held to present issue for triers of fact.

Evidence as to contributory negligence of automobile driver, who collided with wagon left in highway at night, in violation of state Vehicle Act, § 20, subd. W, held to present issue for triers of fact.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by G. Mitsuda against J. W. Isbell and another, copartners doing business under the firm name of the Isbell Construction Company, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Farnsworth, McClure & Burke, of Visalia, for appellants.

Leroy G. Smith, of Dinuba, for respondent.

HART, J. This is an action for damages growing out of a collision by a Ford automobile while being operated by the plaintiff with a large and heavily loaded wagon of the defendants which the latter had left standing on a certain highway in Tulare county. The result of the collision was that the plaintiff's wife, who was riding with him at the time of the collision, was instantly killed, the plaintiff himself sustained physical injuries, and the car driven by him at the time and of which he was the owner was greatly damaged.

The complaint, charging that the collision and the results thereof were proximately caused by the negligence of defendants, is in five counts, or, in other words, sets up five different causes of action, to wit: (1)

For injuries to his person; (2) for damage to his automobile; (3) for loss of services of his wife; (4) on account of expenses "for sanitarium service and medical aid"; (5) "for undertaker's charges and funeral expenses for his wife." The aggregate amount of damages claimed by plaintiff in his complaint for the several injuries which thus he alleged he received by reason of the collision is the sum of \$13,463.15.

The defendants, by their answer, specifically deny each and all the material allegations of the complaint and plead contributory negligence, alleging that, but for the negligence of the plaintiff, the collision and the results thereof would not have occurred.

The court's findings were in general accord with the claims of the complaint, and, agreeably to said findings, judgment passed for the plaintiff for the total sum of \$4,728.50. A motion for a new trial, on all the statutory grounds, was made by defendants and denied by the court.

The defendants, prior to and at the time of the happening of the accident, were, as copartners, engaged in the business of contracting for and doing highway construction work. For the purpose of carrying on this work of construction they had equipped themselves with and used a large variety of implements, tools, and other machinery suitable to and necessary for the building of highways. This outfit they moved from point to point, "as they completed one contract and began another." In the month of October, 1921, they had completed one of these highway contracts near the town of Seville, in Tulare county, and, on the 31st day of said month, proceeded to move their equipment from Seville to a certain point in Fresno county. A large part of the equipment, including a "portable blacksmith shop," was loaded on a wagon, drawn by six mules. Some time in the afternoon of said 31st day of October, this wagon, so loaded and propelled, was traveling in a northerly direction over and upon a recently constructed and completed paved highway in Tulare county, and, on reaching a point approximately one-half mile south of the village of Sultana, in Tulare county, the rear axle of the wagon broke, thereby causing the right hind wheel to lean inward and to scrape against the side of the wagon so that a groove was cut into the wagon bed. The wheel, so some of the witnesses said, was thrown in contact with the brake rod, with the result that both hind wheels locked in such manner as to make it impossible to proceed further with the wagon in that condition. There were two men in the wagon at the time of this accidental breaking of the axle. After an examination of the wagon and thus learning the condition in which the breaking of the axle had left it,

the two men in charge of the wagon detached the mules therefrom, placed a lantern reflecting a white light on each of the four corners of the wagon, and then left it, with its load, on the highway, where it remained in that condition until the following morning.

About 10 o'clock of the night of said 31st day of October, the plaintiff was driving a Ford automobile north on the highway on which the wagon of defendants was left standing. His wife was sitting on his right in the front seat. Preceding his machine a short distance, and going in the same direction, was an automobile driven by one Tabuchi, a Japanese friend of plaintiff. Sitting in the front seat with and on the right-hand side of Tabuchi was one T. Iwasa. Immediately before reaching the spot where the wagon was standing, Tabuchi, having observed the light from a lantern suspended from the rear end of the wagon, turned his car to the left so as to pass around the wagon, and in doing so left the paved portion of the highway a short distance. There was at this and some other points scattered over the concrete portion of the highway some fine dirt, and, so the plaintiff testified, the passing of Tabuchi's car over or along the edge of the concrete pavement to get around the wagon caused a cloud of dust to rise just before plaintiff reached the point where the wagon stood, thereby causing plaintiff's vision to become so obscured that he could not or at least did not see the wagon. Thus the collision occurred, with the result as above explained.

The above is a general statement of the circumstances under which the accident occurred. The court made these findings:

"That on or about the 31st day of October, 1921, at about 4 o'clock of said day and at a point on the public highway about three-fourth miles south from the town of Sultana, in said county and state, the defendants did carelessly and negligently leave and abandon a wagon with overhanging loaded rack, allowing the said wagon and rack then and there to completely obstruct the easterly half of said highway and extended for about 24 inches westerly across the center of said highway, thereby making it necessary for vehicles traveling on said highway to turn off the pavement in passing said wagon and travel in loose soil and dust on and beyond the margin of said pavement. * * *

"Plaintiff was driving upon said highway in a northerly direction, following, at reasonable distance, another automobile which preceded him, and was traveling at a reasonable rate in a new Ford touring car at about 10 o'clock of the evening following the abandonment of said wagon upon said highway. The said wagon was invisible to plaintiff at all times. There was loose dirt or dust on each margin of the pavement and loose dry soil on each side of the pavement, and the travel of vehicles on the highway raised dust into the atmosphere and such dust hid the wagon, and

lights thereon, from plaintiff and his wife.

* * *

"That defendants were guilty of gross negligence in leaving said wagon upon said highway as aforesaid without displaying red lights thereon during the nighttime.

"With reference to the allegations set out in defendants' answer, it is found and determined that defendants did cause to be lighted and hung upon the rear end of said wagon a lantern, and upon the front end of said wagon two lanterns, and that said lanterns on the front were on said wagon and burning at the time of the collision described in the complaint, and one on the rear was burning at said time, but all were white lights and dust prevented plaintiff from seeing the white lights or wagon, and there were no red lights on said wagon.

"That plaintiff was not driving in a careless nor negligent manner, nor at a high or unlawful rate of speed, nor without due regard for the safety and convenience of pedestrians nor other vehicles nor drivers on said highway and plaintiff was not guilty of contributory negligence and no negligence of plaintiff contributed to the collision, nor to any injury nor to any damage resulting therefrom;

"That plaintiff was driving his automobile in a careful and prudent manner, but he did not see any lantern displayed on the rear of said wagon, and is not guilty of negligence in his manner of driving nor in approaching the said wagon."

The general contention of the defendants is that the foregoing and, consequently, all other material findings, are not supported by the evidence; the specific points being: (1) That, according to the uncontradicted evidence, the defendants were not guilty of any negligence, "either as a matter of law or of fact"; (2) that, conceding for the purposes of the argument, that defendants were primarily negligent in leaving their wagon on the highway as indicated and that the plaintiff was not guilty of contributory negligence, "still a wholly independent and responsible human agency, to wit, the other automobile which raised a cloud of dust and obscured respondent's vision, intervened between the act of appellants in leaving the wagon on the road, and the accident, and such intervening independent human agency was the direct proximate cause of the collision"; (3) "assuming that appellants were guilty of some negligence in leaving the wagon on the road, still, on the uncontradicted evidence, plaintiff was guilty of such contributory negligence as precludes his recovery."

The plaintiff testified:

"I had an accident in October, 1921, on the highway south of Sultana. I think it was November 1st. The afternoon of the day of the accident the wife of Mr. Harada was ill and we visited her. We first went to the home of Harada and then visited the hospital at Orosi. My wife stayed at Harada's when I went to the hospital. In going to Harada's place, we went over the Sultana highway at about 3 or half past 3 in the afternoon, and,

when we returned along the Sultana highway, it was between 9:30 or 10 o'clock at night. On our return along the highway, in my machine was my wife. She was sitting at my right on the front seat. There was another machine, the owner of which is now in Japan, but the party that was riding with him, by the name of Iwasa, is here. They were driving ahead of me. The distance between our machines varied at different times, but at the time of this accident I think it was about 40 or 50 feet ahead of my machine. I saw the machine turn slightly, and then a cloud of dust, and my vision was obscured, and I do not remember anything after that. The machine ahead of me turned slightly to the left. I made a slight turn in the direction that the other machine turned, then the dirt arose and I couldn't see him, and I do not know what happened afterwards. I had been able to see his machine clearly up to that time. It was directly ahead of me. I did not see any light ahead of that machine in the road, nor did I see any object ahead of the other machine as I drove along. I have no recollection what happened to my machine after the cloud of dust arose. I was driving about 16 or 17 or 18 miles an hour. I do not know how fast I was driving at the time when I was struck because I do not remember anything about it. I was following the other machine. We were together. I was not looking at my speedometer, but I could judge the speed by the amount of the gasoline that I pressed. I think it was about 5:30 in the morning when I regained consciousness at the hospital in Dinuba. After I regained consciousness I felt a very severe pain in my right shoulder. I remained in the hospital two weeks. * * *

"I went through Sultana the first time I went down there in the afternoon and over the same road where the accident occurred. That road was a new paved highway. There was dirt on the edges of the highway, but not much in the middle. When we left Harada's place about 9:30 that night, we were going home. * * * We traveled on the highway more than one-half mile before the accident, and I had been following behind his car. It was a clear night, there wasn't any fog, but it was dark. We left Harada's house about 9:30. As Tabuchi was driving along that road, after we left Harada's house and before the accident, there was no dust to speak of. I had my lights burning and Tabuchi had his lights burning on his car. As we were going along that road north, before we got to where this accident occurred, I could not see the lights on the wagon. I never did see any lights on the wagon. I could not see them just immediately or just at the instant when my car hit the wagon. Just a little before the accident the dust arose."

A. E. Russell, a resident of Dinuba, Tulare county, was at the place where the accident occurred early in the morning following the day of its occurrence. He testified:

"I reside at Dinuba in this county. On or about the 31st day of October, 1921, I had occasion to pass along the paved highway south of Sultana driving toward Dinuba. I noticed an obstruction on the highway at the time I

passed just south of Sultana. I noticed a wagon setting there in the road which had a rack on it. A fellow was standing there, and an automobile was in the ditch. The wagon was loaded with lumber, a feed rack, boards, and junk. It was a big rack and the lumber was sticking out about 4 feet behind the rack. The rack extended over about 2 feet on each side of the wheels. The right front wheel I think was right at the edge of the paved highway. The right-hand hind wheel was about 2 feet on the paved highway; it was setting in an angle. The wagon was facing north. We thought the wagon was standing 2 feet over the middle of the highway; that is, the lumber was sticking out of the back end of the wagon, towards the west. It might be 2 feet over the middle of the highway. There was dirt on the highway; it was a new highway and had not been perfectly cleaned off. The dirt stood about 4 feet on each side. Some places you could get a visible view of the edge of the highway. You could see the tracks of passing vehicles in the dirt in the edge of the highway as they went around the wagon. * * * The wagon was facing north and the rear end was out on the highway. There are olive trees and fig trees along the right-hand side of the road going north. These trees are set at 10 or 12 feet from the edge of the highway. I saw these things between 6 and 7 o'clock in the morning, around about 6 o'clock, at little after 6 o'clock."

Cross-examination:

"The road going south from Sultana had just apparently been recently built and uncovered and the dirt covered over the edges of the highway 3 or 4 feet. It was quite dusty driving along there. * * * There were figs or olive trees along the highway and I would say their branches would come out to 8 feet. The trees were 7 or 8 years old. You could drive your car off the highway and not hit the limbs. * * * I would say that the trees were planted 20 feet apart. * * * I don't know the width of the rack on the wagon. I noticed something wrong with the wagon. The right rear wheel was lopped over, and was dragging against the frame of the wagon. It looked like it had been doing that for quite a while, it had cut quite a circle in there by rubbing. I didn't notice whether or not it was caught on the brake. The paved highway there is about 16 feet."

Redirect:

"I would have thought that the wagon could have been moved. I made a special note that there was plenty of room to move the wagon off the highway."

Recross:

"The boards on the wagon extended about 4 feet back of the bed. I would not consider there was anything extra heavy about it. Two horses would move it easy enough on the highway. I noticed there were fifth chains there."

C. V. Lamb was traveling over the highway on the night of the accident and short-

ly thereafter was at the scene thereof. He testified:

"I saw the automobile which was damaged in the collision. It was in the ditch; up quite a ways above the wagon. I could not say how far. It was standing right in the bottom of the ditch with the front wheels up on the west bank. * * * When I first saw the machine, a Japanese man was in it. He was in a kind of a stupor. It looked like he had run into that wagon. * * * I went back the next morning about 9 o'clock and saw the premises. I saw a wagon on the highway. * * * At the time I was there I did not observe the position of the wagon. I had passed it during the night. We noticed it was setting on the highway. The man that was driving the car had to get off the highway to get by on the west side. * * * Along the highway the edges were covered with dirt."

Cross-examination:

"I should think it was a pretty dark night. * * * I had gone north earlier in the evening and passed the wagon when it was dark. Along the edge of the paved highway for about a foot there was dirt on either side. I observed the night of the accident that other machines caused considerable dust."

T. Iwasa accompanied plaintiff in the latter's car to the home of Harada, but on the return rode with Tabuchi. He testified:

"I first noticed the noise (of the collision) at the time of the accident. We got off of our machine and went to see what happened and found that Mr. and Mrs. Mitsuda were injured, and we took them to Dinuba. At that time Mrs. Mitsuda was dead. Just before we heard that noise, as we approached, we saw a wagon ahead of us. The condition of the road was not very good at that point where we avoided the wagon in order to pass it and immediately after we heard this noise. We had to get off the highway in order to pass the wagon. There was very light sand laying on the side and I suppose that is what caused the accident, was going through the sand like that raised a dust, and, after we stopped the machine and went back to see what happened to Mitsuda, we could not see it very well on account of the dust thrown up. The road was clear as far as the center was concerned, but on the side was dust or sand."

Cross-examination:

"I went down that highway when Mitsuda and I went there (to Harada's) in the afternoon. I noticed at that time in the afternoon that the dirt was covering part of the highway. * * * As we were going north along the road that night, I could see the rear light, but we noticed it some distance away. I called Tabuchi's attention there was a white light down there. That was about the distance between the telephone poles. * * * He (Tabuchi) commenced turning out about a hundred feet away; it might be a hundred feet after we went off the highway up to the time we went back on it. I know that one side of the machine went off the highway. * * * After we passed the wagon, it was dusty back

there and one could hardly see the other automobile."

Leroy G. Smith, attorney for plaintiff, testified as follows:

"I will state at the outset that I was called by a Japanese interpreter very early in the morning, I should judge about half past 3 o'clock following this accident and, as soon as it was light enough to see, went out to the scene of the accident, and went very carefully over the situation. I had in mind the possibility of adjustment of claims if a claim should be made, and looked more carefully in detail, perhaps, than another person would under the same circumstances. I found that the right rear wheel of the wagon had evidently weakened under the heavy load, and the top was impressed against the frame of the wagon, and had cut something of a groove where the tire comes in contact with the frame. There was nothing else on any one of the four wheels, unless it would be a hot box, which I could not discover, that would in any way impede the motion of a wheel. That wheel was not locked, or any other member of the wagon, except by the friction of the top of the wheel rubbing against the wagon. It struck me as an exceptionally heavy load to put on a wagon of that kind. I think it was a thimble skein wagon. It was difficult to determine just where the edges of the highway at that point were, but I took a stick and scraped off the dirt at both the right front wheel and the right rear wheel. The right front wheel was turned so that it was not parallel with the edge of the highway. A portion of the wheel was touching the edge; the tongue being pointed toward and to the right of the highway. The rear wheel leaned inward and the lower part was nearer the outer edge of the highway than the plumb from the upper part of the wheel would have been, so that the hub, the middle of the spokes, was further in on the highway than the tire where it came in contact with the highway. I went to both edges of the highway and scraped off the dirt so I could locate the extreme edge of the highway. I measured from the middle of the highway to a plumb line from the overhanging left rear corner of the wagon and I estimated the distance from the center of the highway to the left rear corner of the wagon to be between 22 and 23 inches west of the middle of the highway. There was a well-beaten trackway made by automobiles where machines had passed around that wagon. The dirt was very loose and it was of a peculiar filmy kind of dirt that makes a dust. I was satisfied at the time that there was a light on the left front of the wagon and it is only a conclusion in my mind there was a light on the left rear because of the pieces of a lantern that I saw there. * * *"

"The automobile was 57 steps from the point of impact on the wagon to a place directly opposite the Ford on the highway. The right-hand side of the car was practically demolished. The top was torn to shreds and the car bore the appearance of having something ran through the right side of the windshield across the front seat taking the back with it and jamming the right rear of the body. There was plenty of room to move that wagon off

the highway without coming in contact with the trunks of the trees, and, by disturbing the limbs of those trees slightly, the whole load could have been put well over the edge of the highway. Outside of that dragging tire there was nothing that would prevent its being moved. The dirt was soft on that side. It is true it would have pulled a great deal harder than on the highway. The wagon could have been unloaded and moved very easily. There was nothing bulky on that wagon; that is, I mean to say, while the total load was of tremendous bulk, the pieces upon it could have easily been handled and thrown off to the side of the road or put onto something else. There was no lanterns near or around the right side of the wagon, and no evidence of any having been hung there, and there was no evidence of a flag about the wagon of any kind, and I could see no sign of any kind of any warning except the two lanterns that I referred to in the beginning."

Cross-examination:

"The wagon was loaded with cement frames and some other loose stuff, and also lumber. My conception of the load is that it was too large; much heavier and higher than that given by Mr. Russell this morning. There was lots of lumber, these heavy frames they use for pouring cement. I think there must have been at least 2 feet of that packed in solid, perhaps 2½ or 3. I think that about four men could unload it in a couple of hours."

The witness Iwasa, called for further cross-examination, stated:

"When I went down that Sultana highway in the afternoon at 3 o'clock, this wagon was standing there."

Henry Cano, driver of the wagon on the day of the accident, testifying for plaintiff, stated that it was about 5:30 p. m. when he first started to drive on the highway on which the accident occurred.

[1] The above is a comprehensive statement of the testimony presented by the plaintiff. There is a conflict between that testimony and the testimony introduced by the defendants upon many of the essentially vital facts. It was, of course, for the trier of the facts (the court in this instance) to settle that conflict and from the whole mass of testimony determine the ultimate facts, and, unless it appears that upon the whole testimony the decision arrived at is, as a matter of law, erroneous, then that determination is binding upon this court.

[2] The proposition first advanced by the defendants is that the mere act itself of leaving the wagon on the highway under the circumstances as indicated, did not constitute negligence on their part. To the contrary, they contend, the provisions of subdivision W of section 20 of the state Vehicle Act (Stats. 1919, p. 219, in force at the time the damage complained of here was sustained) furnishes legal justification for the act of leaving the wagon on the highway. That paragraph of said section provides:

"No person shall leave standing or cause or permit to be left standing upon the main traveled portion of any public highway a vehicle undergoing repair or which has been stopped for the purpose of having repairs made thereon, or for the purpose of camping: Provided, however, that this provision shall not apply to a vehicle which shall be disabled, while on such main traveled portion of the highway, in such manner and to such extent that it shall be impossible to avoid stopping such vehicle on said main traveled portion of the highway, and impracticable to remove the same therefrom until repairs shall have been made."

[3] The language of the above provision is very general, but, in its application, it must be given a construction conformable to reason and common sense. If the language of the section were to be accepted without qualification, there would be no limit of time during which the highways of the state might be used for the purpose of repairing a vehicle getting out of order while being driven over such highways. What the section evidently means, or was intended to mean, is that where some essential part of the mechanical contrivances of a vehicle, while being driven over a highway, gets so out of repair as to render it incapable of performing its work, with the result that such vehicle cannot be moved by the usual method of moving it, then, if it be practicable to remedy the difficulty within a reasonable time, the vehicle may be allowed to stand on the highway until the defect or injury is corrected. Moreover, the provision clearly contemplates that the use of the highway for that purpose must be with as little inconvenience and hazard to others legitimately using it as is practically possible; and, unless upon the face of the testimony it can justly be declared that the time employed in making the repair was reasonable, considering all the conditions and circumstances, and that the manner of the use of the highway for that purpose entailed no unreasonable inconvenience or no such added peril to the traveling public as could not be overcome by the exercise of reasonable care, then the determination of all those matters would be with the jury or the court, where, as here, the decision of the questions of fact is committed to the latter.

[4] The evidence in this case is such as to make it peculiarly the province of the trier of the questions of fact to determine whether the defendants acted with due or reasonable diligence and with reasonable convenience and safety to others traveling over the highway in removing the wagon or in repairing the damage thereto so that it could be removed from the situation in which it was allowed to remain standing on the thoroughfare. The court was at liberty to find specifically, as impliedly it did find, these facts: That the wagon, large and heavily loaded with certain materials, which extended over or beyond its bed, was left standing at a slight angle on the highway, the front

wheels being on the edge of the right side of the highway and the rear end nearer the center thereof; that the wagon was left standing in that condition and situation between the hours of 3 and 4 o'clock p. m. of the day of the accident and suffered to remain so standing until the following morning, without any real effort on the part of the defendants either to remove it or to make any earnest attempt to repair the injury to it so that it could be removed; that, notwithstanding the asseverations of the defendants to the contrary, there were facilities or means at hand (the tools constituting the portable blacksmith shop and the large boards or scantling which were a part of the equipment on the wagon) with which the brake could have been pried from the wheels and other repairs so made within a comparatively brief space of time as to have enabled them to remove the wagon from the concrete pavement to the dirt portion of the highway, thereby making the paved portion perfectly clear and safe for the usual travel; that, as a matter of fact, the wagon, in the first instance, could have conveniently been turned to and left standing on the dirt portion of the road; that, because of the position in which the wagon was left on the concrete pavement, passing autoists were, to be perfectly safe, compelled to leave the concrete and travel for the required distance over the unpaved portion of the highway to pass the point where the wagon stood; that, finally, and as the sum of all the foregoing considerations, the defendants did not exercise the proper diligence, under the circumstances as shown, to correct the damage to the wagon so that it could have been removed from the highway.

[5] The second point that, even if the act of the defendants in leaving the wagon on the highway as above explained constituted negligence, still the evidence shows that the proximate cause of the collision was due to an intervening independent act of negligence, is devoid of merit. As seen, it is the contention that the stirring up of the dust by the passing of Tabuchi's car to the left of the wagon and on the unpaved portion of the highway, with the result that the air was so impregnated with flying dust as to obscure plaintiff's vision, thereby preventing him from seeing the wagon or the lights suspended therefrom, constituted an intervening cause, wholly independent of the original or primary act of negligence, and which so arrested and displaced the primary or original act of negligence as to make it the sole proximate cause of the collision. But the circumstance of the stirring up of the dust was only a natural incident of the passing of automobiles or other vehicles over the highway. The highway in question was new, having been only recently completed, and over it, near its edges, was scattered fine dirt, not an uncommon way of leaving con-

crete highways immediately following their completion. Besides, as shown, the position of the wagon on the highway made it safer, if not absolutely necessary, to leave the concrete when passing the wagon and travel on the dirt portion. Naturally, under these circumstances, passing vehicles would be expected to cause dust to rise and becloud the air, and this condition would only be an essential incident of an act made necessary by the preceding wrongful act of the defendants. In other words, the defendants, by their own act of leaving the wagon on the highway as indicated, created a condition which itself was the direct cause of the flying dust and the consequent interruption of the plaintiff's vision so that he was prevented from seeing the wagon; and it was a condition or contingency so natural to arise under the circumstances that the defendants were bound and deemed to anticipate that it would happen.

The situation here with respect to the claim of a sufficient independent cause intervening to arrest or suspend the operation of the original act of negligence, etc., is, in the general aspect thereof, no different from that existing in the case of *O'Connell v. United Railroads*, 19 Cal. App. 36, 64, 124 P. 1022, and *Merrill v. Los Angeles Gas & Elec. Co.*, 158 Cal. 499, 503, et seq., 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134. In the *O'Connell* case the charge of negligence mainly relied upon was that the plaintiff, a youth of about the age of 16 years, was employed and put to work as a trolley tender on a work car owned and operated by the defendant. The boy had previously never had experience in such work and the defendant's agents, in charge of the car, failed to warn him, before he entered upon the discharge of the duties of trolley tender on an electric car, of the danger attending the performance of the duties to which thus he had been assigned. He was directed by the defendant's foreman to reverse the trolley, so that the car would take an opposite direction to that in which it had been moving, and, in doing so, the car being still in motion, the trolley was broken, causing him to lose his balance, so that he fell to the ground in front of the car, which partly passed over his body, whereby he sustained serious physical injuries. The claim was that the breaking of the trolley and not the failure of defendant's agents to warn the plaintiff of the perils of working in such a position was the proximate cause of the injury. To that contention this court made the following answer, which is of peculiar pertinency to this case as made by the evidence:

"The primary causation here could not, by its very nature, be otherwise than continuous, for it was the very germ from which the ultimate damage developed and without which there would perhaps have been no damage.

Its wrongfulness followed, permeated, and inhered in every subsequent act of the plaintiff in discharging his duties as a trolley tender, and the breaking of the pole was only a necessary ally in the production of the disastrous result which, in all reasonable probability, it was, from its very inception, destined to bring about."

In *Merrill v. Los Angeles G. & Elec. Co.*, supra, in which the question in hand is learnedly considered and discussed, it is said:

"The original act of negligence, the primary causation, may be in its nature so continuous that the concurrent wrongful act precipitating the disaster will in law be regarded, not as independent, but as conjoining with the original act to create the disastrous result."

So here the original act of negligence by the defendants, as found by the court, was in its very nature necessarily continuous, and the stirring up of the dust just before plaintiff's car collided with the wagon merely conjoined "with the original (wrongful) act to create the disastrous result."

[6] The evidence is such that it was entirely with the trial court, as the arbiter of the issues of fact, to solve the question whether the plaintiff was or was not guilty of contributory negligence. There is nothing in the evidence which would justify the declaration, as a matter of law, that the plaintiff did not, under the circumstances, approach the point of collision with reasonable or the due amount of care. He was driving his car at a low rate of speed, not to exceed 17 miles an hour, and was about 50 feet in the rear of Tabuchi at the time the latter swerved to the left to pass around the wagon and, in doing so, stirred up the dust, thereby obstructing the vision of plaintiff so that he could not see any object on the highway before him; and this turning to the left by Tabuchi and consequent stirring up the dust was so instantaneous and so near the point where the wagon was standing that it is probably true—in fact, the court could well have specifically so found—that the plaintiff, notwithstanding the low rate of speed at which he was then driving, could not have stopped his car in time to avoid colliding with or running into the wagon. The plaintiff, as has been shown, testified that, because of the fact that Tabuchi's car was for a long distance in front of him and traveling north on the same side of the highway as he was and on the side on which the wagon was standing, his view ahead of him was so obstructed that he could not and did not at any time before Tabuchi turned to the left see a light or any lights hanging from the wagon or stationed at or near where the wagon stood. But it is further argued that, as Iwasa testified that he saw the wagon on the highway at the point where the collision occurred in the early part of the afternoon of

the day of the accident, when he and plaintiff were passing over the highway on their way to the home of Harada, so it must be true that the plaintiff at the same time saw the wagon. There is no direct evidence that the plaintiff saw the wagon at the time referred to, nor is there any evidence that Iwasa, at the time, or at any time, made any remark to the plaintiff with respect to the circumstance of the standing of the wagon on the highway. The court could have concluded, as probably it did, that the plaintiff did not on that occasion see or notice the wagon, or that, if he did, it made no impression on his mind. But, if it were true that plaintiff did see the wagon at said time, and even noticed that it was disabled, still it does not necessarily follow therefrom that he was to assume or suppose that it would be allowed to remain standing on the highway for a period of six or seven hours, and in such a position as practically to obstruct the highway and so make it extraordinarily hazardous, particularly in the nighttime, to others traveling thereon. Thus briefly have we referred in a general way to the evidence bearing upon the charge that the plaintiff was guilty of negligence which proximately caused or contributed to the accident to confirm the statement substantially above made that the evidence addressed to that issue is such that, as to its effect, reasonable minds could reasonably differ; that, therefore, said evidence presented for the trial court's solution a question of fact; and that, consequently, the finding of the court on that issue is conclusive on this appeal.

The judgment is affirmed.

We concur: PLUMMER, J.; FINCH, P. J.

MEMORANDUM DECISIONS

195 Cal. 566

CITY PROPERTIES COMPANY, Plaintiff and Respondent, v. SOUTHERN CALIFORNIA BOND & FINANCE CORPORATION (a Corporation), Defendant and Appellant. (L. A. 8523.) (Supreme Court of California. March 5, 1925.) In Bank. Motion to dismiss appeal by defendant from an order of the Superior Court of San Diego County; William P. Cary, Judge. Motion denied. Herbert C. Kelly, of San Diego, for appellant. Crouch & Sanders, of San Diego, for respondent.

PER CURIAM. This matter came before us at our last calendar in Los Angeles upon respondent's motion to dismiss the appeal upon the ground of appellant's failure to file transcript within time. Counsel for appellant being actually engaged in the trial of a case in another county, was unable to be present at the hearing thereof, but forwarded by mail an affidavit in opposition to the motion. At the hearing respondent presented counter affidavits, and upon the showing thus made it appeared that appellant's bill of exceptions had been settled by the trial judge December 1, 1924, and that the transcript was not presented for filing until January 26, 1925, the return day of the motion, and long after the service of notice thereof. Upon this showing the motion was granted and the appeal dismissed. Within due time thereafter appellant petitioned for a rehearing of the order dismissing the appeal and also petitioned for relief under section 473, Code of Civil Procedure, supporting the petition by affidavits, from which there appeared some material facts, the existence of which had not been ascertained by appellant at the time of the hearing on the original motion. The petition for rehearing was granted, and the matter is now before us upon respondent's motion to dismiss the appeal and appellant's application to be relieved from default. There is some conflict arising from the affidavits filed in these various proceedings, but the following facts are gathered therefrom without substantial contradiction: The order appealed from was made October 11, 1924, and defendant's notice of appeal therefrom was filed November 14. Appellant's proposed bill of exceptions upon appeal was served upon respondent November 19, and November 28 respondent delivered to appellant its proposed amendments thereto. Ap-

pellant refused to adopt the proposed amendments, and upon the same day he delivered to the clerk of the court for the judge who tried the case his proposed bill of exceptions and respondent's proposed amendments thereto. Both parties rested thereafter in the expectation that they would in due time receive notice from the clerk of the time set by the trial judge for the settlement of the bill of exceptions. No such notice was received by either party, and on January 8, 1925, respondent discovered from the record in the clerk's office that the bill of exceptions had been settled, without including therein any of respondent's proposed amendments thereto, on December 1, 1924. Respondent thereupon served and filed notice of motion to dismiss the appeal as aforesaid. It now transpires that through some mistake or inadvertence in the clerk's office appellant's proposed bill of exceptions was presented to the trial judge without the presentation to him of respondent's proposed amendments thereto and without advising him of the fact that amendments had been proposed thereto. Thereupon the trial judge, evidently believing that no amendments had been proposed to appellant's proposed bill of exceptions, settled the same as proposed by appellant without notice to either of the parties. Two things are apparent from this showing: First, that appellant's inactivity, while awaiting the receipt of notice from the clerk of the time fixed by the trial judge for the settlement of the bill of exceptions, may justly be regarded as excusable neglect; second, that the purported settlement of the bill of exceptions by the trial judge was not such a settlement thereof as the law contemplates in cases where amendments have been proposed thereto by respondent and have been rejected by appellant. The trial judge was misled by the circumstances into believing that no amendments had been proposed to appellant's proposed bill. It seems, therefore, that the relief sought herein by appellant should be granted, and that the trial judge will doubtless, upon proper application therefor, or upon his own motion, vacate the order heretofore made by him settling the bill of exceptions and will fix a time for the settlement thereof, at which time, and upon notice to the parties, he will either allow or disallow respondent's proposed amendments thereto as to him may seem proper. It is therefore ordered that the motion to dismiss the appeal be and it is hereby denied.

fications of insufficiency of the evidence. The motion is supported by certified copies of a purported order of the superior court amending the engrossed bill of exceptions. It appears herein that on July 23, 1924, an engrossed bill of exceptions was stipulated to be correct by written stipulation of the parties appended thereto. On July 26, 1924, it was settled, allowed and certified to be correct by the judge who tried the case (Mr. Justice Knight, of the District Court of Appeal, formerly a judge of the superior court). Thereafter, on December 11, 1924, there was filed in the trial court an order purporting to amend said engrossed bill of exceptions *nunc pro tunc* as of July 26, 1924, by inserting therein specifications of insufficiency of the evidence. This order recited that it was made upon the ground that the specifications of insufficiency of the evidence had been omitted from the bill of exceptions through the mistake, inadvertence and excusable neglect of appellant, and the order was signed "Benj. K. Knight, Judge of Said Superior Court, Presiding at the Trial of the Case and Who Decided the Same." The specifications referred to in this order are the ones which are sought by this motion to be inserted in the printed transcript upon appeal, which was filed in this court October 24, 1924. The question of the validity and effect of the order purporting to amend the bill of exceptions may more conveniently and satisfactorily be considered and determined in connection with the consideration and determination of the appeal upon its merits. It is therefore ordered that the motion be granted, without prejudice to the later consideration upon this appeal of the question of the validity and effect of the order purporting to amend the bill of exceptions.

195 Cal. 546

I

James C. SHEEHAN, Plaintiff and Appellant, v. ALL PERSONS, etc., Defendants, and Fidelity Bond & Mortgage Company, Defendant and Respondent. (S. F. No. 11341.) (Supreme Court of California. March 3, 1925.) In Bank. Motion for diminution of record and to insert matter in transcript on appeal from Superior Court, City and County of San Francisco; Benj. K. Knight, Judge. Granted. George D. Collins, Jr., of San Francisco, for appellant. Harding & Monroe, of San Francisco, for respondent.

PER CURIAM. This is a motion, upon suggestion of diminution of the record, to insert in the copy of the bill of exceptions in the printed transcript on file herein certain speci-

CALIFORNIA REPORTER

235 PACIFIC REPORTER

195 Cal. 699

In re PERKINS' ESTATE. (L. A. 7946.)

(Supreme Court of California. April 2, 1925.)

1. Wills ⚡21, 53(2)—Actual mental condition of testatrix at time of execution of will is condition to be determined in will contest.

To contest a will on ground that deceased was of unsound mind, actual mental condition of testatrix at time of execution thereof is question to be determined, and her mental condition before or after execution is important only as tending to show mental condition at time of execution of will.

2. Wills ⚡52(1)—Contestants must show that testatrix was of unsound mind at time of execution of will to set it aside.

A person being presumed sane, burden is always on contestants of will to show affirmatively, and by preponderance of evidence, that testatrix was of unsound mind at time of execution thereof.

3. Wills ⚡52(3)—Proof of subsequent insanity of testatrix will not create nor carry presumption of its past existence.

In execution of wills, insanity of testatrix exists as matter of law only from time it is shown to exist, and proof of subsequent insanity will not create or carry a presumption of its past existence.

4. Wills ⚡31—Mental derangement sufficient to invalidate will, stated.

Mental derangement sufficient to invalidate a will must be insanity of such broad character as to establish mental incompetency generally, or some specific and narrower form of insanity under which testator is victim of some hallucination or delusion, and such abnormality of mind must have had a direct influence on testamentary act.

5. Wills ⚡55(1)—Testatrix not shown to be of unsound mind at execution of will.

Contestants held not to have sustained burden of establishing that at execution of will testatrix was of unsound mind.

6. Wills ⚡55(10)—Dislike of relatives not necessarily proof of insanity sufficient to set aside will.

That a person dislikes his relatives with or without reason is not necessarily proof of insanity sufficient to set aside his will.

7. Wills ⚡31—Testamentary capacity not dependent on testatrix's ability to reason logically.

Testamentary capacity does not depend on testatrix's ability to reason logically or on her freedom from prejudice.

8. Wills ⚡38(3)—Testatrix not victim of insane delusion because mistakenly believing that relatives were unfriendly.

That testatrix mistakenly believed that relatives were unfriendly to her held not to warrant conclusion that she was victim of an insane delusion.

9. Wills ⚡50—Testatrix not insane because not dealing with relatives as generously as expected.

That testatrix did not deal as generously with her relatives as they hoped and expected was not proof of insanity.

10. Wills ⚡166(1)—Evidence held insufficient to show undue influence.

Evidence held insufficient to show undue influence in execution of will.

11. Witnesses ⚡200—Testimony of attorney relative to conversations with testatrix held admissible where not retained professionally.

In will contest, on ground of undue influence and lack of testatrix's mental capacity, court did not err in admitting testimony of attorney as to conversation between himself and testatrix relative to a proposed loan, and her appearance at the time, where there was no evidence that he was retained by testatrix professionally, and advice given was in nature of business rather than legal advice.

12. Evidence ⚡474(4)—Attorney held competent to testify as to sanity of testatrix.

Court did not err in permitting attorney with whom testatrix had business dealings as an intimate acquaintance to qualify as a witness concerning her sanity.

13. Evidence ⚡498½—Whether witness may testify as intimate acquaintance of testatrix is for court to determine.

In a will contest, whether witness may testify as an intimate acquaintance of testatrix, regarding her sanity, is a question of fact for trial court to determine.

14. Evidence ⚡498½—Court has wide discretion in determining whether witness may testify as intimate acquaintance to sanity of testatrix.

In will contest, court has wide discretion in determining whether witness may testify as an intimate acquaintance of testatrix concerning her sanity.

15. Appeal and error ⚡971(2)—Court's discretion in determining whether witness may testify as intimate acquaintance of testatrix not reviewable unless abused.

Court's discretion in determining whether witness may testify as intimate acquaintance of testatrix concerning her sanity is not reviewable unless such discretion is abused.

16. Evidence ⚡472(8)—Attorney held incompetent to give opinion as to testatrix's insanity.

In suit to contest will on ground of testatrix's lack of mental capacity, attorney with whom testatrix had business dealings held incompetent to give opinion as to her ability to clearly comprehend transaction of important business, such as execution of her last will and testament; he being a nonexpert witness.

17. Wills ⚡324(2)—Capacity of testatrix to make will is mixed question of law and fact.

Capacity of testatrix to make will is a mixed question of law and fact to be decided by jury under instructions of court.

18. Evidence —554—Admission of physician's testimony as to testatrix's capacity to execute will held not erroneous.

In suit to contest will on ground of testatrix's lack of mental capacity, court did not err in permitting physician, in response to long hypothetical question, to answer that he did not think that testatrix was of sound mind, but that he was not prepared to say whether she was insane at time of signing will.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Proceedings by Irving E. Bigelow, Jr., to probate the will of Clara Anna Perkins, sometimes known as Mrs. D. E. Perkins, deceased, opposed by Mattie Belle Fink and another. From judgment denying probate of will, proponent appeals. Reversed.

Ticknor, Carter & Webster and Wilton W. Webster, all of Pasadena, and Lincoln G. Backus, of Monrovia, for appellant.

Robert Brennan, of Los Angeles, and Miller, Kelly, Shuttleworth & McManus, by Jesse A. Miller, all of Des Moines, Iowa, for respondents.

LENNON, J. The decedent, Clara Anna Perkins, a widow, whose will is the subject of contest in this proceeding, died on the 26th day of October, 1922, at Monrovia, Cal., at the age of about 56 years. She left an estate, consisting of real and personal property, appraised, approximately, at \$57,000. She left surviving her a sister, Mattie Belle Fink, and two brothers, Benjamin M. Bentley, who had been an invalid for some 20 years, and Frank G. Bentley. Mattie Belle Fink and Benjamin M. Bentley are the only contestants. They for many years lived in the city of Des Moines, Iowa. The decedent formerly resided there. She, with her husband, came to California some 10 years prior to her death. Frank G. Bentley, the non-contesting brother of the decedent, has lived in California for some 24 years. The death of the decedent was due to aneurism of the descending aorta and chronic neuritis. She was also a sufferer before her death, in a moderate degree, from nephritis or chronic Bright's disease.

The decedent by the provisions of her will devised and bequeathed to Mattie Belle Fink, her sister, \$250; to Benjamin M. Bentley, her brother, \$250; to two nieces and a grandnephew, \$250 each; to Frank J. Bentley, her brother, \$5,000; to the First Church of Christ Scientist of Monrovia, Cal., \$1,000; to N. C. Carson and his wife of Monrovia, Cal., friends of the decedent, a house and lot in Monrovia; to Irving E. Bigelow, Jr., all of the rest and residue of the estate, which would approximate, after the payment of the debts of the decedent and funeral expenses, about \$30,000. Irving E. Bigelow, Jr., the

proponent of the will in the court below and appellant here, is a young man whom the decedent met some two years prior to her death while he was in military service stationed at the balloon school in Arcadia, Cal., and for whom the decedent had developed a strong attachment.

Upon the issues raised by the opposition to the probate of the will by Mattie Belle Fink and Benjamin M. Bentley, and answer thereto, the case was tried, with a jury, and a verdict rendered in favor of the contestants. The findings of the jury were to the effect that the decedent at the time of the making of her will was of unsound mind; that undue influence was exercised upon the decedent; and that her last will and testament was the product of such undue influence. From the judgment entered in accordance with this verdict, Irving J. Bigelow, Jr., named as residuary legatee in the will of the decedent, appeals.

In support of the appeal and as grounds for a reversal of the judgment it is urged that: (1) The evidence is insufficient to support the verdict of the jury that the decedent was of unsound mind at the time of the making of the will; (2) the evidence is insufficient to support the verdict of the jury that the will in question was produced by undue influence; (3) the court erred in overruling objections to the testimony of a witness for the contestants, William B. Brown, an attorney at law; and (4) that the court erred in permitting the witness Charles L. Allen, over objection, to answer the hypothetical question propounded to him as to the sanity of the decedent.

[1-3] It is well settled that, upon the contest of a will on the ground that the deceased was of unsound mind, the actual mental condition of the testatrix at the time of the execution of the will is the question to be determined. *Estate of Dolbeer*, 149 Cal. 227, 86 P. 695, 9 Ann. Cas. 795; *Estate of Little*, 46 Cal. App. 776, 189 P. 818; *Estate of Casarotti*, 184 Cal. 73, 192 P. 1085. Evidence as to mental condition before or after the execution of the will is important only in so far as it tends to show mental condition at the time of the execution of the will. The presumption is always that a person is sane, and the burden is always upon the contestants of the will to show affirmatively, and by a preponderance of the evidence, that the testatrix was of unsound mind at the time of the execution of the will. *Estate of Dow*, 181 Cal. 106, 183 P. 794; *Estate of Little*, supra; *Estate of Allen*, 177 Cal. 668, 171 P. 686; *Estate of Casarotti*, supra; *Estate of Johnson*, 152 Cal. 778, 93 P. 1015; *Estate of Wilson*, 117 Cal. 262, 49 P. 172, 711. Insanity exists as a matter of law only from the time it is shown to exist and proof of subsequent insanity will not create nor carry a

presumption of its past existence. Estate of Dolbeer, *supra*.

Every mental departure from the normal will not destroy a testamentary disposition, otherwise valid, of the testatrix's estate. It is not the rule of law that no person who is insane may make a valid will. The real rule is that the will of a person, who by reason of insanity is incapable of making valid testamentary disposition of his estate, shall not be upheld. Estate of Chevallier, 159 Cal. 161, 113 P. 130; Estate of Wasserman, 170 Cal. 101, 148 P. 931.

[4] Mental derangement sufficient to invalidate a will must be insanity in one of two forms: (1) Insanity of such broad character as to establish mental incompetency generally; or (2) some specific and narrower form of insanity under which the testator is the victim of some hallucination or delusion. Even in the latter class of cases, it is not sufficient merely to establish that a testator was the victim of some hallucination or delusion. The evidence must establish that the will itself was the creature or product of such hallucination or delusion; that the hallucination or delusion bore directly upon and influenced the creation and terms of the testamentary instrument. The evidence must establish, in addition to the fact of the existence of the hallucinations or delusions, the fact that by reason of these hallucinations or delusions the testatrix devised or bequeathed her property in a way which, except for the existence of such delusions, she would not have done. In short, the abnormality of mind must have had a direct influence upon the testamentary act. Estate of Chevallier, *supra*; Estate of Collins, 174 Cal. 663, 670, 164 P. 1110; Estate of Redfield, 116 Cal. 637, 48 P. 794; Estate of Casarotti, *supra*.

[5] Applying these principles of law to the instant case, the conclusion is inescapable that the contestants have failed to sustain the burden of establishing the fact that at the time of the execution of the will the testatrix was of unsound mind. It was not shown that the particular form of mental unsoundness with which it is claimed the testatrix was at times afflicted bore directly upon and influenced her testamentary act. Disregarding any conflicting evidence and resolving whatever conflicts there may be in the evidence in favor of, and granting to the contestants every possible inference to be drawn from the evidence, there still remains a hiatus in the chain of proof that at the time of the execution of the will the testatrix was mentally incompetent or that she was at the time subject to delusions which in any manner affected her testamentary act.

Reduced to its real evidential purport, the evidence in support of the contestants' claim that, at the time of the execution of the will, the testatrix was of unsound mind may be summed up as follows: Upon the occasion of

the visit of testatrix's sister to California four years prior to testatrix's death, the sister found that the testatrix's disposition was greatly changed; that she was highly irritable; the least thing upset her; financially she was extremely close, whereas she had previously been very generous. For at least a year prior to her death the testatrix at times suffered severe pain from intermittent attacks of neuritis; sometimes these attacks were so severe as to require a sedative, and sometimes they would pass off without the use of any sedative. The sedative consisted of from one-eighth to one-quarter of a grain of morphine and this was never administered more than twice a day. The night preceding the day of the execution of the will, one-fourth of a grain of morphine was administered to the testatrix, but none was administered to her on the morning she executed her will. Her arm was swollen and cramped. At times she would groan and call out in pain. She had on certain occasions a "starey" look in her eyes. At times she was delirious and subject to hallucinations. On one occasion she told her brother Frank Bentley that they were going to Europe and inquired if all of the trunks were packed; on another occasion that they were going to Iowa; and on yet another occasion she insisted that her nightdress was torn, whereas, in fact, it was not. Several days before her death she told the nurse who was in attendance that she was going to be married and asked her to see that no one used the telephone as she wished to call up her bridesmaids. At another time she told the nurse that the pictures had been taken down from the hooks on the wall in order that babies might be hung there. All of these hallucinations, so the testimony shows, occurred some five or six days prior to the signing of the will or some nine or ten days subsequent to the signing of the will. At times during her last illness she would call Frank Bentley "Benny," the name of the other brother. Although she was always suffering more or less, some days she would have a comparatively easy day and would converse and carry on ordinary and usual conversations and would conduct herself in all respects as a normal person. On two occasions, several months prior to her death, the testatrix called to see William Brown, an attorney, upon the feasibility of obtaining a loan of \$18,000. Upon those occasions he explained to her that the interest actually amounted to 8 and 9 per cent.; that although in the circular of information on the subject the interest was set out as 6 per cent., it actually amounted to 8 or 9 per cent. because she was required to retire the principal in installments. He explained to her that it was a very inadvisable step for her to borrow the money to build bungalows on her property, but she seemed "unable to visualize it, or take a preview of the situation." He testified that upon the

second visit she made no reference to her former visit, but commenced to explain the proposition to him as if he had not already advised her.

On the morning of the execution of the will, a short while after Dr. McKittrick, the attending physician and attesting witness departed from the house, the attending nurse upon entering the room found the testatrix "clear off." "She was either delirious or something else. She certainly was not all right. She was not quiet. She was talking incoherently." The will was signed by a mark instead of the signature of the testatrix. The testatrix several days after the execution of the will said to Mrs. Frank Bentley:

"I have not done right by Frank and Benny. Tell them not to be mad at me. It is just my little joke."

Within a day or so previous to October 10, 1922, the day on which the will was signed, the brother, Frank Bentley, had instituted proceedings to have a guardianship appointed for his sister and had had the papers served. Upon being informed by Mr. Backus, the testatrix attorney, that he and her Eastern relatives were provided for, he dropped the proceedings. The testatrix was at the time of her death suffering somewhat from chronic Bright's disease. In answer to a hypothetical question setting forth all of the above-mentioned facts, the testimony of Dr. Charles Allen was:

"I don't think she was of sound mind. As to the degree of her irrationality at that particular moment, I don't know; neither would I be prepared to say that she was insane at the moment of signing that will."

The evidence thus outlined does no more than show that the testatrix was mentally distressed and disturbed a short while after the making of the will. It does not show that she was of unsound mind in the legal acceptance of the term at the time of the making of the will. Estate of Packer, 164 Cal. 525, 129 P. 778; Estate of Purcell, 164 Cal. 300, 128 P. 932. And the question to be determined is not what might have been her mental condition, but what in fact was her mental condition at the time that she made the will. Estate of Wilson, 117 Cal. 262, 275, 49 P. 172, 711.

The evidence absolutely fails to establish by sufficient evidence that the testatrix was afflicted with insanity of "such broad character as to establish mental incompetency generally." On the contrary, the evidence is all to the effect that except on the occasions when she was suffering intensely from neuritis she was perfectly normal and rational. It likewise fails to establish the fact that the testatrix was suffering any specific or narrower form of insanity, hallucination, or de-

lusion at the time of the making of the will which had a direct influence on the testamentary act. The evidence is that the hallucinations from which she suffered were in the nature of hallucinations arising from the paroxysms of pain caused by attacks of neuritis. The evidence shows that these attacks were not permanent but only temporary. Moreover, they were not of a character to influence the testamentary act. The hallucination that the testatrix was going on a trip to Iowa; that she was going on a trip to Europe; that there were holes in her night-dress and bedclothing; that she wished the use of the telephone reserved for calling up the bridesmaids for her wedding; that babies were hung on the wall in place of pictures—are obviously but the vagaries of a mind made delirious by the pressure of pain. No possible relationship between these delirious hallucinations and the testatrix's disposition of her property can be traced. The evidence falls short of establishing that such hallucination or delusion existed at the time of the execution of the will, or that the will was in the slightest degree the product or offspring of such abnormal condition.

At this point it may not be amiss to note that it is significant that the nurse who was in the room of the testatrix just prior to the execution of the will, and must have been in a position to know the condition of the testatrix at that vitally important time, failed to testify that the testatrix's condition was in any manner abnormal.

Moreover, the conclusion that the will was executed at a time when the testatrix was in possession of her normal faculties is strongly fortified by the fact that there is in the record proof of an olographic will made more than a year prior to the execution of the will in question, in which she made much the same disposition of her property. In a letter written by the testatrix at the time of the making of this olographic will she stated her reasons for making Mr. Bigelow her principal beneficiary to be that had he been her own son she could not have loved him more, and that by reason of his many kindnesses many happy hours had been added to her lonely life.

[6] Contestants, in support of their contention that the testatrix was of unsound mind generally, and at the time of the making of the will, rely chiefly upon the alleged "unwarranted" belief of the testatrix that her relatives were not interested in her and that they would be glad to hear of her death. This belief, it is argued, was an insane delusion, which resulted in an antipathy to her relatives and prompted and influenced her in the making of the will. The fact that a person dislikes his relatives, with or without reason, is not necessarily proof of insanity. As was said in Estate of Kendrick's Estate, 130 Cal. 360, 364, 62 P. 605, 607:

"Prejudices, dislikes, and antipathies, however ill founded, or however strongly entertained, cannot be classed as insane delusions, nor is every delusion an insane delusion."

See, also, *In re Spencer*, 96 Cal. 448, 452, 31 P. 453; *Estate of Carpenter*, 94 Cal. 406, 417, 29 P. 1101.

[7] Care must be taken to differentiate between mere unreasonable opinions and mental derangements. Testamentary capacity does not depend upon the testatrix's ability to reason logically or upon her freedom from prejudice. A belief may be illogical or preposterous, but it is not therefore evidence of insanity. *Estate of Scott*, 128 Cal. 57, 67, 60 P. 527.

[8] The record in the instant case clearly and convincingly shows that this belief as to the lack of cordiality in the relations of herself and her eastern relatives was not a delusion in the usual and legal acceptation of the term. The existence of cordial relations depends upon the attitude of both parties. It may well have been that the sister, Mrs. Fink, entertained none but the most kindly feelings toward her sister. This is not incompatible with the fact that the testatrix may not have reciprocated those feelings. And if she did not, she was justified in her belief that cordial relations did not exist between herself and her sister. Mrs. Fink testified that there was no "serious" difficulty between herself and her sister. She did testify, however, that the testatrix had wanted the daughter of the witness, who had been raised in testatrix's home in Des Moines, to come and live with the testatrix in California, but that she (the witness) had refused to let her daughter do so because she did not want her daughter to be away from her and it was difficult for her to leave Des Moines. She also testified that she and the testatrix did have some disagreement about the care her mother was receiving. The record also shows that this belief of the testatrix that her sister did not care about her was entertained by the testatrix some six years prior to the making of her will. It was not, therefore, the sudden, inexplicable antipathy of an enfeebled intellect. Evidence introduced by contestants was to the effect that at the time of the existence of the belief the testatrix was a person of strong and vigorous mentality. The fact that Mrs. Fink was justified in not wanting her daughter to come to California has no bearing upon the question of whether or not from that fact the testatrix was justified in believing that her sister cared nothing about her. It often happens that a person thwarted in his desires imputes wrong motives to the one responsible. The fact that the relatives of the testatrix in their own minds held nothing but the most friendly feelings toward the testatrix will not suffice to warrant the conclusion that because the testa-

trix believed, mistakenly, perhaps, that the relatives were in fact unfriendly, she was the victim of an insane delusion. *Estate of Calef*, 139 Cal. 673, 675, 73 P. 539. If all mistaken beliefs were to be catalogued as delusions, few indeed would escape the stigma of insanity.

[9] Nor does the fact that testatrix left only \$250 to her crippled brother in the east, toward whom she never manifested any but the most affectionate regard, tend to show that the will was an unnatural will and the testatrix of unsound mind. The evidence shows that she believed that she had adequately provided for her brother, aside from her will, by selling him the property on which he was living in Des Moines, which she valued at \$12,000, for \$3,100. In other words, having made other provisions for him, she did not deem it necessary to leave him a large amount in her will. The property of the testatrix was hers to dispose of as she willed, and the fact that she did not deal as generously with her relatives as they hoped and expected is not proof of insanity.

[10] It will not be necessary to discuss in detail the question of the insufficiency of the evidence to support the finding of undue influence, for the reason that a careful and painstaking search of the record fails to reveal an iota of evidence as to any undue influence in the execution of the will. There is an utter lack of any proof of pressure brought to bear upon the testatrix which overpowered her mind and overcame her volition at the very time the will was made. *In re Ricks' Estate*, 160 Cal. 450, 117 P. 532.

[11-15] The court did not err in admitting the testimony of the witness for the contestants, William B. Brown, as to the conversation between himself and the testatrix relative to a proposed loan of \$18,000 and her appearance at that time. Mr. Brown at the time he saw and talked with the decedent was a lawyer, but there is no testimony that he was retained by the testatrix then or at any other time in that capacity. It is true that he gave her advice, but it was in the nature of business rather than legal advice. Neither did the court err in permitting Brown, as an intimate acquaintance, to qualify as a witness concerning the sanity of the testatrix. Whether or not a witness may testify as an intimate acquaintance is a question of fact for the trial court to determine. That court is vested with a wide discretion, and its determination is not subject to review unless the court has abused its discretion. Such an abuse is not here shown.

[16, 17] The court did err, however, in permitting the witness to give his opinion as to the ability of the testatrix to clearly comprehend the transaction of important business such as the execution of her last will and testament. The effect of the question was to

ask the opinion of the nonexpert witness as to the capacity of the testatrix to make a will. The capacity of testatrix to make a will is a mixed question of law and fact, to be decided by the jury under instructions of the court, and the opinion of the witness upon this question should have been excluded. *Estate of Taylor*, 92 Cal. 564, 28 P. 603; *Estate of Russell*, 189 Cal. 759, 772, 210 P. 249.

[18] We find no error in the ruling of the trial court permitting in evidence the testimony of Dr. Charles Allen, who replied, in response to a long hypothetical question framed to meet the views of the contestants:

"I don't think she was of sound mind. As to the degree of her irrationality at that particular moment, I don't know; neither would I be prepared to say that she was insane at the moment of signing that will."

The record failing to disclose any substantial evidence that at the time of the execution of the will the testatrix was of unsound mind, or that she was actuated by undue influence, the judgment must be reversed. It is so ordered.

We concur: MYERS, C. J.; SEAWELL, J.; SHENK, J.; RICHARDS, J.; LAWLOR, J.; WASTE, J.

195 Cal. 683

PEOPLE v. YAHNE. (Cr. 2769.)

(Supreme Court of California. March 28, 1925.)

1. Courts $\S$ 97(5)—Question whether requiring certificate of public convenience from one engaged in interstate commerce imposes burden on interstate commerce controlled by decisions of United States Supreme Court.

Contention that attempt to require operator of auto stage in interstate commerce, to obtain certificate of convenience, under St. 1917, p. 333, $\S$ 5, would constitute the imposition of a burden on interstate commerce, is a question arising under federal Constitution and laws as to which the decisions of the Supreme Court of the United States is the ultimate authority.

2. Commerce $\S$ 62—Statute prohibiting operation of bus over state highways held unconstitutional as to those engaged solely in interstate transportation.

Auto stage and Truck Transportation Act (St. 1917, p. 330) requiring transportation companies to obtain from railroad commission a certificate of public convenience and necessity as condition precedent to use of highways is invalid as against one who is engaged solely in interstate commerce, as an unconstitutional invasion of field reserved by commerce clause.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Melville Yahne was convicted of operating an auto stage as a common carrier without having obtained a certificate of public convenience and necessity, and he appeals. Reversed.

See, also, 193 Cal. 386, 224 P. 452.

H. L. McAllister, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

Carl I. Wheat and Woodward M. Taylor, both of San Francisco, for Railroad Commission.

PER CURIAM. Defendant herein was accused by information of a misdemeanor in violating the provisions of section 5 of the Auto Stage and Truck Transportation Act (Stats. 1917, p. 330, c. 213). The violation charged consisted in the operation of an auto stage for the transportation of persons for compensation as a common carrier on the public highways of this state and over a regular route, without first having obtained from the railroad commission, as provided for by the act, a certificate declaring that public convenience and necessity required such operation. This appeal is from the judgment of conviction. Defendant was engaged in the business of transporting passengers for hire from San Francisco, California, to Portland, Oregon, but he neither received nor discharged any passengers at intermediate points. He was engaged, therefore, solely in interstate transportation. As transportation is commerce, he contends that, inasmuch as he was engaged solely in interstate commerce, the state of California has no jurisdiction, through its railroad commission, over the transportation of persons or property for compensation upon the highways of this state, when such transportation is solely of an interstate character. He asserts, therefore, that he is not required and cannot be compelled to obtain from said commission the certificate of convenience and necessity provided for in the act in question, for the reason that such requirement and compulsion would constitute the imposition of a burden upon interstate commerce such as is beyond the power of the several states under the provisions of the federal Constitution and statutes.

[1, 2] The question thus presented is one arising under the federal Constitution and the laws of Congress enacted in pursuance thereof, as to which the decision of the Supreme Court of the United States is the ultimate authority. *Estate of Romaris*, 191 Cal. 740, 745, 218 P. 421. At the time of the trial of this case in the court below and up to the time when the decision of the district court of appeal herein became final, the Supreme Court of the United States had rendered no decision upon the precise point in-

volved herein, but since then that court has rendered two decisions which in our opinion are determinative of the present case. *Buck v. Kuykendall* (No. 345, Oct. term, 1924) 45 S. Ct. 324, 327, 69 L. Ed. —, and *Bush & Sons Co. v. Maloy et al.* (No. 185, Oct. term, 1924, decided March 2, 1925) 45 S. Ct. 326, 327, 69 L. Ed. —. Those decisions hold that while appropriate state regulations adopted primarily to promote safety upon the highways and conservation in their use may not be obnoxious to the commerce clause where the indirect burden imposed upon interstate commerce thereby is not unreasonable, nevertheless a statute whose primary purpose is not regulation with a view to safety or to conservation of the highways, and which determines not the manner of use but the persons by whom the highways may be used, is in effect a regulation of commerce and an unconstitutional invasion by the state of a field reserved by the commerce clause for federal regulation. Under these decisions we see no escape from the conclusion that the provisions of the Auto Stage and Truck Transportation Act, *supra*, which require transportation companies as therein defined to apply for and obtain from the railroad commission a certificate of public convenience and necessity as a condition precedent to the use of the highways of the state, are invalid as against one who is engaged solely in interstate transportation.

The judgment is reversed.

71 Cal. App. 176

PEOPLE v. MURPHY. (Cr. 1215.)

(District Court of Appeal, First District, Division 1, California. Feb. 6, 1925.)

1. Criminal law § 1192—Continuation of trial after noon on Saturday, and that indictment was signed by person other than foreman of grand jury, held not jurisdictional errors, authorizing annulment of judgment.

Alleged error, in that trial was continued after noon on Saturday, and that grand jury which presented indictment had been illegally selected, and that indictment had been signed by person other than foreman, held mere errors of law, requiring presentment on appeal, and not jurisdictional error, authorizing annulment of judgment after affirmance.

2. Criminal law § 1137(2)—Continuance of trial after noon on Saturday at suggestion of counsel for accused not matter for objection.

Where counsel for accused suggested that he laish examination of witness, continuation of trial after noon on Saturday held not grounds on which accused might maintain error; right to object having been waived.

3. Indictment and Information § 137(2)—Irregularities in method of impanelment of grand jury not grounds for setting aside indictment.

Objection going merely to method of impanelment of grand jury held not to disclose grounds for setting aside indictment, especially in view of Pen. Code, § 995, as amended by St. 1911, p. 435.

4. Criminal law § 1144(3)—Regularity of indorsement and signing of indictment by one not the foreman of grand jury presumed.

In view of Pen. Code, § 930, providing that grand jury may select member to act as foreman *pro tem.*, if regular foreman cannot act, regularity of indorsement and signature of indictment by other than regular foreman will be presumed, in absence of any proof that he was not foreman *pro tem.*

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Edmund Murphy was convicted of rape, and after affirmance appeals from orders denying motions to annul judgment. Affirmed.

Ernest B. D. Spagnoli, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

KNIGHT, J. There are two appeals being prosecuted by the defendant in this case, both having been taken from orders made after final judgment. Although said appeals come before us on separate records, we think the questions arising thereunder may be considered and disposed of in one opinion.

The appellant, Edmund Murphy, was convicted of the crime of rape, and upon appeal the judgment of conviction was, on July 12, 1921, affirmed. *People v. Murphy*, 53 Cal. App. 474, 200 P. 484. On August 9, 1924, a motion was presented to the trial court, on behalf of appellant, to annul said judgment upon the ground that part of the trial took place after the hour of 12 o'clock, noon, on Saturday, December 18, 1920. Upon hearing the evidence submitted by the respective parties, said motion was by the trial court denied. The defendant appealed. On October 6, 1924, a second motion was made for the annulment of said judgment upon the grounds that the grand jury which found and presented the indictment, upon which appellant was subsequently tried and convicted, had been illegally selected, drawn, and impaneled, and that said indictment had been indorsed "A true bill" and signed by a person other than the foreman of said grand jury. Said motion was, after a hearing, also denied, and from the order denying the same the defendant has appealed.

[1, 2] Irrespective of the merits of the contention made by appellant in support of these motions, we are of the opinion that

the alleged errors complained of were not jurisdictional, but if errors at all, constituted nothing more than mere errors at law, which occurred prior to the pronouncement of judgment in the case and therefore should have been presented for review, along with the other assignments of error upon which the appeal was taken from the judgment, and we believe that the appeals now before us might be properly disposed of upon that ground; however, we have examined into the contentions made by appellant, and find that they would be unavailing to appellant, even if seasonably presented.

Regarding the claim that part of the trial took place after the noon hour on Saturday, December 18, 1920, the record discloses that upon arrival of the noon hour on that day the court called attention of appellant's counsel to the fact that it was 12 o'clock, to which appellant's counsel replied: "We will make no objection to finishing with this witness." The court then said: "All right. On motion of the defendant we will continue. * * *" Thereafter the witness, who was under examination by appellant's counsel, was asked only three short additional questions by appellant's counsel, and after some discussion between counsel the witness was excused, and one of the assistant district attorneys was sworn and testified as a witness on behalf of appellant. He was asked by appellant's counsel the single question as to whether or not he knew that certain criminal cases against another defendant charged with a like offense had been dismissed, to which he replied that he did. Such were all the proceedings had after the noon hour, except some discussion between counsel on both sides and the court, during which certain facts were stipulated, and the entire proceedings, according to matters set forth in the record, consumed no more than three or four minutes.

The precise question arising here came before this court in an appeal from the judgment in *People v. Maljan*, 34 Cal. App. 384, 167 P. 547, and it was there held:

"Conceding, but not deciding, that the court erred in proceeding with the trial into Saturday afternoon, still the defendant cannot be heard to complain of this, for his attorney, on his attention being called to the fact that the hour of noon had arrived, distinctly and in open court waived the right to object to the trial proceeding into the afternoon, and this is a matter in which the defendant's waiver is binding upon him. It falls within the same class of rights, upon the subject of waiver, as a right to be present at a view of the premises by the jury, the right to have the judge present at such view, and other similar rights, and in such cases it has been held that the right may be waived. *People v. Mathews*, 139 Cal. 527, 73 Pac. 416; *People v. White*, 5 Cal. App. 329, 90 Pac. 471; *People v. Bird*, 132 Cal. 261, 64 Pac. 259."

Applying the rule above stated to the situation in the instant case, it is manifest that the point urged by appellant is not, and even if taken advantage of at the proper time would not be, maintainable as error.

[3] With respect to the point urged on the second appeal, it is claimed that in the impanelment of the grand jury the names appearing on the second panel, of which there were 4, were resorted to in the completion of the jury before the 16 names appearing on the original panel were exhausted; in other words, that the 20 names appearing on both panels were deposited in the jury box together, and that the grand jury was selected therefrom, instead of first depositing and drawing the 16 names appearing on the first panel and then depositing the 4 names appearing on the second panel and completing the personnel of the grand jury therefrom; that, consequently, in drawing 19 names from the box, one name which appeared on the original panel was not drawn, and that person did not become a member of the grand jury.

It thus appears that appellant's objection goes merely to the method employed in the impanelment of the grand jury, and it is well established in this state, as was stated in *People v. Hatch*, 13 Cal. App. 521, 109 P. 1097, in which numerous cases are cited, that no irregularities in the formation and impanelment of the grand jury constitute grounds for setting aside an indictment; and this was true even prior to the amendment of 1911 (St. 1911, p. 435) to section 995 of the Penal Code, which substantially narrowed down the provisions of that Code section.

[4] The fact, if it be a fact, that said indictment was indorsed "A true bill," and signed by a member of the grand jury, other than the one whom the minutes of the court show was appointed and sworn as foreman when the grand jury was impaneled, indicates no error, for the reason that section 930 of the Penal Code provides:

"In the absence of the foreman of a grand jury from any meeting of the same or in the event of his disqualification to act, the grand jury may select a member of that body to act as foreman pro tem., who shall perform the duties of, and have all the powers of the regularly appointed foreman in the absence or disqualifications of such foreman."

In the absence of any proof to the effect that the member of the jury who indorsed and signed said indictment was not the foreman pro tem., we must presume in favor of the regularity of the proceeding. *People v. Hatch*, supra.

The orders appealed from are affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

71 Cal. App. 798

(235 P.)

PEOPLE, Respondent, v. Edmund MURPHY, Appellant. (Cr. No. 1227.)

(District Court of Appeal, First District, Division 1, California. Feb. 6, 1925. Hearing Denied by Supreme Court April 6, 1925.)

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Ernest B. D. Spagnoli, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

KNIGHT, J. The questions involved in this appeal have been discussed and decided in the opinion this day filed in *People v. Murphy* (No. 1215) 235 P. 51, and for the reasons therein stated the order appealed from is affirmed.

We concur: **TYLER, P. J.**; **ST. SURE, J.**

71 Cal. App. 262

IVES v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 5056.)

(District Court of Appeal, First District, Division 2, California. Feb. 13, 1925.)

Master and servant — 389—Compensation insurance carrier held entitled to credit for amount received by employee in settlement with third persons.

Where employee was awarded compensation against insurance carrier, and thereafter brought suit against third person for same injuries, and entered into purported compromise with such third persons, releasing them from liability for a stipulated sum, *held* that, whether such compromise was valid or not, and even if made without consent of Industrial Commission or court, under Workmen's Compensation Act, § 26, as amended by St. 1919, p. 920, and sections 30, subd. (f), and 57, Industrial Commission properly amended its original award, and credited insurance carrier with payment in full of its share of award.

Application for certiorari by George A. Ives against the Industrial Accident Commission and others to review order of Commission modifying award of compensation to petitioner for injuries. Award affirmed.

Ernest A. Clausen, of San Francisco, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondent Industrial Accident Commission.

Redman & Alexander and R. P. Wisecarver, all of San Francisco, for other respondents.

STURTEVANT, J. This is an application for a writ of review directed against the Industrial Accident Commission. On the 15th day of January, 1923, George A. Ives was engaged in grading and building a new road.

He was in the general employment of Costello & Ritchie, and in the special employment of J. P. Holland. While engaged in his employment, he was riding on a tractor. Costello & Ritchie were insured by the Ocean Accident & Guarantee Corporation. While so riding on the tractor, a truck operated by the San Francisco Motor Drayage Company ran into the tractor on which Ives was riding and injured him. At the time of the accident mentioned J. P. Holland was insured by the General Accident Fire & Life Assurance Corporation. On the 2d day of March, 1923, Ives filed his application for adjustment of his claim under the Workmen's Compensation, Insurance and Safety Act of 1917 (St. 1917, p. 831). Thereafter the commission made an award against the Ocean Accident & Guarantee Corporation and against the General Accident Fire & Life Assurance Corporation. Thereafter it made a supplemental award against the same corporations, and thereafter it made a second supplemental award for permanent disability against said corporations, and each of them, in the sum of \$2,687.07, payable at the rate of \$20.83 a week, beginning as of January 23, 1923, for 129 weeks, until the whole of said amount shall have been paid, and that the Ocean Accident & Guarantee Corporation, Limited, and General Accident Fire & Life Assurance Corporation, Limited, be credited with all compensation theretofore paid by them on account of temporary disability.

On the 27th day of April, 1923, Ives commenced an action in the superior court against the San Francisco Motor Drayage Company et al., in which suit Ives sought to recover damages from the defendants therein for the injuries sustained by him, and which injuries are the same as those hereinabove referred to. On January 18, 1924, the Ocean Accident & Guarantee Corporation joined in said suit as a party plaintiff. Thereafter Ives, as the plaintiff in said action, entered into a purported compromise agreement with the defendants in said action, by the terms of which he attempted to release said defendants from all liability for the sum of \$1,727.35. At the same time defendants in said action paid to the General Accident Fire & Life Assurance Corporation the sum of \$872.65, and tendered a like sum to the Ocean Accident & Guarantee Corporation, Limited, but it refused to accept the tender. The total payments made or tendered being \$3,472.65. On the 26th day of May, 1924, the Ocean Accident & Guarantee Corporation filed with the commission an application for a rehearing and set up the purported compromise as newly discovered evidence and asked for relief. Later a rehearing was granted and the commission made a supplemental award purporting to

amend its award of May 14, 1924, so that the same, among other things, provided:

"It is further ordered that defendant Ocean Accident & Guarantee Corporation be and it is hereby credited with payment in full of its share of the supplemental award entered herein on May 14, 1924."

The petitioner does not challenge the figures as being incorrect, but the exact attack made by the petitioner is:

"That in making said amended supplemental award of September, 1924, in so far as it credits Ocean Accident & Guarantee Corporation, Limited, with payment in full or in part of its share of the supplemental award made by the commission of May 14, 1924, the Industrial Accident Commission acted without and in excess of its powers. * * *"

Elaborating his contention in his brief, the petition says:

"It is conceded that the settlement made by the petitioner in full satisfaction of his claim in said action was without the written consent of either the commission or the court in which such action is pending. If, therefore, for that reason said settlement was invalid as provided by section 26 of said act, the Ocean Accident & Guarantee Corporation, which is now the sole plaintiff in such action, can proceed to trial, and none of the defendants in such action can avail himself of the defense that one of the plaintiffs, to wit, the petitioner, had compromised his claim and dismissed the action as to him, such settlement being declared invalid by section 26 of said act."

As we view the rights of the parties, it seems to be unnecessary to determine whether the purported compromise was valid or invalid. It was one or the other. Let us suppose that it was valid, and that this petitioner received the sum of \$3,472.65, and now holds the same. Then and in that event it is provided by statute:

"* * * The court shall, on application, allow as a first lien against any judgment recovered by the employee the amount of the employer's expenditures for compensation. * * *" Section 26, Workmen's Compensation Act, as amended by St. 1919, p. 920.

And it is also provided that an insurance carrier, under the facts above recited, "shall be subrogated to all the rights and duties of such employer and may enforce any such rights of its own name." Section 30, subd. (f), Workmen's Compensation Act. From a comparison of the awards and the compromise, it will be noted that the employer and the insurance carrier, under the foregoing statutes, would be entitled to be wholly reimbursed under their first lien. Let us assume, on the other hand, that the compromise was not in the form of a judgment, and that it was made without the consent of

the commission and without the consent of the court. No reason appears why the employers, or the insurance carriers, might not waive the irregularity and assert their rights against the moneys received under such circumstances, but every reason appears why they should be entitled to assert their rights. Whether the settlement was made in the statutory mode or otherwise is a question in which the tort-feasor may be greatly interested but in which the employer or his insurance carrier has no concern.

The manner in which the commission handled the compromise seems to have been in every respect according to approved forms and procedure. No statutory provision has been cited to us prescribing the particular form of procedure for the purpose of disposing of such a question, but it is provided:

"The commission shall have full power and authority: (1) To adopt reasonable and proper rules of practice and procedure. * * *" Section 57, Workmen's Compensation Act.

To us it seems clear that the rule of practice and procedure followed in this instance was reasonable.

The award is affirmed.

We concur: LANGDON, P. J;
NOURSE, J.

71 Cal. App. 324

In re SNYDER'S ESTATE.

SNYDER v. RILEY, State Controller.

(Civ. 4852.)

(District Court of Appeal, Second District, Division 1, California. Feb. 17, 1925. Hearing Denied by Supreme Court April 16, 1925.)

1. Taxation ⚡893—Circumstances justifying inference that grantor was actuated by contemplation of death sufficient to sustain finding that transfer subject to collateral inheritance tax.

Though burden is on state to show that transfer is subject to collateral inheritance tax, under Inheritance Tax Act of 1921, it is not necessary that one making transfer should have made direct statement of his motives, but, if circumstances shown are such as might justify inference that grantor was actuated by contemplation of death, it is sufficient to sustain finding to that effect.

2. Taxation ⚡879(1)—In "contemplation of death" does not require transfer to be made with sense of impending death.

The phrase "in contemplation of death," as used in Inheritance Tax Act of 1921, does not mean that transfer in order to be taxable must be made with sense of impending death.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contemplation of Death.]

3. Taxation ☞893—Mere fact that transferor is advanced in years, and not in good health, is not alone sufficient to prove transfer in contemplation of death.

Mere fact that one is much advanced in years, or not in good health, is not alone sufficient to prove that transfer made by him was made in contemplation of death, within Inheritance Tax Act of 1921; and, if it appears that interests having relation to ordinary affairs of life rather than death constituted controlling consideration for making transfer, it will not be subject to tax.

4. Taxation ☞893—Evidence held to sustain finding that conveyance by mother to son was made in contemplation of death.

Evidence held to sustain finding that conveyance of property by mother to son was made in contemplation of death, within Inheritance Tax Act of 1921, and subject to collateral inheritance tax, as against contention of son that it was merely consummation of much earlier contract.

5. Taxation ☞893—Finding that deed of transfer was gift deed immaterial, where evidence clearly warranted finding that transfer was without adequate consideration.

Where evidence clearly warranted finding that conveyance of property by mother to son was made without adequate consideration, as defined by Inheritance Tax Act 1921, § 2, and hence was subject to collateral inheritance tax, further finding that deed of transfer was a "gift deed" was immaterial.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Proceeding by Ray L. Riley, State Controller, to subject transfer made by Jennie W. Snyder, deceased, to collateral inheritance tax, contested by John W. Snyder. From order imposing inheritance tax, contestant appeals. Affirmed.

Sloane & Sloane, of San Diego, for appellant.

Ralph W. Smith, of Sacramento, for respondent.

CONREY, P. J. This appeal is taken by John Whiteley Snyder, a son of the decedent Jennie W. Snyder, from an order of the superior court of San Diego county, imposing upon him an inheritance tax of \$7,500 because of a conveyance made to him by his mother, prior to her death, of certain real property, here briefly designated as the Snyder Block. The same order fixed a tax of \$17,377.78 to be paid by him on other properties to which he has succeeded under her will. The correctness of this portion of the order is undisputed. The contest in the court below and the object of this appeal is to determine whether or not the conveyance inter vivos of the mother to the son falls within the provisions of the Inheritance Tax Act, St. 1921, p. 1500. It is the contention of the grantee that it does not, for the reason that

it was not made in contemplation of death. That it took effect in possession and enjoyment before the death of the grantor is not disputed.

The court found, however, that the conveyance was made in contemplation of death and without adequate or valuable consideration. The contention on which this appeal is based is that such finding is entirely unsupported by the evidence.

The deed of conveyance in question was executed on the 24th day of November, 1922. Mrs. Snyder died on the 9th day of January, 1923. The property covered by this deed comprised less than one-tenth of her estate. She did not make a will disposing of the large residue of her property until January 2, 1923.

The court found that the deed, although dated November 24, 1922, was not delivered until a few days thereafter; that the transfer of said Snyder Block by decedent to her said son, and all negotiations and agreements in relation or appertaining to the transfer thereof, were made without valuable or adequate consideration and, within the purview of the Inheritance Tax Act of California, in contemplation of the death of the grantor; that no consideration was paid by the grantee or by any other person on his behalf to the grantor for said property. The court further found that for a period of one year immediately prior to decedent's death she was ill and suffering from a fatal ailment from which she died, and that said decedent at the time of the making of said deed, to wit, November 24, 1922, and at all times thereafter, realized the seriousness of her condition and was fully aware during all of said time of the mortal character of said ailment.

The Inheritance Tax Act of 1921 provides for the imposition of the tax upon a transfer of property (when not exempt under certain conditions not applicable here)—

"when the transfer is of property made by a resident * * * by deed, grant, bargain, sale, assignment or gift, made without valuable and adequate consideration (i. e., a consideration equal in money or in money's worth to the full value of the property transferred): (a) In contemplation of the death of the grantor, vendor, assignor or donor."

It is further provided therein that the words "contemplation of death," as used in the act—

"shall be taken to include that expectancy of death which actuates the mind of a person on the execution of his will, and in nowise shall said words be limited and restricted to that expectancy of death which actuates the mind of a person making a gift causa mortis; and it is hereby declared to be the intent and purpose of this act to tax any and all transfers which are made in lieu of or to avoid the passing of property transferred by testate or intestate laws."

Appellant contends that there is nothing shown in the evidence to indicate that Mrs. Snyder contemplated a fatal termination of her malady, or was governed or influenced thereby in any management of her business or disposition of her property up to within a few days of her death. Appellant concedes that the testimony of the witness Mrs. Clarkson, notwithstanding that there is conflicting evidence, "is possibly sufficient to render immune from review the finding of the court that Mrs. Snyder's health was failing during the year prior to her death." We think that the evidence of that witness is sufficient to sustain that finding, not only concerning the fact of serious illness, but to include the further fact that Mrs. Snyder knew that she was in failing health. Mrs. Clarkson lived with Mrs. Snyder for about four years immediately prior to Mrs. Snyder's death. Mrs. Clarkson was one of the household from October 6, 1918, until March 5, 1923. She testified that during the last year Mrs. Snyder's health failed rapidly, and that Mrs. Snyder told her that she had kidney trouble and dropsy. She saw Mrs. Snyder at the hospital many times between the 4th of November, 1922, when Mrs. Snyder for the last time went to the hospital, and the time of her death at that place. We are satisfied that there is evidence sufficient to sustain the finding of the court that at the time of making said deed, to wit, November 24, 1922, and at all times thereafter, decedent realized the seriousness of her condition and was fully aware during all of said time of the mortal character of said ailment. According to the certificate of death, Mrs. Snyder's physical ailments included a chronic disease of the kidneys, and her age was 77 years. While it appears that she did not execute a will until one week before her death, it also is in evidence that during the preceding two years she had taken counsel on that subject, and had caused certain outlines or drafts of a will to be prepared for her.

But appellant then says that, even conceding that his mother was contemplating death at the time when the deed was executed, yet the execution thereof was not an act done in contemplation of death, because the transaction was one which merely carried into effect a previous contract which had been entered into months earlier, and that both parties had entered into the performance, and in part had performed, the conditions of that contract.

[1, 2] The evidence discloses that appellant was a teacher, and had been living away from San Diego county; that for several years Mrs. Snyder had been making efforts to induce appellant to give up this work as a teacher and assist her in the management of her property. There is evidence that she had expressed an intention to give the Snyder Block to appellant if he would com-

ply with her wishes concerning these matters. This he did not do until August, 1922. It is admitted by him that in thus changing his plans he did so partly because of the realization of his mother's advancing years and failing strength. Assuming this to be so, it may well be that Mrs. Snyder on her part was also influenced by her own knowledge of her advancing years and failing strength. And, if this be so, it is a much shorter step to infer that, together with the contemplation of her age and weakness, she also was thinking of the end of life, or, in other words, was acting in contemplation of death. We are not unmindful of the rule that the burden of showing that a transfer is subject to a collateral inheritance tax is upon the state. *Estate of Minor*, 180 Cal. 291, 294, 180 P. 813, 4 A. L. R. 456. But it is not necessary that the decedent should have made a direct statement of her motives. If the circumstances shown are such as in the mind of a reasonable man might justify the inference that, in coming to an agreement with her son, as well as in making said deed, she was actuated by the contemplation of death, that will be sufficient to sustain the court's finding to that effect, for of course it is well understood that on appeal this court will not undertake to decide the fact contrary to evidence and inferences therefrom which are thus justified. The phrase "in contemplation of death," as used in the statute, does not mean that the transfer, in order to be taxable, must be made with a sense of impending death. *Estate of Pauson*, 186 Cal. 358, 364, 199 P. 331. A will is made in contemplation of death, but not necessarily, or even most frequently, under pressure of the knowledge that death is near.

[3] The mere fact that a person is much advanced in years or not in good health is not alone sufficient to prove that a transfer made by him of his property was made in contemplation of death. If it sufficiently appears that interests having relation to the ordinary affairs of life, rather than death, constituted the primary and controlling consideration for the making and ultimate consummation of an agreement to transfer property, the transfer will not be subject to the tax. *Estate of Minor*, 180 Cal. 291, 180 P. 813, 4 A. L. R. 456. In the cited case the transfer in question was made pursuant to an antenuptial agreement, and was held to be not made in contemplation of death, notwithstanding that the transferor was 78 years old at the time of the marriage; that, the controlling consideration of the transfer being the marriage, that circumstance necessarily excluded the idea that a desire to make a testamentary disposition was in a substantial sense a direct cause of the transfer.

In the case at bar, appellant relies upon the principles announced in the *Minor Case*,

merely substituting an agreement of a different nature for the antenuptial agreement in the Minor Case. The argument is that, an oral agreement having been made between the mother and son, and the parties having entered upon the performance thereof, and appellant having entered upon the possession and enjoyment of the transferred property as early as October, 1922, the intention of Mrs. Snyder, and the motives and purposes which controlled her mind in making the transfer, must be deemed to be the intention, purposes, and motives which existed at and prior to the making of said oral agreement, and not those additional considerations which may have arisen in her mind at the time of actual execution of the deed in the latter part of November; that the court's finding that the decedent, on November 24, 1922, and at all times thereafter, realized and was aware of the mortal character of her ailment, implies that the same condition of her mind in relation to that subject did not exist prior to that date; that before November 24th, notwithstanding that she knew (as shown by the testimony of Mrs. Clarkson) that she had "kidney trouble" and other physical ailments, that fact, taken by itself alone, is without force as evidence that the agreement which she made with her son, including the promise to convey to him the Snyder Block, was an agreement made in contemplation of death.

[4] Nevertheless, we think that the evidence is sufficient to sustain the findings of the court. In addition to the facts to which we have referred, there are other items of evidence such that, when all are considered together, they reasonably justify the inference that the probability of her death in the near future, as indicated by age and disease, was an important moving cause of the agreement and transfer. In delivering the deed, she asked that it be not recorded. In writing to her son, in March, 1922, Mrs. Snyder said:

"Once again I ask you if you will consider trying to look after our interests here at a salary equal to what you would receive elsewhere. I don't like the idea of turning it over to a trust or to real estate man."

The letter did not mention the Snyder Block. When, some months later, appellant accepted employment by his mother, his salary was computed and paid on the same basis which that letter suggested. The court might reasonably infer that in the mind of Mrs. Snyder her transfer of the Snyder Block to appellant was a gift, and not a compensation for services to be performed by the grantee. And, if she thought of the intended transfer as a gift, then, under the conditions which were well understood by her, there is reason in the conclusion that the transfer was made "in contemplation of

death." Perhaps the opposite inference, from the facts proved, would have been so far within reason that if it had been adopted by the trial court it would have been sustained. But, assuming this to be so, we have a finding upon conflicting evidence, upon an issue of fact, concerning which reasonable and unprejudiced minds might differ; a finding which therefore must be sustained because it rests upon sufficient evidence.

[5] Appellant contends that the evidence is insufficient to support the finding of the court that the deed of transfer was a "gift deed," made without any consideration paid therefor. But it is conceded by appellant that if this finding had been confined to a declaration that the conveyance was made without the adequate consideration defined by section 2 of the Inheritance Tax Act ("a consideration equal in money or in money's worth to the full value of the property transferred"), he might not feel justified in disputing its legal correctness. Of course, this is a fair admission, since the evidence clearly warranted the court in finding that the conveyance was made without adequate consideration as thus defined. This being so, it is comparatively unimportant that the court determined that the transfer was made by a gift deed.

The order is affirmed.

We concur: HOUSER, J.; CURTIS, J.

71 Cal. App. 266

O'GORMAN et al. v. WACHTER.
(Civ. 2887.)

(District Court of Appeal, Third District, California. Feb. 13, 1925.)

Venue $\Rightarrow$ 5(3)—Vendor's action for recovery of purchase price of real property is a "transitory action," and must be tried in county of defendant's residence.

An action by vendor for recovery of purchase price of land agreed to be sold is not a local action for recovery of real property or an interest therein, under Code Civ. Proc. § 392, subd. 1, but is a "transitory action," within purview of section 395, and must be tried in county where defendant resides.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Transitory Action.]

Appeal from Superior Court, Sonoma County; Ross Campbell, Judge.

Action by Timothy O'Gorman and another against Herman Wachter. From an order denying defendant's motion for change of venue, he appeals. Reversed.

Ernest Torregano, of San Francisco (Morgan V. Spicer, of San Francisco, of counsel), for appellant.

Hilliard Comstock, of Santa Rosa, for respondents.

PLUMMER, J. Defendant appeals from an order of the superior court of the county of Sonoma, denying his motion for a change of venue.

The record shows that on or about the 5th day of June, 1923, the plaintiffs, then the owners of certain parcels of land situate, lying, and being in the county of Sonoma, entered into an agreement with the defendant, whereby the plaintiffs agreed to sell, and the defendant agreed to buy, said parcels of land, and to pay therefor the sum of \$12,750. This agreement provided for the payment of said sum in installments. All of said payments were due prior to the beginning of this action.

Payments not having been made according to the agreement hereinbefore referred to, the plaintiffs brought this action to recover the entire purchase price of \$12,750, and in their complaint alleged tender of conveyance to the defendant, and also set forth their willingness to deliver to the defendant a good and sufficient deed of conveyance transferring to said defendant a clear title to the premises described in the agreement, and demanded judgment against the defendant in the sum of \$12,750, to be paid upon delivery by plaintiffs to said defendant of such conveyance. The defendant, being a resident of the city and county of San Francisco, upon making his appearance in said cause, filed therewith a demand for a change of the place of trial of said action from the county of Sonoma to the city and county of San Francisco, and supported his demand with a good and sufficient affidavit as to his residence in the city and county of San Francisco, and, also, as to the other requirements necessary to be set forth in an affidavit supporting a demand for a change of venue. No question is made as to the sufficiency of the pleadings upon which the defendant based his demand for a change of venue, the only question involved being as to whether the cause set forth in plaintiffs' complaint is local or transitory. If local, the motion was properly denied. If transitory, the order of the trial court must be reversed.

These questions involve sections 392 and 395 of the Code of Civil Procedure. Subdivision 1 of section 392 provides that actions for the recovery of real property, or of an interest or estate therein, or for the determination in any form of such right or interest and for damages to real property, must be tried in the county where the land is situated; and section 395, *supra*, specifies that all other actions must be tried in the county in which the defendants, or some of them, reside.

It is contended on the part of the plaintiffs that this action comes within the terms of subdivision 1 of said section 392, and on

the part of the appellant that section 395 applies and that the action should be tried in the county of the defendant's residence.

The complaint in this case is in the usual form of a complaint for the recovery of the purchase price of the land agreed to be sold. There is nothing in the complaint which asks for any relief concerning the premises, or which affects the title thereto, or any interest or ownership therein. The plaintiffs allege their willingness and readiness to tender and deliver to the defendant a good and sufficient deed of conveyance therefor, upon receipt of the purchase price agreed to be paid. It is true that the prayer of the complaint asks that the court specifically enforce the agreement herein referred to. This, however, is nothing more than praying that the court enter judgment in favor of the plaintiffs for the sum of \$12,750, the agreed purchase price. The judgment of the court to be entered in this case would not constitute any lien upon the premises, or require the plaintiffs to do anything in relation thereto which they have not already offered to do, to wit, to make conveyance. In this respect, this action is the exact opposite of the case upon which the plaintiffs rely, *i. e.* *Grocers', etc., Union v. Kern, etc., Co.*, 150 Cal. 466, 89 P. 120. In that case, the plaintiff in the action was a vendee seeking to compel a conveyance of the land agreed to be purchased and asking, in addition thereto, an accounting of the proceeds thereof, and directly called for a judgment and decree of the court compelling a transfer of the title to the premises involved from the defendant to the plaintiff, and consequently necessarily involved the determination of the right and interest of the parties in and to the real property covenanted to be sold and conveyed.

In the present action, no question is presented involving any lien of the vendor upon the premises, and therefore differs directly from those cases where partial payments have been made and the vendor seeks either a judgment canceling the vendee's rights under the contract, and further adjudicating that the vendor is entitled to retain all the payments, or adjudging that the lands be sold to pay the balance remaining due upon the premises, or that the vendor's title be quieted as against any claim of the vendee thereto, such for instance, as was involved in the case of *Robinson v. Williams*, 12 Cal. App. 515, 107 P. 705. In that case, relied upon by the respondent herein, the purpose was not to obtain a judgment for the purchase price, but was, as the court said, "only to cancel the written instrument and quiet the vendor's title as against any claim that might be made by the vendee, or any of his assigns." It was further stated in that case that the character of the action is to be determined by the complaint, and not merely by the relief prayed for. Being essentially

an action to quiet title and cancel an instrument that might become a cloud thereon, it necessarily falls within the terms of subdivision 1 of said section 392, Code of Civil Procedure.

That an action which involves merely the recovery of the purchase price of real estate is essentially an action for a debt the same as one founded upon a promissory note, and therefore transitory and not local, has been frequently adjudicated in this state as well as in other jurisdictions. Referring to cases outside of California, we find the rule well stated in *Kerr, etc., v. Nygren*, 114 Minn. 268, 130 N. W. 1112, Ann. Cas. 1912C, 538, where it is said:

"It is not necessary, in an action by the vendor for specific performance, that the land, the subject-matter of the contract sought to be enforced, be within the jurisdiction of the court, though the rule is different where the vendee seeks performance by decree of court. In such a case the court cannot decree a transfer of the title of land beyond its jurisdiction; but where the vendor brings the action, the whereabouts of the land is immaterial. The action is personal, and operates upon the person of defendant. The court requires a delivery to him of a valid conveyance of the land, and decrees that he thereupon pay the purchase price. 36 Cyc. 771 et seq., and cases cited; 26 Am. & Eng. Ency. Law, 132; *Fall v. Eastin*, 215 U. S. 1, 30 Sup. Ct. 3, 54 L. Ed. 65, 23 L. R. A. (N. S.) 924; *Garden City Co. v. Miller*, 157 Ill. 225, 41 N. E. 753; *Potter v. Hollister*, 45 N. J. Eq. 508, 18 Atl. 204; *Walsh v. Selover Bates & Co.*, 109 Minn. 136, 123 N. W. 291; *Hawkins v. Ireland*, 64 Minn. 339, 67 N. W. 73, 58 Am. St. Rep. 534."

In the case of *Samuel v. Allen*, 98 Cal. 406, 33 P. 273, in an action by a vendor upon a contract of sale prosecuted in Fresno county, the land being situate in the county of Los Angeles, the court, speaking through Justice Temple, thus described the character of the action:

"It is true that in some sense the vendor has a lien on the land for the portion of the purchase money which remains unpaid, and that it has been held that until a conveyance has been made the lien constitutes such security as will prevent the creditor from suing out an attachment, but it has also been uniformly held that such contract does not establish the relation of mortgagor and mortgagee. There is therefore no statutory prohibition upon the right to a personal action to enforce the debt when it becomes due. The action is for money due, as much so as though suit were upon a promissory note. It is not therefore a local action, and the court in Fresno county has jurisdiction, although the land which is the subject of the contract is in Los Angeles county."

The ruling of the trial court that the action was local rather than transitory was consequently reversed.

In *Longmaid v. Coulter*, 123 Cal. 208, 55 P.

791, where the same questions were presented, the court reaffirmed its holding in *Samuel v. Allen*, supra, quoting with approval the language which we have just set forth. In *North Stockton, etc., v. Fischer*, 138 Cal. 100, 70 P. 1082, 71 P. 438, it was again held that a vendor, under a written contract of sale, who had demanded payment of the residue of the purchase price, might maintain an action for the balance due, after having tendered the deed, and recover the same, as in an action to recover a debt. In *Herman Kraft Co. v. Bryan*, 140 Cal. 73, 73 P. 745, the court again reaffirmed its holding in the case of *Samuel v. Allen*, supra, that an action could be maintained by a vendor for the purchase price without having resort to the lien retained by him as security for such payment. That an action for the purchase price is not purely local and does not involve anything embraced within the provisions of subdivision 1 of section 392, Code of Civil Procedure, the case of *Gallup v. Sac., etc., Drainage Dist.*, 171 Cal. 71, 151 P. 1142, is directly in point. In that case, an agreement had been made between the property owners and the drainage district settling the amount to be paid by the drainage district to the property owner. The action was begun in Yolo county. The situs or residence of the defendant was in Sacramento county. The defendant demanded a change of venue. This was denied. The court held, citing the cases to which we have referred, that it was merely an action for the recovery of money and—

"In view of the allegations of the complaint, construed in the light of the provisions of the act, we are of the opinion that the action cannot be held to be one for injuries to real property within the meaning of section 392 of the Code of Civil Procedure."

The order of the trial court denying a change of venue was reversed. The Appellate Court of this state, Second District, in *Paramore v. Colby*, 45 Cal. App. 559, 188 P. 72, cited many authorities and held that "it appears to be settled law that such an action brought merely to recover money due on the contract is an action at law." In that case, the action was brought by the vendor to recover unpaid installments due upon the purchase price of lands on a contract entered into between the plaintiff and the defendant. In *Amaranth Land Co. v. Corey*, 182 Cal. 66, 186 P. 765, in an action brought by a vendor for the purchase price of lands, the cases which we have cited were affirmed, and the court again said:

"A vendor retaining the legal title to land sold may waive his security and bring an action at law for the purchase money, or file his bill in equity for the specific performance of the contract."

The action in that case was held to be simply an action for a debt due. If the ac-

tion were one for specific performance, the remedy in this case would be by the court laying hold of the defendant and compelling him to perform the covenants of his contract, which, of course, under the decisions which we have cited herein, is a mere personal action as against him and is enforceable against the defendant personally, or by judgment of debt against his property, and does not in any wise trench upon the title of the land agreed to be sold. The court does not deal with it in such case. It deals only with the defendant and requires him to perform the covenants of his agreement, to wit, pay the amount of the purchase price. It follows from what we have said, based upon the authorities cited, that the action in the instant case is purely transitory and not local, and the defendant having made such showing as the statute requires clearly establishing his residence in the city and county of San Francisco, at the time of the institution of this action, at the time of the service of summons, and also at the time of his demand for a change of venue, the order of the trial court should have directed such change.

The order of the trial court denying the defendant's motion for a change of the place of trial is hereby reversed.

We concur: FINCH, P. J.; HART, J.

71 Cal. App. 380

PEOPLE v. STEVENS. (Cr. 1228.)

(District Court of Appeal, First District, Division 2, California. Feb. 21, 1925. Hearing Denied by Supreme Court April 20, 1925.)

Criminal law $\S$ 633(2) — Statute, providing that clerk in reading information to jury shall omit all that relates to previous conviction, held not violated.

Pen. Code, $\S$ 1093, subd. 1, providing that, where defendant has confessed previous conviction, clerk in reading information to jury shall omit all reference thereto, held not violated, where district attorney, after reading portion of information pertaining to offense for which defendant was being tried, continued, "and doth furthermore charge that prior to commission of offense," when he was then interrupted by court and proceeded no further.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

W. G. Stevens was convicted of passing a fictitious check with intent to defraud, and he appeals. Affirmed.

Louis J. Hardie, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal by the defendant from a judgment of conviction

of a felony, to wit, the passing of a fictitious check with intent to defraud. The defendant pleaded "not guilty," but confessed to a previous conviction for a similar offense, which previous conviction was also charged in the information.

Subdivision 1 of section 1093 of the Penal Code provides that where the defendant has confessed the previous conviction the clerk, in reading the information to the jury, "shall omit therefrom all that relates to such previous conviction."

The only point made upon appeal is that there was a violation of the aforementioned provision of section 1093, Penal Code. The point is entirely without merit, for the record discloses that the district attorney, after reading the portion of the information which pertains to the offense for which the defendant was then and there being tried, continued reading as follows: "And the said district attorney doth furthermore charge that prior to the commission of the offense. * * * He was then interrupted by the court and proceeded no further. Appellant contends that the judgment against this defendant should be reversed because of the reading of this incomplete sentence, which made no reference at all to the previous conviction charged in the information. The mere statement of the objection demonstrates its triviality.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

71 Cal. App. 357

FRANKFORT v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 5015.)

(District Court of Appeal, Second District, Division 1, California. Feb. 19, 1925.)

1. Criminal law $\S$ 27—Person sentenced to state prison held convicted of felony.

Under Pen. Code, $\S$ 17, one sentenced to state prison for violating Corporation Securities Act, $\S$ 14, was convicted of felony, notwithstanding offense would have been misdemeanor if other punishment had been imposed under statute.

2. Bail $\S$ 53—Court may increase amount of bail without preliminary notice to defendant.

Even if Pen. Code, $\S$ 1289, be applied to admission of bail after judgment, court's authority to increase amount of bail does not depend on giving preliminary notice to defendant.

3. Bail $\S$ 42—Granting bail after conviction of felony is matter of discretion and not of right.

Under Pen. Code, $\S$ 1272, granting bail after conviction of felony is matter of discretion and not of right.

Original application for writ of mandate by Norman B. Frankfort against Superior Court of the State of California, in and for the County of Los Angeles, and Carlos S. Hardy, Judge, to require approval of an undertaking for bail. Writ denied.

Max Schleimer, for petitioner.

CONREY, P. J. This is a petition for a writ of mandate, to require respondent court, and the judge thereof, to approve an undertaking of bail. The petitioner was convicted upon an indictment charging him with the commission of certain acts in violation of the provisions of the Corporate Securities Act (Deering's Gen. Laws [1923 Ed.] Act 3814). The offense was such that, under the provisions of section 14 of this act, the defendant might be punished—

"by imprisonment in the state prison not exceeding five years, or in a county jail not exceeding two years, or by a fine not exceeding five thousand dollars, or by both such fine and imprisonment."

The sentence pronounced against the defendant was that he be confined in the state prison at San Quentin until discharged according to law. This was in accordance with the indeterminate sentence law.

"A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison." Pen. Code, § 17.

[1] The effect of section 17 is that the defendant must be deemed to have been convicted of a felony, notwithstanding that the offense would have been reduced to the grade of misdemeanor if the judgment had imposed a punishment other than imprisonment in the state prison.

[2] The petition herein alleges that petitioner, as defendant in said criminal action, appealed from the judgment and from the order denying a new trial, and a certificate of probable cause was allowed on said appeal. Thereupon the defendant applied to be admitted to bail pending the appeal. The court granted the application, and fixed the amount of bail pending said appeal at \$10,000 in cash, or an undertaking executed by a surety company in that amount. Contending that the court had no authority to so limit the kind of bail to be given and thereby to exclude defendant from furnishing bail by two or more qualified freeholders, he offered to the court an undertaking in the

sum of \$10,000, executed by several freeholders and householders who, so it is alleged, justified by testifying before the court that they were worth sums which, in the aggregate, amount to \$42,100 over and above all debts and liabilities and property exempt from execution. The petition states that the court refused to amend its order so as to provide for the acceptance of freeholders as sureties on said undertaking. By an affidavit which accompanies and is annexed to the petition, and which the petitioner refers to as being a part thereof, affiant, who is the attorney for petitioner, states that upon said examination of sureties the judge stated that upon the previous day he had amended his order theretofore made regarding bail by providing that an undertaking be given by freeholders in the sum of \$20,000, instead of \$10,000 cash or surety company undertaking. We shall treat this statement as an allegation that such order was made. Petitioner contends that such amended order is contrary to law, because it was made without notice to petitioner or his attorney, and further that, under section 1289 of the Penal Code, the judge had no right to increase the amount of bail while petitioner was still in jail. Said section 1289 reads as follows:

"Increase or Reduction of Bail. After a defendant has been admitted to bail upon an indictment or information, the court in which the charge is pending may, upon good cause shown, either increase or reduce the amount of bail. If the amount be increased, the court may order the defendant to be committed to actual custody, unless he give bail in such increased amount. If application be made by the defendant for a reduction of the amount, notice of the application must be served upon the district attorney."

[3] It will be noted that said section 1289 refers only to admission to bail "upon an indictment or information." But, even if it applied to admission to bail after judgment, we think that the authority of the court to increase the amount of bail required does not depend upon the giving of any preliminary notice to the defendant. Considering that, as we have hereinbefore stated, petitioner stands in the position of a person seeking to be admitted to bail after conviction of a felony, the granting of such admission to bail is a matter of discretion, and not a matter of right. Pen. Code, § 1272.

Since it does not appear that petitioner has tendered to the court any undertaking of bail in the sum of \$20,000 as required by the court's order, it follows that he is not entitled to the demanded writ of mandate.

The petition is denied.

We concur: HOUSER, J.; CURTIS, J.

71 Cal. App. 251

DUFFY et al. v. DUFFY. (Civ. 4856.)

(District Court of Appeal, First District, Division 1, California. Feb. 13, 1925. Hearing Denied by Supreme Court April 13, 1925.)

1. Deeds ☞56(2)—Intent to transfer title essential for effectual delivery of deed.

Intent to pass title and to irrevocably part with dominion and control over instrument is essential for effectual delivery of deed, and mere manual transfer with reservation of right to recall is not enough.

2. Deeds ☞66—Effectiveness of delivery of deed is question of fact.

Whether delivery of deed was effectual is question of fact for trial court from consideration of all the evidence.

3. Deeds ☞60—Delivery, upon verbal promise to reconvey upon contingency, complete.

Delivery of deed on verbal promise to reconvey on happening of given contingency held effectual, notwithstanding right to enforce verbal promise on happening of contingency.

4. Deeds ☞208(1)—Finding that grantor divested himself of title and invested same in grantees, sustained.

Where grantor, in contemplation of death, delivered deed on verbal promise to reconvey in case he recovered from affliction, evidence held to sustain finding that he, by his deed, divested himself of title and invested same in grantees.

5. Deeds ☞72(4)—Grantees held not to have abused confidential relation to procure deed.

Where grantor, in contemplation of death, originated idea of deeding property to brother and sister and took advice of counsel before informing grantees of intention, contention of wife that grantees abused confidential relations to procure deed held without merit.

6. Evidence ☞317(3)—Statements of physician of grantor's physical condition, to his wife, hearsay.

In controversy over deed to brother and sister, made in contemplation of death on verbal promise to reconvey if grantor recovered, statements by examining physician relative to grantor's condition, claimed to have been made to one who became grantor's wife, held mere hearsay, and properly refused.

7. Appeal and error ☞1056(1)—Rejection of evidence as to mental and physical condition of grantor three months subsequent to conveyance, and after he had married, not prejudicial.

In controversy over deed to brother and sister, made in contemplation of death on verbal promise to reconvey if grantor recovered, rejection of evidence having reference in main to mental and physical condition of grantor, made more than three months subsequent to conveyance and after grantor had married, held not prejudicial, especially where it was merely cumulative.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by Mary Duffy and another against Alice Duffy, individually, and as administratrix with will annexed of the estate of Martin D. Duffy. Judgment for plaintiffs, and defendant appeals. Affirmed.

Louitt & Stewart, of Stockton, for appellant.

Daniel V. Marceau, of Stockton, for respondents.

TYLER, P. J. Action to quiet title to certain real estate.

The complaint is in the usual form. The defendant filed an answer and cross-complaint, in which she denied the execution and delivery of the deed under which the plaintiffs claim title, and as an affirmative defense alleged that at the time of the delivery Martin Duffy, the grantor therein, being possessed of real property of the value of about \$35,000, was desirous of arranging his affairs so that while he lived the property would remain his and be subject to his control, but that if he died without making further disposition thereof it would appear to have been deeded to the plaintiffs, his brother and sister, and they would inherit the same without the necessity of probating his estate, and that it was for this purpose that he executed the instrument in question; that Martin believed that the delivery of said deed would not divest him of his estate in the property, and he did not so intend to divest himself of title nor to invest plaintiffs with the same, but to exercise a right of recall at any time he saw fit; that Mary Duffy, one of the grantees named in said deed, promised to return the property therein conveyed upon the demand of the grantor, who relied upon said promise and was induced thereby and by the implicit trust and confidence he reposed in his said sister to make the aforesaid transfer of his property.

These allegations were denied by the plaintiffs in their answer to the cross-complaint.

The prayer of the cross-complaint was that it be decreed that the instrument in question, purporting to be a deed, be declared to be null and void; that plaintiffs acquired no rights by virtue thereof; and that the title of said defendant, as administratrix of the estate of Martin D. Duffy, deceased, in said property be quieted.

The case was tried before the court without a jury, and judgment rendered in favor of the plaintiffs. This is an appeal from such judgment.

There is little or no dispute as to the main facts involved in the case, and they may be summarized as follows: Martin D. Duffy for many years had been engaged in the retail liquor business at Lodi, and had accumulated a substantial fortune composed of real

and personal property. The former consisted of a parcel of land in Lodi devoted to business purposes and a 10-acre vineyard situated a few miles from that town, and was worth in the aggregate about \$35,000, while the personal property amounted in value to about \$10,000. Duffy was a bachelor and about 64 years of age. He had no father or mother living, but he had a brother and sister—his only blood relatives—both of whom were single and had never been married and who lived in the town of Camanche in Calaveras county. The relationship between Martin and his brother and sister was peculiarly close and affectionate, and he visited them at frequent intervals. On December 19, 1921, Martin became seriously ill and went to Oakland for medical advice, stopping at the home of Mrs. Alice McErlane, a widow, with whom he had been on friendly terms for many years. Martin at once consulted physicians in respect to his ailment, and was advised by them that he was suffering from cancer of the throat, an operation to relieve which might prove fatal, but that without an operation his speedy death was certain. Under these circumstances, he requested Mrs. McErlane to telephone to G. M. Steel, an attorney residing at Lodi, and also to his brother and sister at Camanche, requesting them to meet him in Lodi the following day, December 31, Martin arrived at Lodi that evening with Mrs. McErlane, and was met by Miss Mary Duffy and a mutual friend, C. A. Durfey, who had taken care of his business as a bartender for about 14 years. The following morning he called at the office of Attorney Steel and stated that he desired to make a change in his will, and also directed him to draw a deed conveying the above-mentioned real property to his brother and sister. Steel did so, and took occasion to caution Martin (as he had at a previous time) against delivering the deed, explaining to him that if he did so the property would be beyond his control. To this warning Martin replied: "That is all right; that is all right." Martin then signed and acknowledged the instrument. Immediately thereafter the parties retired to a hotel in Lodi, where, in the presence of Durfey and Alice McErlane, Martin handed the deed to his sister Mary Duffy. As to what was said at the time of the delivery there is a conflict in the testimony. Mary Duffy testified that Martin stated at that time, "I give to you and Bill my property. If I get well you will deed back," to which she replied, "Oh, yes." On the other hand, Mrs. McErlane's version of the remarks exchanged was that Martin said, "I am to have it back if I want it," to which Mary replied, "Certainly, Martin." After thus delivering the deed, Martin took out the contents of a safe deposit box which he had shortly before removed from the vaults of a local bank, and which contained money, Liberty bonds, promissory notes, and memoranda of indebtedness to him,

and gave them to Mary, remarking that Durfey could help her out in the collection of the notes and other indebtedness. From the hotel Martin and Mary went to the bank, where the former caused the safe deposit box to be transferred to the names of Mary and Luke W. Duffy, and handed Mary the keys. While at the bank, his brother Luke arrived, and Martin informed him that he had deeded his property to him and his sister. He had reserved unto himself a few hundred dollars which he anticipated would be sufficient to take care of him through his sickness. After leaving the bank, all the parties proceeded to Martin's room. In the course of the afternoon a cousin of Martin, accompanied by her husband, arrived in response to a request made by telephone to Mrs. McErlane. To them Martin stated that he had deeded his property to Mary and Luke, and wanted them to put the deed on record right away. Turning to Mary, he said, "Mary, now I am leaving you comfortable, you don't have to work up in that old post office," and he informed other relatives of what he had done. Mary, although requested by Martin to go to the county seat that afternoon in order to have the deed recorded, was unable to do so, but she sent the document by mail and it was recorded on January 10, 1922.

Other facts and circumstances tending to support the testimony of Mary Duffy as to what took place at the time of the delivery of the deed show that she received the rentals from the Lodi property and placed the same to the credit of herself and brother in a local bank; that in attempting to discuss with the grantor the leasing of this property, he reminded her that it belonged to her brother and herself and that he had nothing to do with it; that upon another occasion one of the tenants of the same had consulted the grantor with reference to his lease, and the grantor advised him that the property belonged to his brother and sister. There is also testimony showing that Martin Duffy had made inquiry as to how his sister was managing her property.

After the execution and delivery of the deed in the manner above recited, Martin returned to Oakland to undergo treatment. On March 7, 1922, he married Alice McErlane. On the previous day he had instructed her to telephone to one W. C. Neumiller, the county treasurer of the county of San Joaquin and an old friend, and to Mr. Steel, his attorney, asking them to attend the wedding. He likewise communicated with his brother and sister, making the same request of them. On the morning of the wedding Martin announced to his sister that he was to be married that afternoon, and inquired if she brought the deed with her. She had not, and so informed her brother, upon which he stated that he was going to make a change, and that he was having Mr. Steel come for that purpose as he wanted Alice McErlane to have

the vineyard together with \$2,000 in cash, remarking, at the same time, "It is mine, and I can do with it as I please." According to the testimony of Mary, Martin said to her, "I thought if you would let Mrs. McErlane have the vineyard you and I will would still have the town property." Mary refused to acquiesce in the suggestion. Although she visited her brother subsequently and during his illness, nothing more was said in relation to the transfer of the property, and the two remained on friendly terms as theretofore. Subsequently, on May 5, 1922, Martin made a will by which he devised the Lodi property to his brother and sister and the vineyard to his wife. On May 17, 1922, he died. His will was admitted to probate, and his widow, Alice Duffy, was appointed administratrix with the will annexed of his estate. She thereafter qualified and letters of administration were issued to her.

On June 7, 1922, Mary and her brother, Luke W. Duffy, filed suit against Alice Duffy, individually and as administratrix, for the purpose of quieting their title to the real property in question, and it is from the judgment rendered in that suit in favor of the plaintiffs that this appeal is prosecuted by the defendant.

The trial court found, in substance, that at the time of the execution of the deed Martin Duffy was suffering from a malady which he believed would prove fatal; that he entertained at the date of the transfer and for many years prior thereto a strong affection for his brother and sister and reposed in them implicit trust and confidence. It also found him to be possessed on the day of the transfer of real property of the value of \$35,000, and that on such day he caused the instrument in question to be drawn and signed, acknowledged and delivered the same to Mary and Luke W. Duffy free from any limitations, conditions, or restrictions; that prior to the execution of the deed the grantor had procured independent advice from an attorney of his own selection and that he made the deed with intent to divest himself of title to the property and invest the same in plaintiffs; that the sole inducement for the execution and delivery of the deed was love and affection.

It is admitted by the appellant that if these findings are supported by the evidence it is idle to assail them. The portion of the findings chiefly challenged by appellant is that with reference to the execution and delivery of the deed with intent to presently invest in plaintiffs title to the property in question without condition, limitation, or restriction. In this connection it is claimed by her that the evidence, given the most favorable interpretation for the plaintiffs, establishes, contrary to the finding, that there was not an absolute delivery, and that therefore either the deed was void, or that the plaintiffs hold

the title in trust for the estate; the better reasoning being that the deed is void.

[1, 2] At the outset it may be stated that the rule is elementary that it is essential to the validity of a transfer of real property that there be a delivery of the conveyance with intent to transfer the title; and the true test under which the effect of the delivery is to be determined is to ascertain whether in parting with the conveyance the grantor intended thereby to divest himself of title. If he did, there is an effectual delivery of the deed; if not, there is no delivery. This is a question of fact to be determined by the trial court from a consideration of all the evidence in a given case bearing upon the subject (*Kenniff v. Caulfield*, 140 Cal. 34, 73 P. 803; *Estate of Cornelius*, 151 Cal. 552, 91 P. 329; *Follmer v. Rohrer*, 158 Cal. 757, 112 P. 544; *Stewart v. Silva*, 192 Cal. 405, 221 P. 191), and a finding based on conflicting evidence is conclusive here (*Sherman v. Sandell*, 106 Cal. 375, 39 P. 797; *Smith v. Flynn*, 64 Cal. App. 218, 221 P. 384). To prove this issue evidence of manual tradition of the instrument is not enough; its delivery to or on behalf of the grantee must be with the intent of presently passing title, and must not be hampered by the reservation of any right of revocation or recall. *White v. Hendley*, 185 Cal. 614, 198 P. 22. Where it appears from all the circumstances that the grantor has made known his intention to irrevocably part with his dominion and control over the instrument to the end that it may presently vest title in another, the delivery is sufficient and complete. *McCully v. McArthur*, 187 Cal. 199, 201 P. 323.

[3, 4] It is claimed by the appellant that the evidence here shows that the grantor had in mind undergoing an operation, which might prove fatal, and yet, on the other hand, he might recover. It is conceded that the conclusion is indisputable that in the event the ailment from which he was suffering should prove fatal the grantor wanted his brother and sister to have his property; and that if he recovered therefrom they were not to have it. It is her contention that the entire evidence shows that pending the outcome the respondents were to have merely a semblance of title, which would save them the expense of probating the estate if the operation proved fatal. It is accordingly argued that under such a state of affairs the grantor still retained control of the title so that in the event of his recovery he could regain the same, and that therefore he never intended by the instrument to completely divest himself of title, having in view that there was no absolute certainty of death resulting from his ailment. In support of this contention counsel for appellant relies upon the doctrine laid down in *Brisson v. Brisson*, 75 Cal. 525, 17 P. 689, 7 Am. St. Rep. 189.

In that case the plaintiff and defendant were

husband and wife. The former was the owner of certain real property. He was about to visit a foreign state and was apprehensive that he might be killed, and was therefore desirous of making a will before his departure so that this property should go to his wife in the event of his death. At the same time, being influenced by his desire to save the expense of probate, and having confidence in his wife, and relying upon her parol promise that she would reconvey to him upon his return, he made a deed to her absolute in form. His apprehensions of calamity befalling him proved groundless and he returned safely, but his wife refused his request to reconvey. The court held that he was entitled to a reconveyance, the wife merely holding title to the property in trust.

Counsel has cited us to other authorities in support of his contention that as the grantor was to be reinvested with his title in the event that he recovered from his malady, the delivery was hampered by a reservation, and that therefore there was no complete delivery. They are in the main cases where deeds were delivered with no intention of presently passing title, the grantors reserving the right of dominion over the deed, to revoke or recall it. These cases are extensively reviewed in *Williams v. Kidd*, 170 Cal. 631, 151 P. 1, Ann. Cas. 1916E, 703, and require no detailed comment. In most if not all of them the delivery was made upon condition, with an express reservation of the right to a reconveyance upon the happening of the condition upon which the instrument was delivered. In such cases there is no question that a right to a reconveyance exists upon the happening of the condition. So here, had Martin Duffy recovered from his ailment he would undoubtedly have been entitled upon demand to a reconveyance; and, in fact, plaintiff Mary Duffy testified that she was ready to execute a reconveyance upon the happening of that event, and that her refusal to accede to the grantor's wishes was because the condition upon which she was to reconvey if requested had not been realized, namely, recovery from his malady.

There is a distinction between the right to recover the deed and the right to claim a reconveyance of the property embraced therein. To say that a promise on the part of a grantee to reconvey upon a certain contingency is the equivalent of retaining title is in effect to say that under such circumstances the grantor by his conveyance merely created a cloud upon his title. But this is not so. If an owner chooses to convey his land upon a verbal promise on the part of the grantee to reconvey on demand or upon the happening of a given contingency, he may do so; and if the delivery of his deed is regular in other respects he parts with the title, subject only to the contingent right to a reconveyance. An agreement on the part of grantee to reconvey negatives the idea of the reten-

tion by the grantor of a right to recall or revoke his deed. If it could be said that there could be no complete delivery because of a promise on the part of the grantee to reconvey upon the happening of a certain condition, then all conveyances made upon condition would be idle acts and of no legal effect unless and until the specified contingency should come to pass. The law affords a remedy where a grantee wrongfully refuses to reconvey according to his agreement. But this is not such a case. Martin Duffy never recovered from his illness, and this was the only condition upon which he would have been entitled to a reconveyance. Having unsolicited and without any suggestion on the part of the grantees limited his right to this single condition, he could not capriciously and as a matter of right ask for a reconveyance upon other grounds. His property had passed from him beyond recall by the delivery of his deed, subject only to his right to a reconveyance upon the happening of the single limitation with which it was burdened. Nor does the fact that the conveyance was made to avoid the expense of probate proceedings, or that the grantor may have cherished the secret hope of recovery, in any manner alter the situation. These facts are not necessarily inconsistent with an intent to presently and irrevocably pass title. *Hefner v. Sealey*, 175 Cal. 20, 164 P. 898.

We conclude, therefore, upon this subject that the evidence fully sustains the finding of the trial court that the grantor by his deed divested himself of title and invested the same in his grantees.

[5] Equally without merit is the further contention that there was a violation of trust and that the grantees used the confidential relation existing between them and Martin to procure the deed. There is no direct evidence that the grantees took advantage of this relation (assuming it to exist). On the contrary, the idea of making the deed originated with the grantor himself; he took independent advice of his counsel of long standing, and the grantees knew nothing of his most natural intention to make them—his only blood relatives—the objects of his bounty until he made announcement thereof.

And, finally, appellant urges some 41 objections to rulings of the trial court upon the admission of evidence and assigns such ruling as error justifying a reversal.

[6] In this connection it is claimed that the court erred in rejecting evidence as to statements made by an examining physician relative to the grantor's physical condition. The statements were claimed to have been made by the physician to Mrs. McErlane. Assuming them to have been material, evidence by her upon the subject was mere hearsay and properly rejected.

[7] Evidence relating to the purchase of a burial plot, and the fact that deceased had telephoned to his attorney in Stockton for

the purpose of making a change in his affairs, together with certain declarations in disparagement of his title, were rejected, and these rulings are assigned as error. We have carefully examined these objections, and find them to be untenable. The evidence had reference in the main to the mental and physical condition of the grantor, and this matter had been gone into fully by the trial court; the facts and circumstances surrounding the execution and delivery of the deed and its purpose, including the grantor's apprehension of impending death, were also all before the court, and most of the rejected statements were made more than three months subsequent to the conveyance and after the grantor had married. Moreover, the testimony was cumulative, and we are clearly of the opinion that its rejection in no manner affected or invaded the substantial rights of the appellant.

From what we have said it follows that the judgment should be and it is hereby affirmed.

We concur: ST. SURE, J.; KNIGHT, J.

71 Cal. App. 352

In re GALLO'S ESTATE.

GALBRAITH et al. v. PANINI et al.

(Civ. 2764.)

(District Court of Appeal, Third District, California. Feb. 18, 1925. Hearing Denied by Supreme Court April 16, 1925.)

1. Costs ⇐236—Appellant entitled to costs on reversal of judgment.

Appellant is entitled to costs on reversal of judgment, under Code Civ. Proc. § 1027.

2. Costs ⇐3—Prevailing party's right to recovery purely statutory.

Prevailing party's right to recover costs is purely statutory.

3. Costs ⇐254(4)—Prevailing party on appeal may not recover expenses of transcript not ordered by court.

Under Code Civ. Proc. § 1027, read with section 274, which was not repealed, prevailing party on appeal may not recover as costs expenses of transcript not ordered by court.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Proceeding by Esta F. Galbraith and another against Dario Panini and others to revoke the probate of the will of Annie Gallo, deceased. From an order taxing costs, plaintiffs appeal. Affirmed.

A. H. Ashley, of Stockton, for appellants. Arthur L. Levinsky and R. J. Jeffry, both of Stockton, for respondents.

THOMPSON, Judge pro tem. This is an appeal from an order taxing costs. Plaintiffs instituted a proceeding to revoke the probate of the will of Annie Gallo, deceased. At the close of plaintiff's case a nonsuit was granted. On appeal the judgment of nonsuit was reversed. 61 Cal. App. 163, 214 P. 496. For the purposes of that appeal plaintiffs ordered a transcript of testimony from the reporter at an expense of \$282.60. Upon the return of the remittitur, in due time, plaintiffs filed their bill of costs, including this item for reporter's transcript. On defendant's motion to tax costs this item was disallowed. From this order the plaintiffs appealed. The bill of exceptions indicates that the plaintiffs procured this transcript of testimony without obtaining any order of court therefor.

[1, 2] A successful appellant is entitled to costs on reversal of the judgment. Section 1027, Code Civ. Proc.; *Robinett v. Brown*, 167 Cal. 735, 141 P. 368. The right of the prevailing party to recover costs is purely statutory. No costs may be recovered except when they are allowed by statute. *Turner v. East Side Canal & Irrigation Co.*, 177 Cal. 570, 171 P. 299.

Section 1027 of the Code of Civil Procedure provides that the prevailing party "may recover all amounts actually paid out by him in connection with said appeal, and the preparation of the record for the appeal, including the costs of printing briefs. * * *

[3] There can be no doubt this transcript of testimony was necessary for the preparation of plaintiffs' appeal from the judgment of nonsuit, as the affidavit of A. H. Ashley, which is attached to plaintiffs' bill of costs, shows. But this section must be read in connection with section 274 of the Code of Civil Procedure, which provides in part:

"In civil cases, the fees * * * for transcripts ordered by the court to be made must be paid by the parties in equal proportions, and either party may, at his option, pay the whole thereof; and, in either case, all amounts so paid by the party to whom costs are awarded must be taxed as costs in the case. The fees for transcripts and copies ordered by the parties must be paid by the party ordering the same. * * *

Section 1027 of the Code of Civil Procedure is the latest expression of the Legislature, but does not repeal the provision of section 274 of the Code of Civil Procedure requiring the party ordering a transcript, without the order of the court, to pay for the same. *Sime v. Hunter*, 55 Cal. App. 157, 202 P. 967. Construing these two sections together, we must conclude that the statute allows all costs actually incurred by the prevailing party in preparation of the record on appeal, except in the absence of an order of court, where the party himself orders the transcript, he must pay for the

same. The only way to properly charge the expense of a transcript as costs on appeal, is to obtain an order of court pursuant to section 274 of the Code of Civil Procedure. *Senior v. Anderson*, 130 Cal. 290, 62 P. 563; *Sime v. Hunter*, 55 Cal. App. 157, 202 P. 967; *Blair v. Brownstone Oil & Refining Co.*, 20 Cal. App. 316, 128 P. 1022; *Kohn v. Kempner* (Cal. App.) 225 P. 24; 7 Cal. Jur. 284. This order was not procured. It follows that the order disallowing the item of \$282.60 was properly made.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

71 Cal. App. 315

PEOPLE v. HUNTER. (Cr. 834.)

(District Court of Appeal, Third District, California. Feb. 16, 1925.)

1. Assault and battery ☞92—Evidence sufficient to show intention and present ability to kill; "assault."

In prosecution for assault with deadly weapon, where accused visited wife's apartment with a revolver in his sock, evidence *held* sufficient to show intention and present ability to kill her; as elements of an "assault," which is an unlawful attempt, coupled with present ability, to commit a violent injury on a person, under Pen. Code, § 240.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assault.]

2. Assault and battery ☞92—Attempted execution of intention to kill shown under evidence.

In prosecution for assault with deadly weapon, where accused visited wife's apartment, evidence that he was attempting to take gun from his sock when she jumped out of the window *held* sufficient to show attempted execution of intent to kill, which, together with present ability, constitutes offense.

3. Assault and battery ☞56—Contention that revolver was not shown to be loaded held without merit.

In prosecution for assault with deadly weapon, contention that revolver, which accused was attempting to secure, expressing intention to kill at same time, was not shown to be loaded, *held* without merit.

4. Criminal law ☞404(4)—Admission in evidence of revolver and cartridges proper.

In prosecution for assault with deadly weapon, admission in evidence of revolver and cartridges found therein, and for which accused was reaching, with apparent intention to kill wife, when she jumped out of the window, *held* not error.

5. Assault and battery ☞89—Evidence that wife jumped out of window to escape accused, competent.

In prosecution for assault with deadly weapon, evidence that wife jumped out of window to escape accused *held* competent.

6. Criminal law ☞829(1)—Refusal of instructions, covered by those given, not error.

In prosecution, refusal of instructions covered by those given *held* not error.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Harry Hunter was convicted of assault with deadly weapon, and he appeals. Affirmed.

Irving M. Brazier, of Ukiah, for appellant.
U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the crime of assault with a deadly weapon. He prosecutes this appeal from the judgment and the order denying his motion for a new trial.

[1] In August, 1924, defendant's wife commenced an action against him for divorce. Thereafter she and their two children resided at the Bolden Apartments in Ft. Bragg, and the defendant occupied a room at the White House in the same town. On the 17th or 18th of September the defendant, who had not been in the habit of carrying a gun, purchased a revolver and a box of cartridges. In the afternoon of the 18th he asked his wife to let him take dinner with her and the children, at her apartment that evening, saying he was going away the next day, and she consented. He spent the evening in the apartment with them, and while there made statements from which it might be inferred that he intended to kill his wife and take his own life. His wife had difficulty in persuading him to leave, but, upon her promise that he might return the next morning at 9 o'clock, he finally left. The next morning about 7:30 he called at a barber shop of which he and his wife were both patrons, and while there said to the proprietor, "I don't think my wife will bother you any more." He then went to his wife's apartment and there took frequent drinks from a bottle of intoxicating liquor which he had with him. His wife testified that—

After the children left for school "he says to me, 'If you have any arguments make them quick. * * * You are not going to leave this room until I do. I am going to kill you. We are both going to die on that bed together. I have stood enough of this.' And I got up out of my chair and threw my right arm around his neck and said, 'No, let's not do that, let's be friends,' and he stooped over and pulled at his pants leg and said, 'No, I am going to use it.'

"Q. Where did he have the gun? A. On his right leg on the outside in his sock, and the sock was thin, and it shone through his sock and was shiny and the whole print of it was there, * * * and he said, 'No, I am going to do it,' and bent over and went at it that way (indicating) to get the gun. * * * He

just made it like a madman. He had a garter on, which he never wore before, and he was trying to unfasten it, when he said, 'I am going to do it, I am going to do it,' just as fast as he could, like that (indicating). It seems as I stuck my head and shoulders out of the window something told me to get out of there, and I threw my legs out— * * * and he grabbed me by the coat collar. * * *

"Q. And you went out of the window and down to the street below? A. On the cement sidewalk, yes. * * * He never shot. * * * When he began so fast like this to get the gun, I never looked back, and when he grabbed me I slipped onto the sidewalk. * * *

"Q. Did he pull his pants leg up? A. Yes. * * * I should judge just under his knee. * * * He says: 'Do you see that thing? I am going to kill you on that bed and then kill myself.' * * * He said it fast and very low. * * * He was wrestling with it to get it out of his sock. * * *

"Q. You mean he had his hands down— A. He had both of them down going just that way, as fast as he could (indicating). * * * He was attempting to get it, but I didn't wait. I never saw it after he got it out. * * * He made an effort to get it out of his sock."

A witness who was across the street at the time testified that he heard screaming and saw Mrs. Hunter drop from the window to the sidewalk, a distance of 16 or 18 feet below; that she said, "He is going to kill me or trying to shoot me or something to that effect"; and that he saw the defendant standing in the window at the time. Another witness gave testimony to the same effect. About 30 minutes later, the defendant was found in bed, in his room at the White House, fully dressed. At about 8 o'clock in the evening of the 19th, the defendant's revolver, fully loaded, was found under a mattress in his wife's apartment. The defendant testified at his preliminary examination but not at the trial. His counsel introduced at the trial a transcript of all the testimony taken at the preliminary examination. At such examination the defendant testified that at the time of the alleged crime he "was pretty near rumdum with this booze they sell around here"; that he did not have the revolver at that time; that he had placed it under the mattress the evening before, "awhile after the children went to bed. * * * I didn't want it to be found on me"; that he did not know that his wife jumped out of the window, "I didn't have presence of mind enough. I was too crazy, I guess."

Appellant contends that the evidence is insufficient to prove the alleged assault, in that it does not show that the defendant attempted to use the weapon. "An assault is an unlawful attempt, coupled with a present

ability, to commit a violent injury on the person of another." Pen. Code, § 240.

[2] The evidence is ample to show that the defendant had the intention and the present ability to kill his wife. The only question remaining is whether he attempted to carry his purpose into execution. To accomplish that purpose, it was necessary for him to take the gun from his sock, to point it at his wife, and to pull the trigger. Any one of these would constitute an overt act toward the immediate accomplishment of the intended crime. He was endeavoring to take the gun from his sock when his wife thwarted the attempt to kill her by jumping out of the window. Naturally she did not wait to see whether he succeeded in getting hold of the gun or whether he pointed it at her, and it is immaterial whether he did either. The actual transaction had commenced which would have ended in murder if it had not been interrupted. In *People v. Stites*, 75 Cal. 570, 17 P. 693, the defendant approached a railroad track with an explosive in his possession which he intended immediately to place upon the track; but, because of the presence of police officers, he retreated without accomplishing his purpose. It was held that he was guilty of an attempt to place an obstruction upon the track. See, also, *People v. Mayen*, 188 Cal. 237, 256, 205 P. 435, 24 A. L. R. 1383, and cases there cited. The facts in the instant case are not essentially different in principle from those in *People v. McMakin*, 8 Cal. 547, and *People v. Piercy*, 16 Cal. App. 13, 116 P. 322, where like judgments were affirmed.

[3-6] Appellant contends that the evidence is not sufficient to show that the revolver was loaded, that it was error to admit the same and the cartridges found therein in evidence, and to admit proof that the defendant's wife jumped out of the window to escape from him. The contentions are so manifestly without merit, as appears from the evidence herein stated, that no discussion thereof is deemed necessary. The refusal of the court to give certain instructions proposed by the defendant is assigned as error. Several of these instructions are framed upon the theory that the evidence is insufficient to prove an assault by defendant. In so far as the proposed instructions contain correct statements of law, they are covered by instructions which the court gave. All other grounds urged for a reversal are trivial and need not be discussed. The evidence is clear and convincing, and no logical basis is suggested upon which the jury could have returned a different verdict.

The judgment and the order are affirmed.

We concur: HART, J.; PLUMMER, J.

71 Cal. App. 239

(235 P.)

PEOPLE v. EKSTROMER. (Cr. 1177.)

(District Court of Appeal, First District, Division 1, California. Feb. 11, 1925. Hearing Denied by Supreme Court April 7, 1925.)

1. Criminal law ⚡457—Intoxication is a matter of nonexpert opinion.

Intoxication is a matter of nonexpert opinion.

2. Criminal law ⚡825(2)—Instruction defining "under the influence of liquor," and permitting jury to accept ordinary definition of words, not prejudicial.

In prosecution for driving automobile on highway while intoxicated, instruction allowing jury to accept ordinary definition of words "under the influence of liquor" held not prejudicial, in absence of request by accused for more definite instruction, and where he practically asked definition which conceded common usage and understanding.

3. Highways ⚡186—"Under the influence of intoxicating liquor," within statute as to operation of automobiles, defined.

"Under the influence of intoxicating liquor," as used in statute relating to operation of automobiles, means such effect on the nervous system, brain, or muscles of driver of automobile as to impair to an appreciable degree his ability to operate car as an ordinary prudent and cautious man, in full possession of his faculties, would.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Under the Influence of Liquor.]

4. Highways ⚡186—Whether accused was under the influence of intoxicating liquor is question of fact from all the circumstances.

In prosecution, under Vehicle Act, § 112, question as to whether accused was under the influence of intoxicating liquor is one of fact to be determined from all the circumstances of case, and it is not necessary to prove any specific degree of intoxication.

5. Highways ⚡186—Evidence sufficient to justify conviction of driving automobile while intoxicated.

In prosecution under Vehicle Act, § 112, for driving automobile on public highway while under influence of intoxicating liquor, evidence held sufficient to justify conviction.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Edward G. Ekstromer was convicted of driving an automobile on a public highway, while under the influence of intoxicating liquor, and he appeals. Affirmed.

Daniel A. Ryan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

ST. SURE, J. Defendant was convicted of violating section 112 of the California Vehicle Act (St. 1923, p. 553) in driving and operating an automobile on a public highway while under the influence of intoxicating liquor. He was sentenced to 90 days in the county jail, and he now appeals from the judgment and from an order denying his motion for a new trial.

Section 112 of the vehicle act reads as follows:

"Persons under influence of liquor or drugs. No person who is under the influence of intoxicating liquor or who is an habitual user of narcotic drugs shall drive a vehicle on any public highway within this state. Any person violating the provisions of this section shall upon conviction be punished by imprisonment in the county jail for not less than ninety days nor more than one year or by imprisonment in the state prison for not less than one or more than three years or by a fine of not less than two hundred dollars nor more than five thousand dollars."

A police officer arrested defendant soon after his automobile and that of one Bates collided at Bush and Leavenworth streets, San Francisco, between 7:30 and 8 o'clock p. m. of October 13, 1923. Defendant had been driving south on Leavenworth street, and crossed Bush, when the cars collided at the left front wheels. Defendant immediately backed from Bates' car and came in contact with a machine in the rear, which had stopped from curiosity of its driver. According to one statement, defendant was at the west curb on Leavenworth street when the officer came on the scene, started away from there down Leavenworth street, disregarded the officer's order to stop, was overtaken and again came to the curb some hundred feet further down on the second command of the officer, who then placed him under arrest. According to his own statement defendant backed from the impact with Bates' car, swung into Leavenworth street and was proceeding south on Leavenworth street when stopped by the police officer and placed under arrest. There is a conflict as to whether the defendant was merely crossing Bush street on his way south on Leavenworth, or turning from Leavenworth east into Bush, just preceding the collision with Bates. The prosecution's position is that defendant was crossing Bush street while proceeding south on Leavenworth, but "too far over" on the wrong side of the street, and a positive statement is made that the position of the car was such that he could not have been attempting any turn, but defendant and a friend with him in his car at the time, state he was making the turn into Bush, and that both cars were going very slowly on account of heavy traffic. No one saw defendant's car before the impact ex-

cept Bates, and he did not see it until it got "right close up." He stated that he was back of the crossing on Leavenworth, his car stationary, waiting for traffic to pass before crossing, and witness Holmes' testimony bears this out.

The evidence was in direct and almost equally divided conflict, both on the question of details of the collision and on the subject of intoxication. Witness Holmes, standing on the corner preceding and at the time of the collision, and the arresting officer, Mantell, testified positively that defendant was intoxicated; and the driver of the other car featuring in the collision made the statement that he thought defendant was drunk by his actions in driving the machine, that he really meant he so judged by the collision. He further testified that although he stood on the running board of defendant's car, right next him, immediately following the collision, he smelled no liquor, and that about half an hour later at the police station defendant seemed "very much sober."

The defendant is accused by the police officer of attempting to run away after the collision, but the charge is denied by defendant and by his companion, Peterson, who was in the car with him at the time, and depends solely upon the facts of whether his car was parked at the curb and driven from there after the arrival of the officer and against his order to remain there, as the latter claims, or whether it merely came near the curb to clear away after exchange of data with the other drivers, started down the hill and came to the curb on the whistle of the officer, who boarded the car while in motion and accused the defendant of flight.

It was at this latter point that the officer ordered defendant out of his car, made him walk a line to a lamp post and back, and then placed him under arrest for driving while intoxicated. The officer testified that defendant was intoxicated. As basis for this opinion he stated that at first (on order) defendant "didn't seem to pay any attention to what I was saying to him"; that defendant's breath smelled of liquor; defendant admitted he had been drinking, it was his birthday; his walk was slow, not irregular, he walked to the lamp post, "kind of staggered against it"; he was dazed; he did not speak clearly, hard to understand.

The bystander, Holmes, testified that defendant was intoxicated. He so judged from the following: Defendant's breath smelled of liquor; he was not steady on his feet; he walked the line unsteadily; the manner in which he got out of the machine; his walking directly into a lamp post while walking the line.

Defendant testified that he had arrived in town in the afternoon following a business trip, had accidentally met his friend, invited him to dinner and driven him to call at the

home of a mutual friend to ascertain the nature and time of an invitation on which acceptance or rejection of defendant's dinner invitation would be grounded; that while there they each had one drink, a ginger ale highball, and that was the only drinking he had done; that from that place he drove with his friend en route to dinner, and came to the corner where the collision took place; that after exchange of data with Bates he backed to clear, struck slightly a machine stopped behind him, exchanged data with the second driver, backed nearly to the curb, started off down the hill and came to the curb again on hearing the whistle of the officer, who boarded the car while it was on its way to the curb, accused him of running away, and used abusive language to him on denial of the charge. Arrived at the curb he was made to alight and climb out through the gear shift and brake at his right (the car being a right-hand drive car); he was then made to walk a line and back, and placed under arrest for driving while intoxicated. He stated to the officer, "I have had one drink—it is my birthday." He was not intoxicated. At the Hall of Justice he wrote a check for his bail.

His friend's story was substantially the same, with the additions that defendant was not to blame for the accident; that he was naturally slow of speech, had in fact a slight impediment in his speech; that his gait was unusual, somewhat of a straddling walk. He was quick-tempered, and resented the officer's charge that he was running away; the officer replied with the statement, "I am going to arrest you for being intoxicated, anyhow, in a car," and on defendant's remonstrance told him, "You be quiet," or some words, to "push him or something," and, "You get out of the car." He got out of the car awkwardly of necessity, because of the gear and brake lever. He walked to the lamp post, asked the officer, "What do you want me to do now?" and on being told, "Walk back," did so. He did not bump the lamp post; he denied he was intoxicated, and he was absolutely sober.

The jury found defendant guilty as charged in the information. Motion for new trial and motion for probation were denied.

The defendant requested five instructions, three on reasonable doubt and one for acquittal, which were "refused as given in substance elsewhere," and the fifth, which was given, as to the burden of proof. The term "under the influence of intoxicating liquor" is not defined in the California Vehicle Act, and the instructions requested by defendant contained no definition of it, but used the term in each of his proposed instructions as though it were one commonly understood. The court, among others, gave the following instructions:

(1) "I instruct you that the term 'under the influence of intoxicating liquor' means that he must have drank enough intoxicating liquor to have disturbed the actions of his physical or mental faculties so that they were no longer in their natural or normal condition"; and (2) "the law as herein set forth does not define the terms 'influence' or 'intoxicating,' and therefore the jury must accept the common, ordinary definition of these words according to their context and approved usage of our language."

Defendant now complains that the judgment, if allowed to stand, is authority for the proposition that any degree of intoxication, however slight, while driving an automobile, constitutes a crime under the statute, rather than such intoxication as, when applied to the driving of an automobile, shows an impairment of ability to drive as an ordinarily prudent person would do. He attacks the instructions of the trial court hereinbefore quoted, on the ground that the definition of the term "under the influence of intoxicating liquor" was insufficient and incorrect; and further, that the court not only failed to define the term "under the influence of intoxicating liquor" properly, but in the absence of any definition in the statute itself of the words "influence" and "intoxicating," left such definition for the jury to determine. He asserts that prejudicial and fundamental error resulted.

Appellant also attacks the validity of the conviction on the ground that it is contrary to law and the evidence, on the premise that the instructions did not correctly define the law and that there was no evidence directly bearing on defendant's ability to drive an automobile.

[1, 2] In disposing of the first point we may say that the record does not disclose any objection on the part of the defendant to the instructions given, and that, indeed, he himself practically asked a definition which conceded common usage and understanding, and which the court gave when, at his request, it instructed the jury:

"You are instructed that it is not necessary for the defendant to show that he was sober, but that the burden of proving that he was under the influence of liquor is upon the prosecution, and before you can convict it is necessary not only that the prosecution prove that he was under the influence of liquor, but to prove the same beyond all reasonable doubt."

In none of the other requested instructions did defendant question or define the phrase unless it may be said that in one, "refused as given elsewhere," he concedes that the slightest influence is sufficient by requesting the court to charge:

"You are instructed that if the testimony is so equally balanced that you are unable to determine one way or the other whether or not the defendant was under the influence of li-

quor or was wholly free of such influence, then you must acquit the defendant."

The requested instruction which was given clearly contrasts the condition of "sober" with "under the influence of liquor," thereby affording substantial ground for the substitution of the term "intoxicated" for the latter. It is generally recognized that intoxication is a matter of nonexpert opinion, and the charge to the jury to determine the meaning of the words "influence" and "intoxicating" by the approved usage of our language was, in fact, but such a statement. Two of the witnesses in the case testified positively that defendant was "intoxicated" and gave the reasons for their opinion. Elements of their opinions were matters which, if believed by the jury, would have operated to impair the ability of one to operate an automobile to an appreciable extent. Such being the case we cannot believe that any prejudicial error resulted either from the definition given by the court or its instruction to the jury to accept the common ordinary definition of the words.

[3] We have read and considered the cases of *People v. Weaver*, 188 App. Div. 395, 177 N. Y. S. 71; *People v. Dingle*, 56 Cal. App. 445, 205 P. 705, cited by appellant. We are not in accord with the holding of the former, but quote with approval the following language from the latter:

"* * * With respect to the meaning of the phrase 'under the influence of intoxicating liquor,' as used in this statute, we think we are well within the bounds of accuracy in saying that if intoxicating liquor has so far affected the nervous system, brain, or muscles of the driver of an automobile as to impair, to an appreciable degree, his ability to operate his car in the manner that an ordinarily prudent and cautious man, in the full possession of his faculties, using reasonable care, would operate or drive a similar vehicle 'under like conditions, then such driver is 'under the influence of intoxicating liquor' within the meaning of the statute."

We have also read cases from other jurisdictions showing in some that the term "intoxicated condition" or "under the influence of intoxicating liquor" was generally accepted and understood and unnecessary to define; and also showing "any degree" of intoxication or influence of liquor of drivers under highway acts, a crime. *Nelson v. State*, 97 Tex. Cr. R. 210, 261 S. W. 1046; *State v. Hatcher*, 303 Mo. 13, 259 S. W. 467; *Hart v. State*, 26 Ga. App. 64, 105 S. E. 383.

[4, 5] Section 112 of the California Vehicle Act was designed to protect the public from the menace of automobiles operated upon the public highway with inadequate or no efficient control, in a world of traffic difficult of management under normal conditions, and should be liberally construed to effect its purpose. We think that such legislation is

well in line with, and motivated by, the same impulses that inspired the enactment of statutes prohibiting railroad employees from drinking intoxicants while on duty; that in prosecutions under the statute it is not necessary to prove any specific degree of intoxication, but that in each case where a person is charged, as appellant is here, with violating the provisions of section 112 of the vehicle act, the question as to whether the defendant was "under the influence of intoxicating liquor" is one of fact to be determined by the court or jury from all of the circumstances of the case.

The point as to the insufficiency of the evidence to justify the verdict, in view of what we have said, has no merit as based on a conflict of evidence.

We are of the opinion that the judgment and order should be, and they are, affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

71 Cal. App. 181

PEOPLE v. BROWN. (Cr. 1173.)

(District Court of Appeal, Second District, Division 1, California. Feb. 6, 1925.)

1. Criminal law ☞1137(5)—Error cannot be predicated on objectionable evidence first brought out on cross-examination.

Where fact of commission of separate offense by defendant was first brought out on cross-examination of witness by defendant's counsel, and on re-examination objectionable evidence was repeated, defendant cannot predicate error thereon.

2. Witnesses ☞37(5)—Testimony as to portion of conversation overheard admissible if conversation itself admissible.

That witness has not heard all of conversation between others does not render portion heard inadmissible, if conversation itself was admissible.

3. Criminal law ☞404(5)—Pawn tickets covering portion of stolen property admissible in prosecution for larceny.

In prosecution for larceny of jewelry, pawn tickets covering some of stolen jewelry and which were signed in name other than defendant's, and other such tickets in handwriting of defendant to afford comparison, held properly admitted.

4. Criminal law ☞1163(3)—Refusal to strike answer, if error, not ground for reversal, where no prejudice shown.

Refusal to strike answer on ground that it was not responsive, even if error, is not ground for reversal, where appellant made no showing that he was prejudiced.

5. Criminal law ☞1036(1)—Alleged error in reception of evidence cannot be raised for first time on appeal.

Where no objection is made to evidence at time it was introduced, alleged error occurring

through its reception cannot be taken advantage of for first time on appeal.

6. Criminal law ☞1120(6)—Assignment relating to exclusion of evidence not reviewed, where materiality of excluded evidence not shown.

Alleged erroneous exclusion of evidence will not be reviewed, where its materiality not shown or apparent to appellate court.

7. Criminal law ☞1036(1), 1044—Admission of evidence not ground for error, where not objected to or motion made to strike.

Error cannot be predicated on admission of evidence, where no objection was made to its introduction nor any motion made to strike it from the record.

8. Criminal law ☞1169(1), 1170(1)—Errors not possibly affecting outcome of case not considered.

Where, if rulings on admission or exclusion of evidence had been acted upon most favorably to defendant's advantage, they could not possibly have affected outcome of case, errors, if any, must be regarded as though they had not occurred.

9. Criminal law ☞788—Rule as to failure to produce most satisfactory evidence held inapplicable.

In prosecution for larceny of jewelry alleged to have been taken by defendant while a guest of prosecuting witness, defendant's requested instruction in language of Code Civ. Proc. § 2061, subd. 7, as to failure to produce most satisfactory evidence within power of party, which was offered because some of guests were not called as witnesses, was properly refused, since defendant had same opportunity to procure attendance of such witnesses.

10. Criminal law ☞829(1)—Refusal of instructions covered by given instructions not error.

Refusal of defendant's requested instructions which were substantially covered by other instructions given to jury is not ground for error.

11. Criminal law ☞825(1)—Defendant, desiring more specific instruction, must request it.

Defendant, complaining of court's instructions informing jury that witness may be impeached by evidence of inconsistent statements, and that witness, false in one part of testimony, is to be distrusted in others, on ground that it was not broad enough and should have singled out certain matters in evidence, should have presented a desired instruction for consideration of trial court, and, having failed to do so, such omission is not prejudicial error.

12. Criminal law ☞1166½(12)—Court's remark as to conflict in defendant's testimony not prejudicial, in view of instruction to disregard.

Remark by court that there was a conflict in defendant's testimony was not prejudicial, in view of instruction that any expression of opinion by court as to matters of fact was to be entirely disregarded.

13. Criminal law §1172(6)—Instruction as to who are persons of unsound mind, though unnecessary, was not harmful.

In prosecution for larceny, where no issue was raised as to state of defendant's mind, an instruction that all persons are of sound mind who are not idiots or lunatics or affected with insanity was unnecessary, but not harmful to defendant.

14. Larceny §77(4)—Instruction on failure of one in possession of stolen property to account therefore held proper.

Instruction in larceny prosecution, that, if stolen property was seen in possession of defendant shortly after being stolen, defendant's failure to account for its possession was a circumstance tending to show his guilt, and that defendant was bound to explain possession, *held proper*.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Robert Alton Brown was convicted of grand larceny, and he appeals. *Affirmed*.

William M. Morse, Jr., of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

HOUSER, J. Defendant was convicted of the crime of grand larceny. He appeals from the judgment and the order denying his motion for a new trial.

By the information defendant was accused of stealing certain articles of jewelry of the alleged aggregate value of \$800. The evidence introduced on behalf of the prosecution showed that on the afternoon of March 13, 1924, several persons, including defendant, were visiting at the home of the prosecuting witness, at which time, in the presence of defendant, the prosecuting witness took the jewelry from a secret vault in a mantelpiece in his home and exhibited it to his guests. Five days later the prosecuting witness discovered that his jewelry was gone, and reported the loss thereof to the police authorities. At that time defendant was interviewed by an officer at the police station regarding the loss of the jewelry. He denied having any knowledge of its whereabouts, and, in the absence of sufficient incriminating facts, was released from custody. About two months later defendant was again taken into custody, at which time several of the stolen articles were found on his person, and the greater part of the remainder thereof was discovered in a pocket of a vest in the clothes closet of defendant's bedroom. One piece of the stolen jewelry was recovered from a pawnshop, where the jury was justified in believing from the evidence that, under an assumed name, the defendant had borrowed some money and deposited such article as security for the debt. Defendant accounted for

his possession of the jewelry by stating that he had found it in his overcoat pocket a few days after he had been at the home of the prosecuting witness, and after he had been first questioned at the police station regarding the matter. Defendant also claimed to have obtained a matchbox, which was one of the stolen articles, from a man by the name of Pierce. Mr. Pierce, however, denied defendant's statement in that regard. It appeared also that at the time the jewelry was exhibited by the prosecuting witness one of the guests who was present lost a valuable Spanish shawl, which was later returned by defendant to the owner thereof.

The first reason advanced by appellant for a reversal of the judgment against him is that the trial court committed prejudicial error in permitting the prosecution, over defendant's objection, to introduce evidence relating to a separate criminal offense not charged against him. The matter related to the loss of the Spanish shawl by one of the persons who was at the home of the prosecuting witness at the time he was exhibiting the jewelry which was afterwards stolen. Under cross-examination by defendant's counsel a witness gave the following testimony:

"Q. And you didn't have any reason to believe at that time that Brown (defendant) might be the person who took it, either, did you? A. Yes.

"Q. Did you have some suspicion? A. Yes.

"Q. Tell me what it was. A. Because there was a shawl missing, that turned up and afterwards he brought back."

Subsequently the same evidence was adduced on redirect examination of the same witness.

[1] Considering that the record discloses the fact that the matter to which objection was made was first brought out on cross-examination conducted by defendant's counsel, and that thereafter, on redirect examination of the witness and against defendant's objection, the objectionable evidence was repeated, we are convinced that, if any harm resulted to defendant by reason of the circumstance, it was nothing of which appellant has a right to complain.

[2] The next specification of error by appellant relates to a part of a conversation had among defendant and certain police officers. It appears that the witness did not hear all the conversation, and related that part only which he had heard. Appellant insists that one who has not heard all of a material conversation is precluded from narrating any part of it. No authority is cited by appellant to sustain his position in that regard. The conversation to which the witness testified contained references to a sale by defendant of a ring belonging to a Mrs. Salisbury. With reference thereto the further point is made that the testimony was hearsay,

in that the witness attempted to tell what Mrs. Salisbury, who was not present at the conversation, had said concerning the matter. An examination of the record shows that the witness was merely narrating what at that time another person had told defendant what Mrs. Salisbury had said. Such being the case, the statement made by the witness was a part of the conversation which he had heard, and, assuming that the conversation itself was admissible (of which no question is raised), the part to which objection was made was also admissible.

[3] Appellant also complains that certain pawn tickets purporting to have been signed by one "Arthur Bates," and which tickets covered one or more of the articles of jewelry which were the subject of the larceny in the case on trial, were introduced in evidence, and that there was no evidence that the signature "Arthur Bates" was in defendant's handwriting. However, while there was no direct evidence to that effect, certain other pawn tickets, admittedly signed by defendant, were made exhibits in the case for the express purpose of affording a comparison of the handwriting of the signature "Arthur Bates" with the acknowledged handwriting of defendant. The evidence was properly admitted.

[4] Another specification of alleged error is connected with the matter just mentioned. A witness was asked: "Q. Now, when you went to this pawnshop, did they show you a stub?" to which question the witness replied: "A. That was across the street there, this place that they showed me that stub." Defendant's motion to strike the answer on the ground that it was not responsive to the question was denied, and appellant urges that the action of the court was error. While the answer may not be directly responsive to the question, nevertheless, in a way, it does answer it. No attempt is made by appellant to show any resultant damage to defendant; and, even assuming that the motion to strike should have been granted, the error was of so little consequence that it cannot be seriously considered as a ground for reversal of the judgment. A similar situation exists with respect to several other of defendant's exceptions. Mere specification of error will not suffice. The rule is that, in order to avail an appellant, error must be shown to have prejudicially affected his case.

[5] Appellant suggests error in that a witness who was detailing a conversation had with defendant was permitted to state that—

"I asked him how he could account for the fact that he had this jewelry in his pocket up at his room, and he said that he found it in his pocket, in his overcoat pocket, a few days after he had been up to Mr. Payne's house. And I said, 'Well, why didn't you tell us about it at the time that we were up there, when Mr. Payne reported this stuff?' He said then that he hadn't found it yet at that time, and I said,

'Then why didn't you report it after you did find it?' and he didn't give any answer to that."

No objection was made to the evidence at the time it was introduced, and it is now too late for appellant to take advantage of any alleged error occurring through its reception.

[6] In the course of the trial defendant's attorney asked a witness the following:

"Q. All the rest of them were arrests, just like you made the first time; take him down some place, and then brought him back and released him; isn't that so?"

The court sustained an objection to the question on the ground that it called for the conclusion of the witness. Like many of the other specifications of error, appellant's presentation of the foregoing alleged error is wanting, in that it is unaccompanied by either argument or citation of authority. In addition thereto the materiality of the question is not shown, nor is it apparent to the court. In such circumstances the point made by appellant requires no consideration by this court.

[7] "Fatal" error is predicated upon the action of the trial court in permitting certain evidence, to which attention is directed, to go to the jury. An examination of the record discloses the fact that no objection was interposed by defendant to any of the questions affecting the matter to which objection is now made; nor was any motion made by defendant to strike such evidence from the record. It is clear that appellant is too late in his contention.

[8] Various other alleged errors, either in the reception or the rejection of offered evidence, are assigned by appellant as reasons why a new trial should be awarded defendant. The majority of them are not seriously presented. Of those which are urged at all it need only be said that, even assuming that appellant's points with reference thereto are well taken, the matters which they cover in the aggregate are, to say the most for them, of very slight importance, and, had they been acted upon most favorably to defendant's advantage, could not possibly have affected the outcome of the case. In such circumstances the errors, if any, must be regarded as though they had not occurred.

[9] It is claimed that the court erred in refusing to give to the jury certain instructions requested by defendant. The first of these was couched in the language of the statute (subdivision 7, section 2061, Code Civ. Proc.), "that if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory [evidence] was within the power of the party, the evidence offered should be viewed with distrust." The pertinency of the offered instruction is suggested in that certain persons who were present as the guests of the prosecuting witness at the

time the jewelry was exhibited were not called by the prosecution as witnesses. It is admitted that the defendant was himself a guest of the prosecuting witness on the occasion referred to, and it would appear that, if the presence of such witnesses was desired at the trial, defendant was as able to procure the attendance of such witnesses as was the prosecution. We are unable to agree with appellant in the application of the statute to the existing facts.

It is contended that the court erred in its refusal to give to the jury the following instruction:

"The court instructs the jury that larceny is the felonious taking of the property of another without the knowledge or consent of the other, and with the intent of the party taking it, at the time of the taking, to permanently deprive the owner thereof, and with the further intent at said time to wholly and permanently appropriate the property so taken to the use of the party taking it. And, if you find from the evidence that it was not the intent of the defendant at the time of the taking to wholly and permanently appropriate it to his own use, then you cannot find him guilty of larceny."

The reason assigned by the trial court for refusing the requested instruction was that the subject was covered by other instructions which the court gave to the jury. In this connection it appears that the jury was instructed that "larceny is the felonious taking * * * of the property of another"; that "the intent or intention with which an act is done is manifest by the circumstances connected with the offense; * * * and that "the mere possession of stolen property, unexplained by the defendant, however soon after taking, is not sufficient to justify a conviction," etc.

Another instruction requested by defendant and refused by the court went more fully into the question of intent with which one's property may be appropriated by another, and included an illustration that—

"If, to illustrate, a man should take and carry away an article of property in an honest belief that it was his property, or that he had a right to remove it, or if he should take or carry away some article of property for any other purpose than the intent to steal it, it would not be larceny; it would be trespass."

Still another of defendant's proposed instructions which the court declined to give to the jury dealt particularly with the effect of possession by defendant of the stolen property. By a final instruction on the subject of larceny defendant sought and the court refused to instruct the jury practically in repetition of what was contained in the refused instructions to which reference has just been had.

Several other instructions along different lines, likewise suggested by defendant and refused by the court, such as the credibility to

be given to defendant's testimony; the doctrine of reasonable doubt; the duty of the jury to decide the case according to the evidence and the law as given by the court; the presumption of innocence of defendant; and the weight of evidence necessary to justify a conviction—were all substantially covered by other instructions which the court gave to the jury.

[10] While each of defendant's offered instructions which were thus refused would appear to be a correct statement of the law respectively pertaining to the facts in the action, the authorities are clearly to the effect that, where the substance of a requested instruction is covered by other instructions given to the jury, the defendant has no cause for complaint. A comparison of the legal principles contained in the refused instructions with those contained in the instructions which were given to the jury leaves no substantial ground for believing that the jury was not fairly informed with reference to the law of the case.

[11] Some general criticisms are presented by appellant with reference to certain of the court's instructions; for example, the instructions which informed the jury that "a witness may be impeached by evidence that he has made at other times statements inconsistent with his present testimony," and that "a witness false in one part of his or her testimony is to be distrusted in others." It is contended by appellant that such statements of the law are not broad enough and that the court should have singled out and emphasized certain matters appearing in the evidence as being proper subjects for the application of the rule to which reference was had. No authority is cited for the correctness of appellant's suggestion in that regard. At any rate, if defendant had thought such an instruction proper in the circumstances, he should have presented it for the consideration of the trial court. This he failed to do. Even assuming that defendant is right in his contention (which we are not prepared to do), as the matter stands, such omission cannot now be allowed as prejudicial error.

[12] Appellant further complains that, while the court instructed the jury that any expression of opinion by the court as to matters of fact was to be entirely disregarded by the jury, such instruction was not specific enough to cure a statement made by the judge during the course of the trial that "there is a conflict between the statements of the defendant." An examination of the proceedings of the trial which occurred at the time the court is credited with the foregoing remark shows that defendant was being asked to explain certain supposed inconsistencies in his former testimony. The record shows as follows:

"The Court: There is no conflict in what he testified to this time and what has been read.

"Mr. McGowen (attorney for defendant): No; no conflict in the testimony.

"The Court: Yes; a conflict in two points. One is he says he didn't know where she got them when she got them for him to wear. He says here she told him to go and get them. There is a conflict."

Even if there had been no inconsistency in defendant's testimony, the remark by the court, when considered with the instruction covering the point, could have produced no disadvantageous effect on the minds of the members of the jury, so far as defendant was concerned.

[13] In an instruction relating to the intent with which an act is done, that is, that such intent must be manifest by the circumstances connected with the offense and the sound mind and discretion of the accused, the court concluded with the statement that "all persons are of sound mind who are neither idiots or lunatics or affected with insanity." Appellant objects to that matter. Again, no authority is cited to support appellant's contention; nor is any argument attempted other than that it "clouds the issues." It may be that, in view of the fact that no issue was raised as to the state of defendant's mind, any reference thereto was unnecessary, but we are unable to perceive in what manner defendant was harmed thereby.

[14] The final contention by appellant relates to a part of an instruction given by the court to the jury as follows:

"If the jury believe the property was stolen, and was seen in the possession of defendant shortly after being stolen, the failure of the defendant to account for such possession, or to show that such possession was honestly obtained, is a circumstance tending to show his guilt, and the accused is bound to explain the possession in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence discloses any such."

As is said in the case of *People v. Gibson*, 16 Cal. App. 347, 350, 116 P. 987, 988, where a similar instruction was given:

"The giving substantially in the form here used of instructions in like cases has been so often approved by the Supreme Court that it may be said the propriety thereof has become settled law in this state. *People v. Horton*, 7 Cal. App. 34, 93 Pac. 382; *People v. Etting*, 99 Cal. 577, 34 Pac. 237; *People v. Abbott*, 101 Cal. 646, 36 Pac. 129."

And see, also, *People v. Davis*, 14 Cal. App. 117, 111 P. 268; *People v. Luchetti*, 119 Cal. 501, 51 P. 707.

We find no prejudicial error in the record. The judgment and the order denying defendant's motion for a new trial should be affirmed. It is so ordered.

We concur: CONREY, P. J.; CURTIS, J.

71 Cal. App. 308

LOONEY et al. v. SCOTT. (Civ. 2805.)

(District Court of Appeal, Third District, California. Feb. 16, 1925.)

1. Appeal and error ⇨1010(1)—Findings of trial court, as to context of oral contract, conclusive on appeal, if supported by any testimony.

Where contract, under which plaintiffs are suing for services performed, was oral, it was for trial court to determine nature and context thereof, and findings of trial court, if supported by any testimony, are conclusive on appeal.

2. Appeal and error ⇨1011(1)—Truth of matter for trial court where evidence conflicting.

Where there is conflict of evidence, it is for trial court to determine truth of matter, and Court of Appeal can only look into record and find whether there is or is not any substantial testimony supporting findings of trial court.

3. Contracts ⇨214—Duty to use diligence in making sale, where compensation for services is to be made on sale of article on which services were performed.

Where compensation for services is to be made on sale of any article on which services have been performed, it is duty of other party to use reasonable diligence in making sale or finding market.

4. Contracts ⇨312(3)—Refusal to make sale of apples, upon which plaintiffs performed services and were to be compensated on sale thereof, authorized plaintiffs to immediately sue for services.

Where plaintiffs entered into oral agreement to dry apples belonging to defendant and were to receive compensation therefor when apples were shipped to market, refusal on part of defendant to accept an offer at market price for apples would authorize immediate institution of suit by plaintiffs to recover compensation for their services, as deliberate refusal to make sale constituted breach of agreement.

5. New trial ⇨91—Lack of knowledge as to admissibility of testimony and failure to present it on trial not ground for new trial.

Lack of knowledge or information as to admissibility of testimony and failure to present it on trial constitutes no ground for granting of new trial.

6. Contracts ⇨322(3)—Evidence held to sustain finding that plaintiffs dried defendant's apples properly.

In action by plaintiffs for services performed in drying defendant's apples under oral agreement whereby plaintiffs were to be compensated upon sale of such dried apples, evidence held to sustain finding that plaintiffs dried such apples in a workmanlike manner and placed them in merchantable condition.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action by Fred Looney and another against H. R. Scott. Judgment for plaintiffs, and defendant appeals. Affirmed.

A. L. Wessels, of Ukiah, and L. W. Perley, of San Francisco, for appellant.

M. H. Iversen, of Ukiah, for respondents.

PLUMMER, J. Action by plaintiffs for services performed in the drying of apples belonging to the defendant under an oral agreement. Plaintiffs had judgment, and the defendant appeals.

It appears from the transcript that defendant is the owner of an apple orchard situated in the county of Mendocino, state of California; that during the year 1922 he entered into an oral agreement with the plaintiffs for the drying of the apple crop then growing and being upon the orchard belonging to the defendant. The complaint in the action contains the following allegations:

"(1) That within two years last past defendant employed plaintiffs to dry his 1922 crop of apples at the agreed price of \$50 per ton, and that said defendant agreed to pay said plaintiffs for said services when the last of said apple crop was shipped to market. * * *

"(2) That in accordance with said agreement, plaintiffs entered the employ of said defendant, and dried 33,287 pounds of apples at an agreed compensation of the sum of \$832.15. That the said apples were all shipped to market on or before January 11, 1923, that the said defendant has not paid the plaintiffs the sum of \$832.15," etc.

The plaintiffs had judgment for the amount sued for.

While a large number of assignments of error are presented by the appellant, only two need to be discussed herein, to wit: (1) That the action was prematurely brought; (2) that the findings of the court are not supported by the testimony.

It appears from the transcript that the plaintiffs, prior to performing any services for the defendant, had a conversation with him as to the agreed price to be paid, and also as to when payment therefor should be made. After the conclusion of the taking of testimony the court permitted an amendment to the complaint, substituting the word "Cloverdale" for the word "market." This amendment was permitted in view of the fact that the testimony in some instances showed that Cloverdale was the contemplated market of the parties when negotiating as to the time when payments should be made for the services to be performed by the plaintiffs for the defendant, the testimony clearly showing that all of the apples had been shipped to Cloverdale a considerable period before the institution of suit. The evidence was also to the effect that offers for the apples were made by prospective buyers while the same were at Cloverdale, and that the final sale was made of the apples at such

place. The evidence further shows that prior to the delivery of the apples at Cloverdale the defendant was offered a considerable sum in excess of that at which the apples were finally sold. The defense to the action was that the apples were not properly handled, that the work was not performed in a skillful and workmanlike manner by the plaintiffs, and that the defendant had been damaged in a considerable sum of money, by reason of the failure of the plaintiffs to perform their work in a skillful and workmanlike manner, and that the apples dried by them were not merchantable, and were necessarily sold at a very low price. It also appears by the testimony of some of the witnesses that after the defendant had been offered 9 cents a pound for the apples, there was a very sharp decline in the price; that the price at Cloverdale dropped from 9 cents to about 5 cents a pound; that the defendant finally sold his apples, or at least 16 tons thereof, at the rate of 3 cents a pound. Upon the conclusion of the introduction of testimony the court made and entered its findings, in substance, as follows, to wit: That the plaintiffs and the defendant entered into the agreement hereinbefore set forth on or about the 4th day of September, 1922; that the plaintiffs dried the quantity of apples herein set forth; that the defendant agreed to pay plaintiffs for said services when said apples were hauled from the premises then owned by the defendant; that said apples were hauled from the premises on or about the 11th day of January, 1923; that there was no agreement that plaintiffs should or would thoroughly and properly or thoroughly or properly, handle, dry, and cure, or handle, or dry, or cure in a merchantable and marketable condition, or merchantable or marketable condition, free from peelings, cores, defective fruit, etc., any or all of said crop of apples; that the plaintiffs did not fail nor neglect to thoroughly and properly, or thoroughly or properly, dry and cure said apples in a merchantable and marketable condition; that the plaintiffs did thoroughly and properly handle, dry, and cure the said apples in a merchantable and marketable condition, and that said apples were thoroughly and properly handled, dried, and cured by said plaintiffs in a merchantable and marketable condition; that the defendant had not suffered any damages by reason of any handling and drying of the apples referred to by the said plaintiffs; that the apples were dried by the plaintiffs under the direction and personal superintendence of the defendant to his satisfaction, etc.

[1, 2] It is urgently insisted by the appellant that these findings are not supported by the evidence and, also, that the plaintiffs covenanted and agreed to perform all the work referred to in a skillful and workmanlike manner, etc. As to these findings, we

may state that, irrespective of the agreement, the defendant is not injured thereby, for the reason that the court thereafter found that the work was all done in a skillful and workmanlike manner, and that the apples were dried and placed in a merchantable condition. In other words, that the work was properly done notwithstanding there was no agreement relating to the same. The testimony set out in the transcript is amply sufficient to justify the trial court in coming to the conclusion that the work was done under the personal supervision of the defendant in this case. It shows that the defendant was present every day upon the premises, that he delivered the apples to the dryer operated by the plaintiffs, that he was there a large number of times, gave directions as to having the apples quartered, instead of sliced or leafed, and generally saw and knew what was being done during the entire period covered by the process of drying the apples, that all the machinery being operated belonged to the defendant and was furnished by him, that some conversation took place between the plaintiffs and the defendant prior to the consummation of the agreement in which the plaintiffs stated to the defendant that they had had no experience in drying quartered apples, but had such experience in drying of leafed or sliced apples, and that the defendant stated, in substance, that this was immaterial, as he would be present and could look over what they were doing. This is in accordance with the version of the agreement and of what took place between the parties at the time it was entered into between the plaintiffs and the defendant as given by the plaintiffs. It differs quite materially from the version of the agreement as testified to by the defendant. However, as the contract was oral, it was for the trial court to determine the nature and the context of the agreement, and, if there is any testimony in the transcript supporting the findings of the court, such findings are conclusive herein. That such testimony does appear is clearly evidenced by the testimony given by the two plaintiffs. One of the plaintiffs testified that the defendant said, "I want you to dry the apples according to my way of drying"; that the defendant was present a number of times every day; that the defendant never objected to any of the work and showed the plaintiff several times as to how to perform different parts of the same. Outside of the testimony of the plaintiffs, there is also testimony by the witnesses Clow, Ward, and Burke, that the apples were dried in a workmanlike and merchantable condition, and were up to the average run of dried apples, especially when dried as quartered dried apples. In contradiction to the evidence introduced by the plaintiffs as to the quality of the work performed by them, the defendant introduced considerable

testimony, including that of himself, that the work was not performed by the plaintiffs in a proper manner, and that the apples were not merchantable. Here, again, we are met by the rule governing Courts of Appeal in such instances. Where there is a conflict of evidence, it is for the trial court to determine the truth of the matter. All the Court of Appeal can do is to look into the record and find whether there is, or is not, any substantial testimony supporting the findings of the trial court. If believed by the trial court, there is ample testimony in the transcript to support the findings hereinbefore set forth, notwithstanding the fact that, if the findings had been to the contrary, such findings would also have found support from the testimony set out in the record. We do not find anything of merit in appellant's objection to the order of the trial court in permitting an amendment to the complaint at the conclusion of the taking of the testimony. If the trial court accepted the version of the plaintiffs as to the time of payment, it is clear that the parties had in contemplation the delivery of the apples at the town of Cloverdale.

[3] The rule seems to be pretty well settled that where compensation for services is to be made upon the sale of any article upon which the services have been performed, it is the duty of the other party to use reasonable diligence in making sale or finding a market. *Williston v. Perkins*, 51 Cal. 554; *Earle v. Sunnyside Land Co.*, 150 Cal. 214, 88 P. 920; *Campbell v. Kennedy*, 177 Cal. 430, 170 P. 1107.

[4] There is testimony in the record to the effect that the defendant declined offers for the apples at a considerable time prior to their actual sale. Refusal on the part of the defendant to accept an offer at the market price for his apples would authorize an immediate institution of suit by the plaintiffs to recover compensation for their services. Under such circumstances, deliberate refusal to make sale constitutes a breach of the agreement. *Spangenberg v. Spangenberg*, 19 Cal. App. 439, 126 P. 379.

[5, 6] A motion for a new trial herein was supported by a number of affidavits, but none of the affidavits show that the proffered testimony could not have been presented to the court at the time of the trial, if reasonable diligence had been exercised. The excuse given by the defendant for the failure to present such testimony is that he was not advised of the fact that the kind and character of the testimony mentioned in the affidavits was admissible, until the trial of the action had taken place. Lack of knowledge or information as to the admissibility of testimony and failure to present the same upon the trial of an action constitutes no ground for the granting of a new trial. While we have carefully examined, it would serve no useful purpose to discuss the half hundred as-

signments of error, because they are all reducible to the real important question in this case. Are the findings supported by the testimony? The testimony to which we have referred is amply sufficient to warrant the findings made and entered by the trial court, and there are no errors at law materially affecting any of the rights of the defendant herein.

The judgment and order of the trial court are hereby affirmed.

We concur: FINCH, P. J.; HART, J.

71 Cal. App. 361

COVELL et al. v. LEE, Superintendent of Schools. (Civ. 2907.)

(District Court of Appeal, Third District, California. Feb. 19, 1925. Rehearing Denied March 20, 1925. Hearing Denied by Supreme Court April 16, 1925.)

1. Schools and school districts $\S$ 42(2)—Elementary school district cannot be made part of high school district against will of majority of registered electors of elementary district.

Under Pol. Code, $\S$ 1728, no elementary school district can become a part of high school district without petition of majority of registered electors of elementary district but, after proper petition is presented to county superintendent of schools, question of forming proposed high school district is determined by majority vote of all electors of proposed district.

2. Elections $\S$ 71—Married woman who had not seen nor heard of her husband for 25 years held resident and elector.

A woman, who had not seen nor heard of her husband for 25 years, held, irrespective of Pol. Code, $\S$ 52, subd. 5, $\S$ 1239, subds. 7, 9, and Code Civ. Proc. $\S$ 1963, subd. 26, a resident of the school district in which she lived and a registered elector within Pol. Code, $\S$ 1728.

3. Schools and school districts $\S$ 42(2)—Signers of petition for formation of high school district may withdraw prior to presentation.

Signers of petition for formation of high school district may withdraw their names from such petition prior to presentation of petition to county superintendent of schools by notice of withdrawal presented to superintendent.

On Petition for Rehearing.

4. Schools and schools districts $\S$ 42(2)—When petition for high school district not signed by majority of registered electors of one district, immaterial whether signed by majority of electors of other districts.

Where petition of registered electors of elementary school districts seeking formation of a high school district did not contain signatures of majority of registered electors of one of such districts, it was immaterial whether

petition was signed by majority of electors of other districts.

Appeal from Superior Court, Yolo County; W. I. Redding, Judge.

Application for writ of mandate by C. A. Covell and another against Harriett S. Lee, as Superintendent of Schools of Yolo County. From a judgment denying the application, petitioners appeal. Affirmed.

See, also, 230 P. 208.

Dixwell L. Pierce, of Sacramento, for appellants.

George T. Kern, Dist. Atty., A. C. Huston, A. C. Huston, Jr., and Harry L. Huston, all of Woodland, for respondent.

FINCH, P. J. Petitioners applied to the trial court for a writ of mandate requiring the respondent, as county superintendent of schools, to call an election for the determination of the question of establishing a high school district to be named "Davis Joint Union High School District." Respondent answered the petition and after a hearing the application was denied. This appeal is from the judgment.

A petition in due form was presented to the respondent praying for the formation of such high school district to be composed of four elementary school districts. Respondent found that the petition was signed by a majority of the registered electors of three of the districts, but that in one of them, Plainfield, there were 54 registered electors, and that only 27 of them had joined in the petition. She therefore refused to call an election to determine the question. Section 1728 of the Political Code provides:

"Whenever a majority of the registered electors, residing in each of two or more contiguous school districts, having in the aggregate at least one hundred pupils in average daily attendance in the elementary schools of such districts, shall unite in a petition to the superintendent of schools of the county who would have jurisdiction over the joint high school district proposed to be formed, which petition shall pray for the formation of a joint union high school district, under a name specified therein, such superintendent shall, within twenty days after receipt of such petition, verify the signatures thereto, and, if he finds it sufficient,"

—he shall call an election for the determination of the question of establishing such high school district. If a majority of the votes cast at such election are in favor of the formation of such high school district, the superintendent shall so certify to the county clerk, and thereupon the district shall be deemed to be formed.

[1] It is to be observed that no elementary school district can become a part of the high school district against the will of a majority of the registered electors of the elementary district. Such will, however, can be expressed

effectively only by signing or refusing to sign the petition for the formation of the high school district. After a proper petition is presented to the superintendent, the question of forming the proposed high school district is determined by a majority vote of all the electors of the proposed district. If such majority be in favor of the proposition, then all of the elementary districts are included in the high school district, even though the electors of some one of them may have voted unanimously against the proposition. It is of great importance, therefore, that the petition represent the will of a majority of the electors of every elementary district proposed to be included in the high school district.

[2] Appellants contend that there were only 53 legally registered electors in Plainfield district; that a certain woman whose name appeared upon the register and was counted by respondent in making up the 54 electors was not a resident of the district, because she was a married woman whose husband did not reside in the district and "the residence of the husband is the residence of the wife." Pol. Code, § 52, subd. 5; section 1239, subd. 9. It may be observed in passing that "the place where a man's family resides must be held to be his residence." Section 1239, subd. 7. It is not necessary, however, to follow these two rules around a circle in determining the question here presented. The woman testified that she had once been married, but that she did not know whether she was still married at the time of the trial, because she had not seen or heard of her husband for 25 years. It is presumed "that a person not heard from in 7 years is dead." Code Civ. Proc. § 1963, subd. 26. But aside from this presumption, in this day of woman's rights, it would be a startling pronouncement to hold that a woman continuously separated from her husband could not establish a residence of her own in a quarter of a century. Whether or not the woman's residence is a proper subject of inquiry in this proceeding, the only rational inference from the evidence is that she was a resident and legally registered elector of the district at the time the petition was presented.

[3] Thirty registered electors of Plainfield district signed the petition while it was being circulated. Three of them later signed written requests, addressed to the superintendent, for the withdrawal of their names from the petition in the following language:

"After reconsideration of the high school problem as affecting the Plainfield school district we, the undersigned, respectfully request that our names be withdrawn from the petition calling for an election on the proposed Davis high school district."

These requests were presented to the superintendent at a time prior to the presentation or filing of the petition. In computing

the number of signers the superintendent rejected these three names, thus reducing the number to 27. Appellants contend that these names should have been counted. It is not contended that the signers could not have withdrawn their names from the petition in some manner before it was filed, but it is suggested that the request for such withdrawal should have been made to the person who circulated the petition. It is not suggested what remedy would be available to one seeking to withdraw, if the person who circulated a petition should refuse to accede to the request.

It is not necessary to review the many decisions of other jurisdictions relied on by appellants. They go no further than to hold, as was held in *Beecham v. Burns*, 34 Cal. App. 754, 760, 168 P. 1058, 1061, where the right to withdraw from a petition for the recall of a public officer was considered, that "the signers of such petitions may not withdraw their names or have their names withdrawn by the clerk at any time after the petition has been filed." The California Irrigation Act (Stats. 1897, p. 254) provides that the board of supervisors of a county, upon presentation of a petition signed as therein provided, and after due proceedings had thereon, shall call an election to determine the question of organizing an irrigation district. The act provides that:

"Said petition shall be presented at a regular meeting of said board, and shall be published for at least two weeks before the time at which the same is to be presented, in some newspaper of general circulation printed and published in the county where said petition is presented, together with a notice stating the time of the meeting at which the same will be presented." Section 2.

In *McAulay v. Board of Supervisors*, 178 Cal. 628, 174 P. 30, the question of the right of petitioners to withdraw from such a petition was in issue. An examination of the record in that case discloses that, after the commencement of publication of notice and prior to the time designated therein for the presentation of the petition to the supervisors, certain signers of the petition filed with the clerk of the board a writing which recited that they had signed the petition and ended as follows:

"We hereby ask that our names be stricken from the same, and that the said petition be denied."

The supervisors found that "by reason of such withdrawals" the petition was insufficient and refused to proceed further in the matter. At that time the act made no provision for the withdrawal of signatures from the petition. In the argument before the Supreme Court many of the cases on which appellants herein rely were cited. The court held that:

"Petitioners * * * may effectively withdraw from the petition for the organization of such district at any time prior to the presentation of the petition to the board of supervisors on the date fixed in the published notice for such presentation, with the result that at the time of such presentation they can no longer be considered by the board as petitioners."

The right of withdrawal, the procedure adopted, and the stage of the proceeding at which the withdrawals were effected in that case were the same in principle as in this, and the decision therein must be held controlling here.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

On Petition for Rehearing.

PER CURIAM. In their petition for a rehearing appellants state that the opinion filed herein does not dispose of their contention that the findings are insufficient to support the judgment.

[4] The findings were considered in *Covell v. Lee* (Cal. App.) 230 P. 208, and what is there said need not be repeated here. The finding there set out is necessarily decisive against the appellants and is sufficient to support the judgment. Since the petition did not contain the signatures of a majority of the registered electors of Plainfield district it was immaterial whether it was signed by a majority of the electors of other districts. *Phillips v. Stark* (Cal. App.) 223 P. 443. The finding is not outside the issues, but it is responsive to the only issue raised by the pleadings.

The petition is denied.

71 Cal. App. 374

PEOPLE v. JAMES. (Cr. 1164.)

(District Court of Appeal, First District, Division 1, California. Feb. 21, 1925.)

1. Criminal law $\hookrightarrow$ 162—Statute punishing felons for owning or carrying concealed weapons held not unconstitutional as double jeopardy.

St. 1923, p. 696, § 2, punishing certain felons for owning or carrying weapons that may be concealed, *held* not unconstitutional as imposing double jeopardy for same offense, since prior conviction constitutes no new offense itself, but merely brings defendant within a class capable of committing offense with which he is charged.

2. Weapons $\hookrightarrow$ 2—Legislature may say that ownership or possession of concealed weapons by felons is harmful.

Legislature may say that ownership or possession of concealed weapons by persons convicted of felony may be harmful to public welfare and may prescribe a penalty therefor.

3. Constitutional law $\hookrightarrow$ 200—Statute punishing felons for owning or carrying concealed weapons held not unconstitutional as *ex post facto* law.

St. 1923, p. 696, § 2, punishing certain felons for owning or carrying weapons that may be concealed, *held* not unconstitutional as an *ex post facto* law because applying to convictions had before statute became effective.

4. Constitutional law $\hookrightarrow$ 203—Law not *ex post facto* because authorizing offender's conduct in past to be taken into account.

Law is not *ex post facto* because, in providing for punishment of future offenses, it authorizes offender's conduct in past to be taken into account and punishment to be graduated accordingly.

5. Statutes $\hookrightarrow$ 72—Statute prohibiting certain felons from carrying or owning concealed weapons held not violative of Constitution requiring all laws to have uniform operation.

St. 1923, p. 696, § 2, prohibiting certain felons from owning or carrying weapons that may be concealed, *held* not violative of Const. art. 1, § 11, requiring all laws to have uniform operation.

6. Weapons $\hookrightarrow$ 17(1)—Sufficiency of information not affected by failure to allege that defendant was within disability prescribed by statute.

Failure in information in prosecution under St. 1923, p. 696, § 2, prohibiting certain felons from owning or carrying concealed weapons, to allege that defendant was within disability prescribed by statute, *held* not to affect defendant's substantial rights or to justify sustaining of general demurrer under Pen. Code, § 1004, without leave to amend.

7. Weapons $\hookrightarrow$ 17(1)—Sufficiency of information not affected by failure to allege that defendant's weapon could be concealed.

Failure of information, in prosecution under St. 1923, p. 696, § 2, prohibiting certain felons from carrying or owning concealed weapons, to allege except in terms of a mere conclusion that defendant's weapon was capable of being concealed, *held* not to affect defendant's substantial rights or justify sustaining of general demurrer under Pen. Code, § 1004, without leave to amend.

8. Indictment and information $\hookrightarrow$ 111(1) — Sufficiency of information not affected by failure to aver that weapon did not come within exception.

Sufficiency of information in prosecution under St. 1923, p. 696, § 2, prohibiting certain felons from carrying or owning concealed weapons, *held* not affected by failure to allege that defendant's revolver was not an antique or incapable of use as a revolver as provided in section 15; such section being a proviso and not being required to be negative.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Joe James was indicted for unlawful possession of a revolver, and from order sus-

taining demurrer to information the People appeal. Reversed, and cause remanded.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.
Gearhart, Carling & Cummings, of Fresno, for respondent.

TYLER, P. J. This is an appeal by the people from an order of the superior court of Fresno county sustaining, without leave to amend, a demurrer to an information charging defendant with the commission of a felony.

The charging portion of the information alleged that defendant on the 22d day of August, 1923, had in his possession under his custody and control a certain firearm, to wit, a revolver, capable of being concealed upon his person, and that he, prior to the date named, to wit, on or about the 24th day of December, 1914, had been convicted of a felony against the person or property of another.

The information was premised upon the provisions of section 2 of chapter 339 of the Statutes of 1923, approved June 13, 1923, p. 696, and in effect on the 17th day of August of that year. That section reads as follows:

"On and after the date upon which this act takes effect, no unnaturalized foreign-born person and no person who has been convicted of a felony against the person or property of another or against the government of the United States or of the state of California or of any political subdivision thereof shall own or have in his possession or under his custody or control any pistol, revolver or other firearm capable of being concealed upon the person. The terms 'pistol,' 'revolver,' and 'firearms capable of being concealed upon the person' as used in this act shall be construed to apply to and include all firearms having a barrel less than 12 inches in length. Any person who shall violate the provisions of this section shall be guilty of a felony and upon conviction thereof shall be punishable by imprisonment in the state prison for not less than one year nor for more than five years."

The demurrer to the information specified all the grounds permitted under section 1004 of the Penal Code. As above stated, the court below sustained the demurrer without leave to amend, and the people appeal.

[1, 2] In support of the ruling of the trial court, it is here claimed by respondent that the demurrer was properly sustained for the reasons: (1) That the act upon which the information is based is unconstitutional; and (2) disregarding its unconstitutionality and assuming its validity, still the information does not state a criminal offense.

Several grounds are urged against the constitutionality of the statute. It is first asserted that it violates the constitutional guaranty that no person shall be twice put in jeopardy for the same offense. In this connection it is argued that section 5 of the act

makes it plain that owning, possessing, or having in one's custody a firearm capable of being concealed upon the person is a perfectly innocent act, and that this being so defendant is not charged with any new offense, but is again being informed against for his prior offense, and is, consequently, being twice put in jeopardy therefor.

But the ownership or possession of firearms capable of being concealed upon the person is not an innocent act so far as the defendant is concerned. Section 5 of the act provides, in part:

"This section shall not be construed to prohibit any citizen of the United States, over the age of 18 years, who resides or is temporarily sojourning within this state, and who is not within the excepted classes [one of which is the ex-convict class] prescribed by section 2 hereof, from owning, possessing or keeping within his place of residence or place of business any pistol, revolver or other firearm capable of being concealed upon the person, and no permit or license to purchase, own, possess or keep any such firearm at his place of residence or place of business shall be required of any such citizen."

By the very terms of the act defendant is excluded from the right to own or possess firearms, and it is within the power of the Legislature to say that such ownership or possession in a person convicted of a felony may be harmful to the public welfare and to prescribe a penalty therefor. Ex parte Rameriz, 193 Cal. 633, 226 P. 914, 918, 34 A. L. R. 51. By being prosecuted upon the present charge the defendant is not again being punished for his past offense, but his conviction of such offense creates a condition in which the subsequent commission of another and different act renders him amenable to prosecution for that act. The prior conviction constitutes no new offense itself, but merely brings defendant within a class capable of committing the offense with which he is charged. People v. King, 64 Cal. 340, 30 P. 1028; People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401. It is to be observed in this connection that unnaturalized foreign-born persons, bearing no stigma of any prior conviction, are by the act placed under the same disability. It seems to be plain that the inhibition against ownership or possession of a certain class of firearms is referred to the status of the persons affected.

The constitutionality of the act is also assailed upon the ground, as claimed, that it is an ex post facto law and retroactive in operation if construed as applying to the present charge against defendant, since the prior conviction pleaded was had before the instant act became operative.

[3, 4] A law is not objectionable as ex post facto which in providing for the punishment of future offenses authorizes the offender's conduct in the past to be taken into account and the punishment to be graduated accord-

ingly. Heavier penalties are often provided by law for a second or any subsequent offense than for the first; and it has not been deemed objectionable that in providing for such heavier penalties the prior conviction authorized to be taken into account may have taken place before the law was passed. *Ex parte Gutierrez*, 45 Cal. 429; *Rand v. Commonwealth*, 9 Grat. (Va.) 738; *Cooley's Const. Lim.* (7th Ed.) 382. In such case it is the second or subsequent offense which is punished, not the first.

[5] It is also urged that the act in question is violative of section 11 of article 1 of the Constitution, requiring all laws to have a uniform operation; it being claimed that the classification here adopted is arbitrary, unreasonable, and not based upon any natural, intrinsic, or constitutional distinction.

This objection is answered in the *Rameriz Case*, *supra*, where the cases on the subject are extensively reviewed. It is there said that it cannot be assumed that the Legislature did not have evidence before it or that it did not have reasonable grounds to justify the legislation and to conclude that unnaturalized foreign-born persons and persons who have been convicted of a felony were more likely than others to unlawfully use firearms or to resort to force in defiance of law. Nor does the fact that the Legislature, in adopting a classification comprising persons who have committed offenses "against the person or property of another," thereby omits those who may have been convicted of other crimes, alter the situation. In the case of *Patson v. Pennsylvania*, 232 U. S. 138, 34 S. Ct. 282, 58 L. Ed. 539 (cited with approval in the *Rameriz Case*), it is said that—

"A state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil * * * is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience. * * * It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named." *Miller v. Wilson*, 236 U. S. 373, 35 S. Ct. 342, 59 L. Ed. 628, L. R. A. 1915A. 829; *Armour & Co. v. North Dakota*, 240 U. S. 510, 517, 36 S. Ct. 440, 60 L. Ed. 771, Ann. Cas. 1916D, 548.

[6-8] And, finally, with reference to the claim that, disregarding the unconstitutionality of the act and assuming its validity, the information filed under its provisions does not state a public offense. The information charged that defendant "did willfully, unlawfully and feloniously have in his possession and under his custody and control a certain firearm, to wit, a revolver capable of being concealed on the person of the defendant, and that the defendant prior to the date

hereof, to wit, on or about the 24th day of December, 1914, in the superior court of the state of California in and for the county of Fresno was convicted of a felony against the person and property of another, to wit, the crime of robbery." The point of this objection is that the information does not directly allege that at the time of having the revolver in his possession defendant was suffering from the disability prescribed by the statute.

The omission of such a conclusion could in no manner affect the substantial rights of the defendant, and in any event it could not possibly justify the sustaining of a general demurrer without leave to amend. The same may be said of the further claim that the information fails to allege, except in terms of a mere conclusion, the fact that the weapon, which defendant is accused of having in his possession, was capable of being concealed upon the person. Section 15 of the act provides as follows: "This act shall not apply to antique pistols or revolvers incapable of use as such." Absence from the information of an averment of the fact that the revolver did not come within the exception did not, as claimed, affect its sufficiency. It is not required to be negated as it is a mere proviso. 2 Bishop, *Crim. Proc.* 639.

The order sustaining the demurrer to the information is reversed, and the cause remanded for trial.

We concur: KNIGHT, J.; ST. SURE, J.

71 Cal. App. 290

SLY v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 4934.)

(District Court of Appeal, Second District, Division 2, California. Feb. 14, 1925.)

1. Prohibition $\S$ 29—Finding that continuance of receivership is unnecessary or unjust not disturbed in absence of evidence, or showing that financially irresponsible defendant would be given control of properties.

Order for discontinuance of receivership, on ground that further continuance is unnecessary and would work hardship, will not be disturbed, though solvency of defendant is disputed, where there is no showing that latter will be given possession or control of property pending suit, though there has been no adjudication of rights, within provisions of Code Civ. Proc. $\S$ 564, subds. 3, 4.

2. Prohibition $\S$ 29—Receivers $\S$ 60—Discontinuance of receivership within court's sound discretion; discontinuance of receivership not disturbed when judgment must be given for defendants.

Discontinuance of receivership is within court's sound discretion, and will not be disturbed by appellate court when it appears after trial that judgment must be given for defendants.

3. Prohibition —29—Peremptory writ to prevent discharge of receiver, as directed by court order, unless plaintiff furnished bond by certain time, denied.

In absence of express stipulation exempting plaintiff from furnishing bond on appointment of receiver, or sufficient information in record as to need of additional security, or any showing of abuse of discretion in fixing amount of bond, peremptory writ of prohibition to prevent discharge of receiver, as directed by court order, if bond in stated sum were not furnished by certain time, will be denied, though no bond was required by order appointing receiver or subsequent modifications thereof.

Original application by Elmer L. Sly for writ of prohibition to the Superior Court of Los Angeles County and Charles S. Burnell, Judge, to prevent discharge of receiver in action for accounting. Peremptory writ denied, and alternative writ discharged.

Craig & Bromley, of Los Angeles, J. F. Seymour, of El Centro, and V. L. Ferguson, for petitioner.

Glen Behymer, of Los Angeles, for respondents.

CRAIG, J. Petitioner herein seeks a writ of prohibition restraining the superior court of Los Angeles county from discharging a receiver in an action wherein petitioner is plaintiff, and William Abbott, John Gray, and Lena Abbott are defendants. The action was commenced for an accounting, and involved certain real estate transactions, contracts, and moneys which were in dispute between the parties. One Charles R. Morfoot was appointed by the trial court to act as a referee to take evidence and report his findings to the court as a basis for final judgment. He was, at the same time, appointed receiver to take charge of all contracts, to collect the amounts due, and to pay the same to the plaintiff in settlement of such amount as an accounting should show to be due, with the usual powers of receivers, upon filing a bond in the usual form in the penal sum of \$10,000, conditioned for the faithful discharge of his duties. The appointment was included in the terms of an order, which also directed that the default of said defendants be entered for failure to answer the complaint. It was thereafter stipulated that the default be vacated and set aside, but that the receiver be continued in office. The lower court thereupon set aside such default and directed that the order appointing the receiver be continued in full force and effect during the pendency of the action, and that the receiver hold all sums of money received by him during his incumbency until the final determination of the action.

It does not appear that the referee heard evidence or made any report, but it does ap-

pear that thereafter, and on July 9, 1924, the referee receiver was ordered to immediately return to various banks all purchase and sale contracts received by him, which they should hold as agents for the receiver, and collect all past due and future payments; that all moneys thereafter received should be held and disbursed upon the orders of the court, and not otherwise, but that, "other than as herein specified, said order heretofore made appointing said receiver shall remain in full force and effect." A further order was made on September 13, 1924, directing payment to the record owners of 21 lots of certain moneys due them, and on the 7th day of October it was stipulated by the parties that any sums of money then due and payable to original owners under these contracts be paid by the receiver and the banks.

The case was brought to trial before the superior court during the month of October, and the judge thereof recites in the return filed in this court:

That it appeared at the conclusion of the evidence "that the plaintiff herein should not recover as against the defendant John Gray, and that the further continuation of the said receivership would work an irreparable loss and injury to the defendant John Gray, and it appearing to the said superior court, department 4 thereof, Charles S. Burnell, judge presiding therein, that no proper bond to indemnify the said John Gray for loss and damage he might sustain by reason of said receivership had been filed in said action."

On October 16, 1924, the plaintiff, petitioner herein, was ordered to furnish bond in the sum of \$30,000, and the trial court then stated that, unless such indemnity be filed by 5 o'clock of the following day, said receiver would be discharged.

[1] Petitioner avers that on the final day of the trial briefs were ordered filed, but that no briefs have been served or filed, and that no judgment has been rendered. The nature of the transactions involved, or the amounts in controversy, do not appear, and there is no showing that a \$30,000 bond is excessive. It does appear that upon the conclusion of the trial upon the merits the lower court determined that the plaintiff was not entitled to recover any of the relief sought by him from the defendant Gray, and that there was no probability of an ultimate recovery by the plaintiff in said action. Of course, the facts here do not bring the application within subdivisions 3 or 4 of section 564, Code of Civil Procedure. Otherwise, as was held in *Wiencke v. Bibby*, 15 Cal. App. 50, 113 P. 876, a trial court would not be justified in continuing the receiver in office after the rights of the parties to the action had been adjudicated. It was there said:

"The action of the court cannot be disturbed for the simple reason that error is not shown. It was probably not necessary for the court to make this formal order, but appellant has shown no ground for complaint. The presumptions are, of course, in favor of the regularity of the proceedings, and we must assume that the court was entirely justified in making the order. *Kahn v. Mattai*, 115 Cal. 692, 47 P. 698. The evidence is not brought up, and hence there is nothing for us to review. If necessary, several reasons could be suggested why the court's action should be considered warranted. Upon the assumption that the order appointing the receiver was void as being in excess of the jurisdiction of the court, it was proper, although not essential, to vacate and set it aside. Again, judgment was rendered in favor of defendant. This of itself would terminate the authority of the receiver who is appointed to hold and preserve the property only during the pendency of the action. The court assuredly would not be justified in continuing the receiver in office after the rights of the parties to the action had been adjudicated, although he could be required to render his account and deliver the property to the person to whom the court awarded it. To the suggestion that the account of the receiver should have been settled and his compensation allowed, there is this additional answer to be made, that the receiver is not here complaining, and if these considerations should be deemed material, we must presume that everything required by the law was done before this order—treating it as a discharge—was made."

As we have said, the court below heard all the evidence, which is not before us, and although there is a dispute as to the financial responsibility of defendant Gray to respond in damages in the event of plaintiff's ultimate recovery, there is no showing that said defendant would be given possession and control of the properties in suit. Several banks are now holding the contracts, and collecting the moneys, to be held by them, subject to orders of the trial court, and not otherwise, "as the agents of said receiver." We cannot say, therefore, that the continuation of the receivership would be necessary, or that it would not work an injustice. The court below has found otherwise and provided depositaries which are apparently responsible, and under its control. It was held in *Copper Hill Mining Co. v. Spencer*, 25 Cal. 11, that an order appointing a receiver might be vacated before trial upon a proper showing, and "with much greater reason after it had appeared upon the trial, to the satisfaction of the judge, that there

was no probability of an ultimate recovery in the action." We would hesitate to say upon the showing here made that the appointment of a receiver was, or was not, justified in the first instance.

[2] The power to discharge a receiver being a necessary adjunct to the power of appointment, the question of his removal is addressed to the sound discretion of the court, and will not be disturbed by an appellate court when it appears after trial that judgment must be given in favor of the defendants. *High on Receivers* (4th Ed.) § 8.

[3] Petitioner's argument and entire case before us is based upon the assumption that the trial court threatens to and unless enjoined will discharge the receiver. This is not entirely true, nor is it an accurate statement of the situation. The court's action was to require that the plaintiff furnish a bond of \$30,000. It must be conceded that in a proper case the trial court has full authority to require that such bond be given. It is true that no bond was directed to be supplied by the plaintiff under the terms of the first order appointing a receiver, nor by the subsequent modifications thereof made upon stipulation. However, there is no express stipulation exempting the plaintiff from the necessity of furnishing a bond. While none appears to have been asked by the defendants, upon the taking of testimony the court may well have concluded that the facts presented were such that the protection of the interests of the defendants made additional security desirable and necessary. The record before us on this application contains insufficient information to advise us upon the absence or existence of such a need. Where no abuse of discretion in a matter of this character is shown, an appellate court is not justified in concluding that the trial court was in error. Also, the record is barren of any showing which would indicate that the order involved an abuse of discretion as to the amount of bond required. Since the trial court has signified no intention of discharging the receiver if the undertaking named in its order is furnished, and as we cannot say that the fair protection of property rights involved does not demand such security, the peremptory writ must be denied, and the alternative writ discharged, and it is so ordered.

We concur: FINLAYSON, P. J.;
WORKS, J.

71 Cal. App. 336

EBERHART v. SALAZAR et al. (Civ. 4756.)

(District Court of Appeal, First District, Division 1, California. Feb. 18, 1925.)

1. Judgment $\hookrightarrow$ 158—Where defendants filed verified amended answer after default judgment, no affidavit of merits was necessary to support motion to vacate default.

Where defendants filed amended answer duly verified setting forth defense to cause of action alleged in complaint two days after default judgment was entered, it constituted part of record and files in case, when motion to vacate default was served and presented, and no affidavit of merits was necessary.

2. Judgment $\hookrightarrow$ 161—That copy of amended answer previously filed was not served on plaintiff nor produced in court on hearing of motion to vacate default held immaterial.

Where defendants filed verified amended answer two days after default judgment was entered, it constituted part of record and files in case, and fact that no copy thereof was served on plaintiff nor produced in court on motion to vacate default judgment was immaterial, where notice of motion stated that it was made on notice and record.

3. Appeal and error $\hookrightarrow$ 957(1)—Judgment $\hookrightarrow$ 139—Trial court has discretion to vacate default and its ruling will not be set aside except for clear abuse.

Under Code Civ. Proc. § 473, trial court has discretion to grant or refuse application to vacate default, and its action thereon will not be set aside on appeal unless abuse of discretion clearly appears, and any doubt should be resolved in favor of application.

4. Judgment $\hookrightarrow$ 143(12)—Affidavit supporting motion to open default judgment held sufficient.

Affidavit supporting defendant's motion to vacate default judgment alleging that amended answer was mailed by defendant's attorney in San Francisco to county clerk of Contra Costa county, 35 miles away, on last day to file pleading, and that there was regular mail between such places, held to justify court in vacating default.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by C. G. Eberhart against A. J. Salazar and another. From an order setting aside a default judgment, plaintiff appeals. Affirmed.

Royle A. Carter, of San Francisco, for appellant.

Raine Ewell, of San Francisco, for respondents.

KNIGHT, J. This is plaintiff's appeal from an order vacating and setting aside a default judgment in an action wherein defendants failed to file their amended answer within the time fixed by the order of

court, after a demurrer to the original answer had been sustained.

The record discloses that the court by *ex parte* order had extended defendants' time to file said amended pleading until and including Friday, March 30, 1923. On the day following, Saturday, March 31, 1923, the amended pleading, not then having been filed, the clerk of said court, at plaintiff's request, entered judgment by default against said defendants. On April 11, 1923, defendants served notice of motion to set aside said default judgment, and pursuant to an order shortening time, said motion was heard on April 13, 1923, and, on May 8, 1923, was granted.

It appears from the affidavit presented in support of defendants' motion to vacate said default judgment that said amended pleading was mailed in San Francisco on March 30, 1923, by defendants' attorney to the county clerk of Contra Costa county, at Martinez, and it is averred in said affidavit that the distance from San Francisco to Martinez is 35 miles and that between the places there is a regular communication by mail. The exact time said amended pleading arrived in Martinez is not shown, but it positively appears that, notwithstanding the entry of said default judgment on Saturday, March 31, 1923, said amended pleading was filed by the county clerk on Monday, April 2, 1923, and that the same thereafter continued to remain a part of the files in the action. Such fact is established by the duly authenticated amendment to the record brought up on a motion for diminution thereof.

[1] Appellant's first contention on this appeal is that the order appealed from was based upon a defective affidavit of merits in that said affidavit was made by the attorney for defendants, and not by the defendants themselves; that no reason was given therein why said affidavit was not made by one of the parties; that it contained no averment that said attorney was familiar with the facts, and that the statement made therein that "the defendants have a good and sufficient defense on the merits to said action" was insufficient.

[2] We think that appellant's contention cannot be sustained, for the reason that it clearly appears from the record that on Monday, April 2, 1923, within two days after the default judgment had been entered, said amended pleading, duly verified by one of the defendants, and setting forth the defense to the cause of action alleged in the complaint, was filed in the office of the county clerk, and constituted a part of the record and files in the case when the motion to vacate the default was served and presented. Therefore, no affidavit of merits was necessary. *Savage v. Smith*, 170 Cal. 472, 150 P. 353; *Melde v. Reynolds*, 129 Cal. 308, 61 P. 932;

(235 P.)

Fulweiler v. Min. Co., 83 Cal. 126, 23 P. 65; San Diego Realty Co. v. McGinn, 7 Cal. App. 264, 94 P. 374.

The fact, if it be a fact, that a copy of said amended answer was not served upon appellant nor produced in court on April 11, 1923, at the time of the hearing of said motion, does not alter the situation. Respondents' notice of motion stated that said motion would be made on said notice "and on the entire record in the action, the minutes of the clerk, the files, and records and pleadings." As above pointed out, on April 2, 1923, said amended answer became and thereafter continued to be a part of the records and files in the action, with which appellant was charged with notice, and was available as an affidavit showing a meritorious defense. *Reher v. Reed*, 166 Cal. 525, 137 P. 263, Ann. Cas. 1915C, 737; *Savage v. Smith*, supra.

[3] Appellant's second point is that the facts averred in said affidavit were not such as to show excusable neglect on the part of defendants. In *Savage v. Smith*, supra, it was said:

"As we have recently had occasion to say: 'The law governing this class of cases is so well settled and has been so often declared in the decisions of this court that we may dispense with the citation of authorities. An application to be relieved from a default under section 473 of the Code of Civil Procedure is addressed to the sound discretion of the trial court and the action of that court will not be set aside on appeal unless an abuse of discretion clearly appears. Any doubt that may exist should be resolved in favor of the application to the end of securing a trial upon the merits.' " *Jergins v. Schenck*, 162 Cal. 747, 124 P. 426.

[4] We are satisfied that the facts averred in the affidavit fully justified the court in vacating the default.

The order appealed from is, therefore, affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

71 Cal. App. 339

PEOPLE v. ALBEXSTONDARE.
(Cr. 1126.)

(District Court of Appeal, Second District, Division 1, California. Feb. 18, 1925. Hearing Denied by Supreme Court April 16, 1925.)

1. Physicians and surgeons §6(10)—Evidence held to show accused practiced healing without license.

Evidence held sufficient to establish beyond reasonable doubt that accused practiced healing without license, even if testimony by members of patients' families was incompetent as being that of accomplices.

2. Criminal law §1186(4)—Errors not resulting in miscarriage of justice disregarded.

Under Const. art. 6, § 4½, errors at trial as to accomplice testimony, where conviction was sustained by other evidence, must be disregarded.

3. Criminal law §1173(2)—Refusal of instruction relating to corroboration of accomplices held not error where accused's guilt established beyond reasonable doubt.

Refusal to instruct as to corroboration of accomplices was not error, where uncontradicted evidence established accused's guilt of practicing healing without license beyond reasonable doubt, even if testimony of members of patients' families was incompetent as that of accomplices.

4. Physicians and surgeons §6(1)—Compensation not necessary to conviction for practicing healing without license.

Compensation for his services is not necessary to conviction of accused for practicing healing without license.

5. Criminal law §728(1)—Instruction held to cure impropriety of court's remark in jury's presence.

In absence of objection or motion to strike out court's remark in presence of jury that motion for postponement was scheme to obtain delay rather than to get justice, refusal of charge to disregard remarks of court indicating its opinion was not error, where court instructed that any conversations between court and counsel had nothing to do with case.

6. Criminal law §1172(1)—Instruction that credibility of accused's testimony is to be weighed by rules applicable to other witnesses held harmless.

In prosecution for practicing healing without license, instruction that credibility of accused's testimony is to be weighed by same rules applicable to that of other witnesses, though erroneous, was harmless, where only effect of disbelieving accused's testimony would be to discredit his testimony that he was not physician licensed to practice in state.

7. Physicians and surgeons §6(10)—Admission of testimony check was delivered to accused practicing healing without license held not prejudicial.

Admission of testimony that check was delivered to accused for services in practicing healing without license without competent proof that he cashed check was not prejudicial, since compensation is immaterial.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

R. H. W. Albexstondare was convicted of practicing healing without a license, and he appeals. Affirmed.

John L. Richardson and Wm. J. Clark, both of Los Angeles, and Otto Sanaker, of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen. (A. B. Bianchi, of San Francisco, of counsel), for respondent.

HOUSER, J. Defendant was convicted of the crime of practicing a mode and system of treating the sick and afflicted without having a valid unrevoked certificate or license from the board of medical examiners of the state of California so to do. The evidence shows that two young women of different families were the subjects of defendant's ministrations, and that he was actively assisted therein by the members of their respective families. Many reasons are urged by appellant for a reversal of the judgment and the order denying defendant's motion for a new trial. Among them are the following:

(1) That the court erred in its refusal to grant defendant's motion for a continuance of the trial of the action against him; and that because of such refusal defendant was unable to procure the attendance of certain witnesses who would have testified in effect that they told all the different members of the family of one of the said two patients of defendant that he (defendant) "was not a physician nor licensed to practice medicine; that he would not attempt to treat a patient as a physician; * * * that he had made a study and had conducted research work in dietetics; that he did not profess any medical skill; that he would not examine or treat the patient, nor would he make any suggestions as to such patient's diet, without the presence and approval of such patient's physician."

(2) That the court erred in sustaining objections made by the prosecution to questions asked by defendant of witnesses, both on direct examination and on cross-examination, which questions, had they been answered by such witnesses, would have proved, or at least tended to prove, that at all times when defendant either treated or attempted to treat the said two patients all the members of their respective families had knowledge of the fact that defendant was not a physician nor licensed to practice medicine within the state of California.

(3) That the court erred in refusing to give to the jury certain instructions requested by defendant relating to the law appertaining to accomplices.

The theory upon which each of such points is presented is that the several members of the family of the patient, having prior knowledge of the fact that defendant was not a licensed medical practitioner within this state, and they with such knowledge having co-operated with defendant in the treatment of the patient, these facts brought them within the rule that one who in any manner, knowingly and with criminal intent, aids and abets another in the commission of a criminal act is as guilty of the offense as is the person who actually commits it, and consequently that the members of the family who, with such knowledge of the facts, assisted defendant in the treatment of the pa-

tient were accomplices of defendant, and that their testimony was subject to the statute which required that before defendant could be convicted on the testimony of accomplices it was necessary that it be corroborated by evidence which tended to connect defendant with the commission of the offense. The entire question in that regard, therefore, revolves around the solution of the problem of whether or not the members of the family were accomplices of defendant.

Section 31 of the Penal Code, so far as its provisions are here applicable, is as follows:

"All persons concerned in the commission of a crime, * * * whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, * * * are principals in any crime so committed."

Section 1111 of the Penal Code provides:

"A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

Considering, first, that both by the witnesses whose presence at the trial could not be had because of the refusal of the court to grant a continuance of the hearing of the action, and as well by questions which were propounded by defendant on direct examination and on cross-examination of other witnesses who testified on the trial, defendant sought to establish the fact that all the members of the family of one of the patients had been informed that defendant was not a physician, nor licensed to practice medicine in this state, it is apparent that if the members of the family of the patient are not excluded from the general rule which makes an accomplice of one who with criminal intent assists in the commission of a criminal act, knowledge on the part of such members of the family of the nature or character of the act to be committed by defendant was an essential element in determining the question of whether or not such persons were accomplices.

It is apparent that if the member of the family of the patient in good faith believed that defendant was a physician and licensed by the state board of medical examiners to act as such, their co-operation with defendant in treating the patient would not have been criminal. Their knowledge of defendant's lack of statutory qualifications in the premises was prerequisite to any constructive criminal intent on their part. Assuming such actual knowledge by the members of the family, and constructive knowledge on their part that the law forbade any one to

treat the sick without "then and there having a valid unrevoked certificate of license from the board of medical examiners of the state of California," it would seem probable that they occupied a position not differing in the law from that occupied by any person not a member of the patient's family who assisted in such treatment.

It may perhaps be considered a hard law which, without incurring severe legal consequences, will not permit the members of the family of an afflicted person to actively assist and co-operate with one who is not licensed to practice the medical profession in what may be an honest endeavor in good faith to alleviate human suffering. The belief may be strong and possibly well founded that such disqualified person may be able materially to assist in restoring the health of the patient, and yet the demands of the law are such that if the statute regulating such practice be disobeyed, all who aid and abet in the commission of the inhibited act shall be equally guilty with the one who actually commits it. The degree of blood relationship in which the members of the family stand to the patient cannot be a factor in determining whether or not the persons assisting in the unlawful act are subject to the provisions of the statute. If it were not so, possibly a mother or a father who actively assisted an unlicensed practitioner in the treatment of a daughter of such parent might be immune from punishment for an infraction of the statute; while a cousin or even a brother or a sister of the patient would be compelled to suffer the penalties imposed by the law.

The language of the law is "all persons concerned in the commission of a crime" who aid and abet in its commission are principals in the crime so committed. Neither would the worthiness of the contemplated ultimate object of the act to be committed in any manner affect the construction of the statute. If the father of his starving children should "aid and abet" or encourage a highwayman in committing a robbery for the express purpose of relieving the distress of the loved ones, while perhaps no one would deny the existence of such extenuating circumstances as should possibly operate, partly if not wholly, to excuse the commission of the crime, the strict interpretation of the law would undoubtedly be that the father by his assistance or encouragement was as much a principal in the robbery as though he had assisted another in the commission of any other offense against the criminal statutes without such impelling motive on his part being present. In such circumstances the cry of the agonized parent would not be heard to prevail as against the unsympathetic words of the law. And so here, assuming that the members of the family of the patient in the highest good faith were engaged in the praiseworthy business of at-

tempting to alleviate the suffering, or to effect a permanent cure, of the afflicted one, yet the language of the statute and the decisions of the courts do not permit of the exercise of discretion as to when or under what circumstances the letter of the law may be disregarded.

The constructive criminal intent of the members of the family of the patient was a very important factor in determining whether or not such persons were accomplices of defendant. Section 1111 of the Penal Code contains the definition that an accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

It therefore should have become a question in the instant case for the determination of the jury whether or not the members of the patient's family had knowledge of the fact that defendant was not a physician and not licensed by the state board of medical examiners of this state to practice "a mode or system of treating the sick and afflicted." Without attempting to determine the question of defendant's legal right to a continuance of the hearing of the action against him, if defendant was not afforded a reasonable opportunity to prepare his defense by subpoenaing witnesses who would testify that they informed the members of the patient's family who assisted defendant in his treatment of such patient that defendant was not so licensed to practice as a physician in this state; and if, as appears from the record, defendant was likewise prevented by the court from establishing such fact by means of questions propounded to other witnesses on their direct examination or on cross-examination, it is clear that, in the absence of other controlling conditions, defendant's substantial rights were invaded. In addition thereto, if, as also appears from the record, the court refused to instruct the jury with reference to the law of accomplices, and especially that part thereof which requires that "a conviction (of a defendant) cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense," it is likewise apparent, assuming that no countervailing circumstances were present, that the rights of defendant were not safeguarded as by the law entitled.

But even if it be assumed as an established principle of law affecting the trial of the case that defendant should have been permitted to show the guilty knowledge on the part of the persons who assisted him in the treatment of the patients as to defendant's lack of statutory qualifications to practice a "system of treating the sick and afflicted," and that defendant was entitled to have the jury fully instructed regarding the subject

of "accomplices," the further question is presented as to whether or not the failure and refusal of the trial court to recognize such rights in defendant, and appropriately to accord to him the full measure thereof, was error of such nature and extent as should result in the granting to defendant of a new trial.

[1] The point which was covered by the testimony of the "accomplices" was that defendant administered medical treatment to the patient. Evidence which came from the testimony of witnesses of whom it is not claimed that they were accomplices was to the same effect. To very briefly summarize:

Arthur C. Merrick testified that on several occasions he drove defendant to the patient's home; that on other occasions, at defendant's request, he delivered at the home of the patient small boxes "wrapped up with some stuff" of which defendant said they were "to follow the inscription on it."

Dr. Marsden, who was a physician and surgeon, testified that on one occasion he met defendant at the home of the patient, and that at that time, in answer to a request by the witness of defendant that he "outline his treatment," defendant stated that he "manufactured his own medicines."

Alice Anderson, who was a practical nurse in attendance upon the patient, testified that defendant ordered the witness to give and that under his direction she gave to the patient certain medicines which were contained in probably 10 or 12 different boxes and bottles which defendant brought to the home of the patient.

Florence D. Smiley testified that she overheard a conversation between the sick girl and defendant in which conversation defendant stated to the patient, "Take this medicine, Myrtle, take it and you will get better"; and at that time that defendant "had a glass with some medicine, some brown liquid in it."

[2] It is clear that in the absence of any evidence to the contrary the combined testimony of these several witnesses was sufficient to establish the guilt of defendant beyond a reasonable doubt, and that without considering the evidence given by the "accomplices," if the jury conscientiously performed its duty, no conclusion other than that of guilt of defendant could have been reached. Although serious errors in the matter of the testimony of the "accomplices" occurred in the trial of the action, such errors did not result "in a miscarriage of justice"; and in accordance with the provisions of section 4½ of article 6 of the Constitution, it follows that, so far as the errors to which reference has been had are concerned, they must be disregarded. *People v. Dial*, 28 Cal. App. 704, 707, 153 P. 970.

Appellant complains that, although requested by defendant, the court refused to give to the jury certain instructions. A

comparison of defendant's proposed instructions which were thus refused by the court with the instructions which the court gave to the jury impels the conclusion that (without important exceptions) in meaning and intent the jury was fully and fairly instructed as to all subjects presented in such refused instructions.

[3] The first refused instruction to which attention is directed deals with a definition and an illustration of the meaning of the word "corroboration." The only purpose of such an instruction would be that of more fully informing the jury with reference to the law of accomplices. With that subject considered as being definitely out of the case, for the reason that, without the testimony of the "accomplices," sufficient uncontradicted evidence remained to justify and demand the verdict against defendant, the question of whether or not the accomplices were corroborated became immaterial. A similar situation is presented with reference to each of the many of defendant's other instructions on the same subject. As heretofore stated, while evidence should have been admitted touching the complicity of several of the witnesses with defendant in the commission of the offense, and in such event the jury properly instructed regarding such evidence, because of the fact that the remaining evidence in the case is so strong that in the absence of any contradictory evidence, without a violation of their oaths, the jury could not do otherwise than find the defendant guilty—defendant's appeal in that regard must be considered as though such errors had not occurred.

[4] Several instructions which defendant requested the court to give to the jury, but which the court refused, in their substance attempted to place an interpretation on the language of the statute with reference to the phrase "practicing or attempting to practice any system or mode of treating the sick or afflicted." The apparent object of such offered instructions was to bring about an acquittal of defendant, because the evidence perhaps was not deemed conclusive that defendant had received compensation for his services. In the case of *People v. Vermilion*, 30 Cal. App. 417, 158 P. 504, it is held (syllabus): "The State Medical Act makes it unlawful for a person to practice any art of healing without having first obtained a certificate from the medical board, and the act is intended to cover such practice whether the service is gratuitous or not." The court was therefore right in refusing such instructions.

[5] As heretofore indicated herein, on the day when the action against defendant was set for trial, defendant's counsel presented a motion for postponement of the hearing of the case. In the course of the hearing of such motion, in the presence of prospective jurors, the court remarked that the pro-

ceeding appeared to be "some kind of a scheme to put this trial off rather than to get justice." No objection was made by defendant to such statement, nor was any motion ever made by defendant to strike such remark from the record. Defendant did, however, offer a general instruction, which the court refused and which included the admonition to the jury that "if any expression of mine has seemed to indicate an opinion relating to any of these matters such expression must be entirely disregarded by you." In the course of the trial the court instructed the jury that "all conversations between counsel and the court or between counsel have nothing to do with the case and is not for your consideration." It is therefore apparent that, even if it be admitted that defendant is not too late to complain of the remark made by the court, the situation was covered by the court's instruction.

[6] At the request of the prosecution, the court gave the following instruction to the jury:

"You are instructed that while the defendant in a criminal action is not required to take the stand and testify, yet, if he does so, his credibility, and the value and effect of his evidence are to be weighed and determined by the same rules as the credibility and effect and value of the evidence of any other witness is determined. If a defendant elects to take the stand and testify in his own behalf, his testimony is to be weighed in the same manner and measured according to the same standard as the testimony of any other witness, and the tests for determining credibility of witnesses as given you in another part of the instructions are to be applied to his testimony alike with that of all other witnesses. No greater presumption attaches in favor of his testimony than attaches to that of any other witness."

By a long line of authorities the giving of such an instruction is held to constitute error. *People v. Faulke*, 96 Cal. 20, 30 P. 837; *People v. O'Brien*, 96 Cal. 182, 31 P. 45; *People v. Curry*, 103 Cal. 548, 37 P. 503; *People v. Lang*, 104 Cal. 368, 37 P. 1031; *People v. Anderson*, 105 Cal. 35, 38 P. 513; *People v. Hertz*, 105 Cal. 663, 39 P. 32; *People v. Shattuck*, 109 Cal. 681, 42 P. 315; *People v. Van Ewan*, 111 Cal. 152, 43 P. 520; *People v. Boren*, 139 Cal. 210, 72 P. 899; *People v. Fritz*, 54 Cal. App. 137, 201 P. 348; *People v. Maughs*, 149 Cal. 253, 86 P. 187.

Defendant was a witness in his own behalf. The only testimony which he gave on direct examination was the following:

"Q. Mr. Albrexstondare, are you a physician licensed to practice in the state of California? A. No, sir."

And on cross-examination his testimony was as follows:

"Q. Have you ever been convicted of a felony? A. No, sir."

Of course, appellant cannot argue that defendant's credibility as a witness was so affected by the giving of the instruction in question that his statement on his direct examination that he was not a physician, licensed to practice in the state of California, was disbelieved by the jury, for the reason that such disbelief on the part of the jury would have resulted in defendant's acquittal. As to the testimony given by defendant on cross-examination that he had never been convicted of a felony, even though the jury disbelieved it, the only effect of such disbelief would have been that it would have tended to discredit defendant's testimony in his statement on direct examination that he was not a physician licensed to practice in the state of California. It therefore follows that no harm resulted to defendant by the giving of such instruction.

[7] Appellant further complains that the court erred to defendant's prejudice in the admission in evidence of testimony going to show the delivery to defendant of a certain check, which it appears was given in partial payment of defendant's services. The principal objection in connection therewith is that no competent evidence was introduced showing that defendant cashed the check. According to the rule laid down in the case of *People v. Vermillion*, 30 Cal. App. 417, 158 P. 504, the matter of compensation for services of the nature of those alleged to have been performed by defendant is wholly immaterial, from which it would follow that whether or not defendant received any consideration in compensation for his services as a physician was of no consequence, so far as establishing the violation of the terms of the penal statute was concerned.

The judgment and the order denying defendant's motion for a new trial are affirmed.

We concur: CONREY, P. J.; CURTIS, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. Appellant's petition to have the above-entitled cause heard and determined by this court after judgment in the district court of appeal is denied.

We neither approve nor disapprove the conclusion of that court that under the circumstances outlined in the opinion the members of the patient's family would be accomplices, if they had knowledge of the fact that the defendant did not have a license to practice medicine. We do not deem it necessary to express an opinion upon that question at this time.

MYERS, C. J., LAWLOR, WASTE, and SHENK, JJ., concur.

LENNON and SEAWELL, JJ., concur in the denial of the petition for hearing by this court.

71 Cal. App. 332

GREENBERG et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 5137.)

(District Court of Appeal, First District, Division 2, California. Feb. 17, 1925.)

1. Prohibition ☞3(1)—Writ issued only when petitioner has no plain, speedy, and adequate remedy at law.

Under Code Civ. Proc. § 1103, a writ of prohibition may issue only on showing that petitioner has no plain, speedy, and adequate remedy in ordinary course of law.

2. Prohibition ☞3(3)—Petitioners held to have plain, speedy, and adequate remedy at law, precluding issuance of writ of prohibition.

An order entered after final judgment, appointing a receiver to whom defendants were commanded to pay rentals, being appealable under Code Civ. Proc. § 963, and subject to stay by filing of undertaking under section 943, defendants had a plain, speedy, and adequate remedy in ordinary course of law, within section 1103, and were not entitled to writ of prohibition.

3. Prohibition ☞20—Mere allegation that petitioner has no plain, speedy, and adequate remedy insufficient, when remedy by appeal exists.

One seeking remedy of prohibition must plead facts or circumstances taking case out of general rule, and mere allegation that petitioner has no plain, speedy, and adequate remedy is insufficient, when it appears that remedy by appeal exists.

Application by Isaac Greenberg and others for writ of prohibition directed to the Superior Court of California in and for the City and County of San Francisco and others. Writ denied.

Sylvain J. Lazarus and Eugene H. O'Donnell, both of San Francisco, for petitioners.

Harry K. Wolff and A. Spivock, both of San Francisco, for respondents.

NOURSE, J. Petitioners are joint defendants in an action pending in the respondent court in which Dora Adelstein is plaintiff. That action is one in unlawful detainer, wherein the plaintiff, as owner of certain real property, sought the forfeiture and cancellation of her lease to said premises against the defendants, the petitioners herein, as lessees of said property. Judgment went for the defendants, and the plaintiff in due time filed and perfected her appeal, which is now pending in this court.

Thereafter the plaintiff made a motion before said court, requesting that the court order said defendants to deposit in court, or in bank, all moneys then due or thereafter to become due from said defendants as rent for said premises under the lease which was the subject-matter of the litigation. Said motion was granted by respondent court, and pursuant thereto an order was entered on November 5, 1924, commanding said defendants to pay said rentals to E. M. Levy, who was therein designated and appointed receiver for the purpose of receiving and collecting said funds. Said order particularly commanded the defendants to pay to said receiver the sum of \$2,750, being rental due for said premises from the 1st day of February, 1924, to the 30th day of November, 1924, and thereafter the sum of \$275 monthly; this being the rental stipulated in the lease. The defendants refused to abide by this order, but offered to pay the rentals (which are admitted to be due and payable) to the plaintiff alone, but on the condition that she would give them a receipt for payment under the lease. This the plaintiff refused to do, because she felt that such a receipt would be an acknowledgment from her that the lease was in all respects in full force and effect, and that this would jeopardize her position on the appeal from the judgment.

It is the enforcement of this order which the petitioners seek to restrain in this proceeding. The petition is framed on the theory that the respondent court was without jurisdiction to appoint a receiver or to compel the impounding of the rentals after the plaintiff's appeal was perfected. The facts stated are not controverted, and are taken from the petition for the writ and from respondents' answer thereto. The petitioners seek to confine the hearing to the single issue of want of jurisdiction to make the order, but the respondents go further, and insist that the writ should not issue, because the petitioners had an adequate remedy by appeal from the order.

[1, 2] We are satisfied that the writ must be denied upon the grounds urged by the respondents, and therefore do not deem it necessary to consider the interesting question of the power of the superior court, after an appeal has been perfected, to appoint a receiver to preserve the funds involved in the litigation. The writ of prohibition may issue only upon a showing that the petitioner has no "plain, speedy, and adequate remedy in the ordinary course of law." Section 1103, Code Civ. Proc. The right of appeal from the order complained of has always been held a "remedy in the ordinary course of law." *Agassiz v. Superior Court*, 90 Cal. 101, 103, 27 P. 49; *White v. Superior Court*, 110 Cal. 54, 58, 42 P. 471; *Grant v. Superior Court*, 106 Cal. 324, 326, 39 P. 604; *Jacobs v. Su-*

perior Court, 133 Cal. 364, 365, 65 P. 826, 85 Am. St. Rep. 204; *Campbell v. Superior Court* (Cal. App.) 228 P. 354.

Cases have been cited wherein the reviewing court held that the want of jurisdiction to make the order complained of was apparent, and that, though an appeal would lie from the order, it could not be said to be a "speedy and adequate remedy," because of the expense and trouble incident to the particular litigation. These cases all rest on the principle that the writ of prohibition is a writ of discretion, and not a writ of right, and the discretion of the reviewing court was exercised in each case in view of the exceptional circumstances presented. *Ophir Silver Mining Co. v. Superior Court*, 147 Cal. 467, 479, 82 P. 70, 3 Ann. Cas. 340; *Davis v. Superior Court*, 184 Cal. 691, 696, 195 P. 390; *Consolidated Adjustment Co. of California v. Superior Court*, 189 Cal. 92, 96, 207 P. 552. Here the order complained of is an order made after final judgment, and as such is an appealable order within the meaning of section 963, Code of Civil Procedure. The filing of an undertaking on an appeal from the order would have stayed the appointment of the receiver and the command to impound the rentals. Section 943, Code Civ. Proc.; *Jacobs v. Superior Court*, 133 Cal. 364, 366, 65 P. 826, 85 Am. St. Rep. 204; *White v. Superior Court*, 110 Cal. 54, 59, 42 P. 471; *Campbell v. Superior Court* (Cal. App.) 228 P. 354, 355.

[3] Those who seek the extraordinary remedy of prohibition must plead the facts or circumstances which take the case out of the general rule; the stereotyped allegation that they have no "plain, speedy, and adequate remedy" is insufficient, when it is apparent that the remedy by appeal exists. The petitioners here have merely alleged that they would be greatly harassed by the efforts of the receiver, resulting in actions at law, attachments, etc., in his attempt to enforce the order of the respondent court. But, as we have said, the filing of a sufficient undertaking would have completely nullified the power of the receiver, and would have forestalled all these actions. The only inconvenience to which the petitioners would have been subjected pending the appeal from the judgment, if such an undertaking were not filed on the appeal from the order, would be that they would have been required to pay the rentals which are admittedly due for the premises during the period when they were enjoying the possession.

For these reasons we conclude that this is not a proper case for prohibition.

Writ denied.

We concur: LANGDON, P. J.; STURTEVANT, J.

2. Sales ⚡176(3)—Buyer held to have waived objection to tender not specified.

In view of Civ. Code, § 1501, and Code Civ. Proc. § 2076, buyer rejecting tender, of delivery order for goods in warehouse, made with intent to pass title, on other and unjustified grounds, *held* to have waived objections that invoice accompanying order was for gross shipping weights rather than net landed weights, and that import duty was unpaid; objections being of such character that sellers could have obviated them.

3. Customs and usages ⚡15(2)—Trade custom and usage as to what constitutes "usual" size bag in shipment of peanuts admissible.

Where contract called for quantity of peanuts in usual size packages, evidence of custom and usage in shipment of shelled peanuts from Shanghai at the time *held* properly admitted, in view of Code Civ. Proc. § 1870, subd. 12, in aid of interpretation of contract.

4. Sales ⚡176(3)—Statutory sections relating to waiver for failure to object to offer of performance and for failure to object to tender must be read together.

In view of Pol. Code, § 4480, *held*, that Civ. Code § 1501, providing that objections to mode of offer of performance which creditor has opportunity to state, and which could be obviated by offerer, are waived if not stated, and Code Civ. Proc. § 2076, providing that objections to tender are waived if not specifically made, must be read as though parts of same statute.

5. Sales ⚡176(3)—In statute providing for waiver of objections to mode of performance which creditor has "opportunity" to and fails to make, scope of word stated.

In Civ. Code, § 1501, providing that objections to mode of offer of performance which creditor has opportunity to state, and which offerer could obviate, are waived if not stated, "opportunity" includes such knowledge, or information charging knowledge, as would enable person to act with intelligence in protection of rights.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Opportunity.]

6. Sales ⚡176(2)—Buyer held to have knowledge of, and therefore to waive objection to, tender by failure to make it.

Knowledge by buyer at time of sellers' tender of Chinese peanuts by delivery order that invoice accompanying it was improperly based on gross shipping weights, rather than net landed weights, *held* inferable, where bill of lading containing gross weights was twice inspected by buyer's representatives, and it had time to ascertain correct amount, and therefore that objection is waived under Civ. Code, § 1501, and Code Civ. Proc. § 2076.

7. Sales ⚡176(3)—Sellers should have opportunity to recede from excessive demand accompanying tender of goods.

If sellers in making tender of goods in good faith demanded something to which they were not entitled, they should have had opportunity to recede from such demand.

195 Cal. 655

HIND et al. v. ORIENTAL PRODUCTS CO., Inc. (S. F. 10056.)

(Supreme Court of California. March 25, 1925. Rehearing Denied and Opinion Modified April 24, 1925.)

1. Appeal and error ⚡930(1)—Jury's implied findings sufficiently supported where evidence substantially supports verdict.

Intendments being in favor of judgment, implied findings of jury will be deemed sufficiently supported if evidence substantially supports verdict.

8. Sales $\S$ 176(3)—Buyer estopped to raise objections not made at time of tender.

Under Civ. Code, § 1501, and Code Civ. Proc. § 2076, buyer is estopped to raise objections to tender not made at time.

9. Sales $\S$ 153—Ascertainment of weight or measure of goods not condition precedent to valid tender where goods otherwise identified.

Where there is no question as to identity of goods, valid tender may be made, though weighing or measuring is necessary to ascertain price.

10. Sales $\S$ 153—Tender held valid though import duty not paid.

Where sellers placed goods in bonded warehouse because of buyer's failure to furnish shipping instructions, tender by delivery order held valid, though import duty was not paid, and contract called for goods "duty free," in view of evidence of custom and usage under such contract of paying duty when shipping instructions are given and goods are withdrawn from bond and loaded for shipment to terminal designated by buyer.

11. Customs and usages $\S$ 13—Contract presumed made in reference to known usage of trade.

Where there is known usage of trade, persons carrying on that trade are deemed to have contracted in reference to usage unless contrary appears.

12. Customs and usages $\S$ 15(1)—Evidence of trade usage always admissible unless it alters contract.

Evidence of a known trade usage is always admissible to supply deficiency or as means of interpretation, where it does not alter terms of contract.

13. Appeal and error $\S$ 999(1)—Jury question whether sellers in making tender were ready to transfer actual possession.

Insufficiency of delivery order to enable buyer to receive goods without further action of sellers will not be considered on appeal, since it was for the jury to determine whether sellers were ready to do things necessary to transfer actual possession.

14. Sales $\S$ 176(3)—Objection to form of delivery order tendered, waived for failure to raise at time.

Buyer's objection to form of delivery order tendered, that it would not enable it to receive goods without further action of sellers, held waived under Civ. Code, § 1501, and Code Civ. Proc. § 2076, for failure to object on that ground at time of tender.

15. Sales $\S$ 202(1)—Payment on arrival and inspection not equivalent to payment on delivery prohibiting passage of title by tender.

Provision of contract for payment on arrival and inspection held not equivalent to payment on delivery prohibiting passage of title by tender, where by its terms contract was clearly not a C. O. D. contract.

16. Sales $\S$ 202(1)—Submission of invoice with tender of delivery order held not to condition passage of title on payment.

Where contract provided for payment on arrival and inspection and by its terms was clearly not a C. O. D. contract, submission of invoice with tender of delivery order held not to condition passage of title on payment.

17. Contracts $\S$ 335(1)—Complaint must allege either performance or excuse for nonperformance, since they are not same.

Complaint must either allege performance or valid excuse for nonperformance, since they are not the same.

18. Sales $\S$ 340—Buyer's failure to furnish shipping instructions does not prevent sellers offering, and thereafter alleging, performance.

Though buyer's failure to furnish shipping instructions might have justified sellers in proceeding on theory of excuse for nonperformance, it did not prevent them from offering to perform and thereafter alleging performance.

19. Trial $\S$ 251(4)—Giving of instruction predicated on excuse for nonperformance held erroneous where performance alleged.

Where, in action for purchase price, sellers alleged performance, giving of instruction predicated on excuse for nonperformance held erroneous.

20. Trial $\S$ 296(2)—Instructing on excuse for nonperformance not prejudicial error, though performance alleged, in view of instructions as whole.

Instructing on excuse for nonperformance by sellers, in their action for purchase price, held not prejudicial error, though performance was alleged, in view of other proper instructions as to necessity of proof of full performance.

21. Trial $\S$ 193(1)—Instruction to draw inferences favorable to fair dealing, rather than corrupt practice, held not objectionable.

Instruction that if two inferences were equally reasonable, to draw one favoring fair dealing, rather than corrupt practice, held not objectionable as being susceptible of construction as opinion of court that one of parties had dealt fairly and the other corruptly.

22. Trial $\S$ 260(3)—Modification of instruction by removal of burden of proof and preponderance of evidence clause not objectionable where covered elsewhere.

Modification of instruction by striking the clause on burden of proof and preponderance of evidence held not objectionable where charge elsewhere fully instructed in these matters.

23. Appeal and error $\S$ 959(3)—Permitting amendment to complaint to conform to proofs not disturbed except for abuse.

Ruling on application to file second amended complaint to conform to proofs, being addressed to sound discretion of court, will not be disturbed except for abuse.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by George U. Hind and another, co-partners, doing business under the firm name and style of Hind, Rolph & Company, against the Oriental Products Company, Inc. From a judgment for plaintiffs, defendant appeals. Affirmed.

Leo Kaufman, of San Francisco, for appellant.

Ira S. Lillick, of San Francisco (Theodore M. Levy, of San Francisco, of counsel), for respondents.

SHENK, J. This is an appeal from a judgment on a verdict in favor of the plaintiffs in the sum of \$26,349.36. On the 29th day of November, 1919, the defendant purchased from the plaintiffs through W. J. Withers, a broker, a quantity of Chinese shelled peanuts. The contract was reduced to writing, and the provisions thereof with which we are here concerned are as follows:

"Quantity: One hundred (100) tons. Article and description: Chinese shelled peanuts, 30/32s from Shanghai, F. A. Q. (fair, average quality) of the season. Package: Usual. Price: Thirteen cents (13¢) per pound, F. O. B. coast, duty paid, net landed weights, net cash on arrival and inspection. Shipment from China during December/January. Routing: Seller reserves the privilege of routing all freight, but will give terminal delivery by line requested by buyer."

The contract was signed by the plaintiffs as sellers and by the defendant as buyer. The peanuts were shipped from Shanghai in due time, arrived at Seattle by the steamship Eastern Victor on March 2, 1920, and were inspected by the defendant. Prior to, at the time of and after, the arrival of the vessel, shipping instructions were requested by the plaintiffs from the defendant, so that the plaintiffs could fulfill their contract to place the merchandise f. o. b. cars or carrier with terminal designated by the defendant. Shipping instructions were not given as requested nor at all. Pending the delay incident to the refusal of the defendant to furnish shipping instructions, the merchandise was placed in a bonded warehouse, where it was located at the time of the tender and rejection next to be noted.

On March 8, 1920, the plaintiffs delivered to the defendant the following delivery order:

"San Francisco, March 8, 1920. Hind, Rolph & Co., Seattle, Wash. — Warehouse. Deliver to Oriental Products Company, Inc., or order one hundred tons shelled peanuts (1112 bags) marked: H. R. No. 18. San Francisco. (100 tons only) Peanuts. No. 18. ex S. S. — Eastern Victor. [Signed] Hind, Rolph & Company, per J. L. Keegan."

Accompanying the delivery order was the following invoice:

"No. 2112. San Francisco, March 8, 1920. The Oriental Products Company, Inc. San Francisco, Calif. Bought of Hind, Rolph & Co., 230 California Street, Payable net cash on arrival and inspection. In U. S. gold coin. Peanuts No. 18. 33—Eastern Victor. 1112 bags (180 lbs. net) Chinese shelled peanuts. Gross 202,940 lbs. Tare 2,780 lbs. Net 200,160 lbs., at 13 cents per lb. f. o. b. Coast, duty paid, net landed weights, \$26,020.80. E. & O. E. (errors and omissions excepted) JLK—EK."

Thereafter the defendant on the date it bears delivered to the plaintiffs the following document:

"March 11, 1920. Hind, Rolph & Co., 230 California Street, San Francisco, Calif.—Gentlemen: We are herewith enclosing delivery order and invoice, covering 100 tons shelled peanuts tendered. We regret exceedingly that we are obliged to reject this tender because of the fact that the goods are packed in 180-pound bags instead of 100-pound bags as purchased, and in addition to this that the report from Seattle on the count is thirty-two thirty-four instead of thirty thirty-two, as purchased. Regretting the necessity of rejecting this tender, we beg to remain, Oriental Products Co. E. W. Rosston."

Subsequent to the foregoing rejection of tender, this action was brought and went to trial on an amended complaint filed August 23, 1920, which charges in two counts. The first count alleges, among other things the contract of purchase and sale, the arrival of the goods and the inspection thereof by the defendant, the tender of the goods with an intention to transfer the title to the defendant, the rejection of the tender, the refusal to accept the goods or pay for the same, and the purchase price based on the gross shipping weights. The second count alleges damages in the sum of \$490.68 on account of warehouse charges. During the course of the trial the plaintiffs, by leave of court, filed a second amended complaint to conform to the proof wherein the alleged purchase price was based on the net landed weights less three-quarters of a cent per pound duty. The defendant admitted by its answer that it had agreed to purchase the peanuts, but set forth that the price alleged in the amended complaint was not based on the net landed weights with duty fully paid; that the sum demanded was not based on the true net landed weights, but upon the gross shipping weights from the Orient; that the plaintiffs had not paid the duty on the merchandise; that the same was not properly prepared for delivery, in that the peanuts were packed in 180-pound bags and not in 100-pound bags; and that the peanuts were not of the size or quality contracted for. The verdict was for the purchase price alleged in the second amended complaint under the first cause of action and for the damages alleged in the second cause of action.

[1] The complaints were drawn and the case was tried, so far as the plaintiffs were concerned, upon the theory that the tender was made with the intention to pass title; that the title thereby passed to the defendant; and that because of the rejection of the tender the plaintiffs were entitled to recover the purchase price in accordance with the provisions of sections 1141, 1485, 1502, and 3310 of the Civil Code. It was and is the contention of the defendant that the tender was not made with the intention to pass the title; that the title did not thereby pass; that the measure of damages as provided by section 3311 of the Civil Code should have been applied; and that the plaintiffs have therefore mistaken their remedy. In its conduct of the case the trial court adopted the theory of the plaintiffs as applied to the facts, and the verdict of the jury was in favor of the plaintiffs on that theory. The intendments are in favor of the judgment, and if the evidence in support of the verdict be substantial, either with or without conflict, the implied findings of the jury will be deemed sufficiently supported. *Hassell v. Bunge*, 167 Cal. 365, 139 P. 800; *Bancroft-Whitney Co. v. McHugh*, 166 Cal. 140, 134 P. 1157; *Ryder v. Bamberger*, 172 Cal. 791, 158 P. 753; 2 Cal. Juris. 879, and cases cited.

[2] It appears without conflict that at the time of the tender, on March 8, 1920, the plaintiffs had not paid the duty, had not ascertained the net landed weights, and based the amount of the invoice on the gross shipping weights. From these facts it is contended by the defendant it must follow that the plaintiffs had not complied with their contract, had conditioned the tender on an excessive demand, and therefore could not pass title and place the defendant in default. The plaintiffs counter that in the defendant's letter rejecting the tender the defendant specified objections to the tender on two grounds only, that the objections stated were unjustified, were found by the jury to be unjustified, and that by the failure of the defendant to object at the time to the tender on other grounds later insisted upon, all such other objections were waived under section 1501 of the Civil Code and section 2076 of the Code of Civil Procedure.

[3] The objections to the tender specified in the defendant's letter of rejection were "that the goods are packed in 180-pound bags instead of 100-pound bags as purchased," and "that the report from Seattle on the count is thirty-two thirty-four instead of thirty thirty-two as purchased." As to the size of the bags, the only provision in the contract having reference to the subject is, "Package: Usual." There is nothing in the contract requiring shipment in 100-pound bags. It therefore became necessary for the jury to determine what packages were usual in the trade of which this particular shipment was a part; that is to say, whether in the ship-

ment of shelled peanuts from Shanghai at the time in question it was customary and usual to use 180-pound bags. The court properly permitted evidence of custom and usage on this point for the reason that the term "usual" required explanation, not in derogation of the contract, but in aid of its interpretation (subdivision 12, § 1870, Code Civ. Proc.). It was in evidence that in the absence of a specific provision of the contract as to size of bags to be used, it was optional with the shipper at Shanghai to select the size. There was abundant evidence that under such circumstances a bag of from 100 to 200 pounds capacity, including a 180-pound size, was usual and customary. Witness Withers, the broker who negotiated the sale, so testified, as did also witnesses Barrichow, Ward, Newhall, Dill, Sternau, Groom, and Hadden.

Concerning the quality of the peanuts the contract provided that they should be 30-32s, that is, from thirty to thirty-two whole peanuts to the ounce. It will be noted that the letter rejecting the tender did not state as a fact that the peanuts were not of the required size, but only that "the report from Seattle on the count" was that they were 32-34s. The agent of the defendant at Seattle inspected the goods and took samples before the rejection. Samples were also mailed to the defendant at San Francisco prior to the rejection. The plaintiffs procured samples and had counts made prior to that time. The evidence was in conflict as to the result of the several countings, but there was substantial, direct, and positive evidence of those who had weighed the sample that the peanuts were 30-32s as required. The testimony of the witnesses O'Brien, Keegan, Beamer, and Newhall was sufficient to support the implied finding of the jury that the peanuts satisfied the description required by the contract.

As to the objections not mentioned in the letter rejecting the tender, it is the contention of the plaintiffs that they were, and each of them was, waived by the defendant because of its failure to specify the same as provided in the Code sections mentioned. Section 1501 of the Civil Code reads:

"All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor, if not then stated."

Section 2076 of the Code of Civil Procedure provides:

"The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards."

[4-6] These two sections must be read together as though they were parts of the same statute. Pol. Code, § 4480; *Allen v. Chatfield*, 172 Cal. 68, 156 P. 47. When so read and applied to the present case, they would mean that when the tender was made to the defendant it was incumbent upon it to specify any objections which it had the opportunity to make to the instruments tendered by the plaintiffs or to the terms thereof, and to specify the terms which it required and which could be obviated by the plaintiffs or be precluded thereafter from making such objections. The "opportunity" which the statute provides must be available to the objector would include, of course, such knowledge or such information charging knowledge of the facts surrounding the transaction as would enable the person whose rights were to be affected to act with intelligence in the protection or preservation of his rights. In this connection it is earnestly insisted by the defendant that the tender by plaintiffs was attended by an unauthorized condition of payment, in that the amount of the bill as specified in the invoice, although appearing as based on the net landed weights, was in reality based on the gross shipping weights from the Orient, and that the defendant had no knowledge at the time it specified its objections to the tender that such amount was not based on the net landed weights.

At the close of the plaintiff's case the defendant made a motion for a nonsuit on the ground that the evidence was insufficient to support a verdict in favor of the plaintiffs and particularly that there was no evidence that the defendant knew prior to its rejection of the tender what the gross shipping weights were. The motion was denied, and the ruling is assigned as error. But there was evidence introduced during the plaintiffs' case in chief from which the jury might infer that the defendant knew the amount of the gross shipping weights prior to and at the time of rejection. The bill of lading showing the oriental shipping weights was received by the plaintiffs at San Francisco on February 25. On the following day the representative of the plaintiffs called at the office of the defendant with the weight certificate and bill of lading showing the gross shipping weights and a surveyor's certificate showing the peanuts to be 30-32s and asked for shipping instructions, which were refused. Later on in the trial there was evidence that prior to the rejection the original bill of lading showing the gross shipping weights was inspected by a representative of the defendant. From this evidence the inference might also be drawn that the defendant had knowledge of such weights before its letter of rejection.

[7] Furthermore, the tender was made on March 8 and was rejected on March 11. During the intervening time the defendant had

full opportunity to ascertain from its agent in Seattle whether the amount specified in the invoice was excessive, and, if so, to specify the correct amount so that the plaintiffs might obviate the objection by a corrected invoice. There was no showing of bad faith on the part of the plaintiffs in offering to perform. They were entitled to the presumption of good faith in the transaction. Under such circumstances, if the plaintiffs demanded something to which they were not entitled, they should have had the opportunity to recede from such demand. In the case of *Kofoed v. Gordon*, 122 Cal. 314, 54 P. 1115, it was said:

"If the person offering to perform is acting in good faith, and makes the mistake of demanding something to which he is not entitled, he ought to be given the same opportunity to recede from such demand that he is allowed for tendering the correct amount where he has tendered too little, or the right thing when he has tendered the wrong thing. * * * This principle is the necessary basis of the numerous decisions in which it has been held that an express objection to a tender upon one ground is as clearly a waiver of unauthorized conditions as of other objections not mentioned." (Italics added.)

See, also, *Hoover v. Wolfe*, 167 Cal. 337, 139 P. 794; 6 Cal. Jur. 412 and cases cited.

[8] The principle of estoppel embodied in section 1501 of the Civil Code and section 2076 of the Code of Civil Procedure is generally recognized. *Railway Co. v. McCarthy*, 96 U. S. 258, 24 L. Ed. 693; *Bank of Taiwan v. Union Nat. Bank (C. C. A.)* 1 F. (2d) 65 and cases cited; 2 Williston on Contracts, §§ 743, 744.

[9] Defendant cites the case of *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 18 P. 248, 9 Am. St. Rep. 199, in support of its contention that the ascertainment of the net landed weights was a condition precedent to a valid tender. But that case does not hold that weighing is necessary if the goods be otherwise identified. The court there quotes the following rule laid down by Mr. Benjamin:

"Where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, *although the individual goods are ascertained*, and they are in the state in which they ought to be accepted.' Benjamin on Sales, b. 2, c. 3."

And then goes on to say:

"So far as concerns the proposition that where weighing or measuring is necessary to the identification of the goods, the title does not pass until they have been weighed or measured, the American cases are generally in accord with the above rule. [Cit. cas.] In California the cases are to the same effect. [Cit. cas.] Some of the

American cases are not in accord with the rule laid down by Mr. Benjamin in this: that *if the goods are identified*, it does not matter that weighing or measuring is necessary to ascertain the price or the quantity. And this seems to be the law in California. For the Civil Code contains the following: 'Sec. 1140. The title to personal property, sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, *whether it is separated from other things or not.*' This section does not dispense with identification. On the contrary, it requires it. It only dispenses with segregation when the property is otherwise identified. Therefore, where the identification consists in the segregation, weighing, or measuring, they are still necessary. And the present case was of the latter character."

There is no question in the case at bar as to the identity of the goods, irrespective of the weights or quality.

[10] The defendant further contends that, under the contract, the plaintiffs were required to pay the import duty before they could be in a position to make a valid tender. It is unquestionable that the plaintiffs obligated themselves to deliver the merchandise free of duty. However, there is nothing in the contract as to when the duty should be paid. The defendant knew at the time of rejection that the goods were in a bonded warehouse, and it was uncertain whether any duty would have to be paid until after shipping instructions had been furnished. If the terminal to be indicated by the defendant were domestic, the payment of the duty would, of course, be necessary in order that the goods be released from bond. But if the designated terminal were a foreign port or in a foreign country, which it might have been, no duty would have been required. Even though the payment of duty by the plaintiffs were certain, it was in evidence that, according to custom and usage under such a contract, the time of payment of the duty was when the shipping instructions had been furnished and the goods were withdrawn from bond and loaded for shipment to the terminal designated by the buyer. There was also evidence that, in the absence of such instructions, the demand for the purchase price would by custom and usage be made on the presentation of the delivery order, gross shipping weights, and invoice, and that when payment was made in accordance with the tender any difference in weights that might develop would become a matter of subsequent adjustment between the parties.

[11,12] It satisfactorily appears that the parties to the contract contemplated that shipping instructions should be furnished by the buyer before the goods were placed f. o. b. carrier. The written contract is not as explicit on the subject as it might be, for it merely provides that the "seller reserves the privilege of routing all freight, but will give

terminal delivery by line requested by buyer." This language might reasonably be said to import an obligation on the part of the defendant to designate the terminal at the appropriate time, but whatever uncertainty or omission occurs in the language of the contract is clarified and supplied by the evidence herein that, pursuant to custom and usage of the trade, unless otherwise specifically provided by contract, it was the duty of the buyer to furnish shipping instructions before the seller was required to pay the duty or ascertain the f. o. b. weights. It is the general rule that when there is a known usage of the trade, persons carrying on that trade are deemed to have contracted in reference to the usage unless the contrary appears; that the usage forms a part of the contract; and that evidence of usage is always admissible to supply a deficiency or as a means of interpretation where it does not alter or vary the terms of the contract. *Brown v. Howard*, 1 Cal. 423; *Taylor v. Castle*, 42 Cal. 367; *Burns v. Sennett*, 99 Cal. 371, 33 P. 916; *Union Ins. Co. v. American Ins. Co.*, 107 Cal. 333, 40 P. 431, 28 L. R. A. 692, 48 Am. St. Rep. 140; 6 Cal. Jur. 315, and cases cited; *Miller v. Germain, etc., Co.*, 193 Cal. 62, 222 P. 817.

[13,14] The defendant also contends that the form of the delivery order was insufficient; that it was an order by the plaintiffs at San Francisco on the plaintiffs at Seattle and was not accompanied by an assignment or other document which would enable the defendant to receive the goods without further action on the part of the plaintiffs; and that under the form of order submitted it still remained within the power of the plaintiffs to withhold the goods until the purchase price had been paid. It is not suggested that the plaintiffs were unable to do any of the things which it is claimed by the defendant they should have done to effectuate actual possession in the defendant. It was for the jury to determine under the evidence presented whether the plaintiffs were ready and willing to perform all things necessary to transfer actual possession. In addition, there was no objection to the form of the delivery order in the defendant's letter of rejection. Therefore, any objection to the terms of the order were waived under the Code sections above quoted. Also there was evidence that the delivery order here employed was in form in accordance with the custom and usage under similar situations.

The defendant earnestly insists that the present case is governed by the rules laid down in *Gopcevic v. California Packing Corp.*, 64 Cal. App. 132, 220 P. 1078. That was an action to recover the purchase price of the entire crop of prunes grown by plaintiff on his orchard. The contract provided that the seller was to harvest, properly dry and cure the crop for the season of 1920 and

deliver the same to defendant. By the express terms of the contract title to the prunes was to pass to the buyer after completion of weighing and payment, and thereafter the crop was to be at buyer's risk. The plaintiff claimed to have properly dried and cured the prunes and made them ready for shipment and to have offered to deliver the same in accordance with the terms of the contract, but that the defendant refused to accept them. The plaintiff claimed to have made an unconditional tender of the goods. There was neither allegation nor proof of an intent to pass the title at the time of the tender, nor was there allegation or proof of a waiver on the part of the defendant as to the sufficiency of the tender. The proof showed that the plaintiff insisted upon standing on the letter of his contract to the effect that payment should be made at the time of delivery. It was held that the plaintiff had mistaken his remedy, was not entitled under the pleadings and proof to maintain his action for the purchase price but should have proceeded under section 3311 of the Civil Code. Assuming the correctness of that decision, the rules there laid down do not apply to the present case for the reason that the allegations and proofs were not the same. Numerous propositions of law, however, properly applicable to the facts in this case are there stated. It is said:

"The question of the passing of title being one of intention of the parties, in the ascertainment of this intention resort must be had to the terms of the contract, the conduct of the parties and the circumstances of the case. The intention being the governing principle, the question in the main is one of fact. * * * If the seller transfers to the buyer the title to the property sold, he may under section 3310 recover the full purchase price. * * * If tender is made by the vendor with intent to pass title in the goods to the vendee, title is thereby deemed to have passed, and the vendor may sue for the contract price (Civ. Code, § 1141). If tender is made without intent to pass title until payment is made, title is not deemed to have passed, and the situation is controlled by section 3311."

[15] We are not impressed with the argument of the defendant that the clause in the contract here in question providing that payment should be made on "arrival and inspection" is equivalent to a provision for payment upon delivery. Actual delivery in this case would take place upon the placing of the goods f. o. b. carrier and transmission of the bill of lading. It is clear that the intention of the parties was that when the goods had arrived, been inspected by the defendant, and found to be in accordance with the contract, the purchase price would be due and payable. This is not by its terms a cash on delivery contract.

[16] The defendant argues that the plaintiffs converted the same into such a contract by the submission of an invoice at the time

of the tender. We think the circumstances here shown, including the admitted fact that the defendant had the delivery order in its possession from the 8th to the 11th of March, were sufficient to entitle the jury to conclude that the plaintiffs had waived immediate payment as a condition to the transfer of the title.

Taking into consideration the terms of the contract, the evidence of custom and usage not inconsistent with those terms, the conduct of the parties, especially of the defendant in waiving objections which it might have interposed, and the other circumstances appearing in the case, it is concluded that the evidence was sufficient to support the findings of the jury implied from the rendition of the verdict.

[17] It is contended by the defendant that the plaintiffs' pleadings are insufficient to justify recovery. It is suggested that the theory of the plaintiffs' case is that the failure of the defendant to furnish shipping instructions was an excuse available to the plaintiffs for not performing the alleged conditions precedent under the contract. The plaintiffs allege full performance on their part, and it is insisted that under the facts they should have alleged excuse for nonperformance if they expected to recover. The case of *Peek v. Steinberg*, 163 Cal. 127, 124 P. 834, is relied on. In that case the allegation was that the plaintiff had performed on his part. The proof did not show performance, but did show excuse for nonperformance. The court said:

"Such an allegation will not justify a recovery on proof of a valid excuse for nonperformance. 'The rule is fundamental that the complaint must either allege performance or a valid excuse for nonperformance. One is not the same as the other.'"

[18] But here full performance was alleged. Keeping in mind the waiver of objections to which the defendant committed itself, the proof showed a sufficient offer of performance on the part of the plaintiffs. Although the failure of the defendant to furnish shipping instructions might have justified the plaintiffs in proceeding on the theory of excuse for nonperformance, that circumstance did not prevent them from offering to perform and thereafter alleging performance.

[19, 20] The giving of certain instructions requested by the plaintiffs and the refusal of certain proposed instructions requested by the defendant are alleged as error. It is insisted that it was error to give that portion of instruction XXI to the effect that if the jury should find that the defendant failed to furnish shipping instructions when it was required to do so within a reasonable time after the arrival of the goods, and such failure delayed or prevented the plaintiffs from performing their obligations under the contract, then the plaintiffs were excused from

performing such obligations to the extent that they were so delayed and prevented by the act of the defendant. The case of Peek v. Steinberg, supra, supports defendant's contention that when full performance is alleged and excuse for nonperformance is not alleged, such instruction is error. But it cannot be said that the defendant's rights were prejudicially affected by the instruction in view of the fact that the court properly instructed the jury as to the necessity of proof of full performance before a recovery could be had, and that in the absence of such proof by a preponderance of the evidence the verdict must be for the defendant.

[21] Instruction No. VIII, given at the request of plaintiffs, was to the effect that if there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, it was the duty of the jury to draw the inference favorable to fair dealing. The defendant contends that this instruction was ambiguous and misleading; that it may have been misconstrued by the jury as intending to indicate that in the opinion of the court one of the parties had dealt fairly and the other had favored corrupt practice. We do not think the instruction is subject to the criticism offered. It was a correct exposition of the law on the subject. *Ryder v. Bamberger*, supra, and cases cited.

[22] Complaint is made of the modification of instruction No. V proposed by the defendant, whereby the clause "and that the burden of proof is upon plaintiffs to establish that fact by a preponderance of the evidence" was stricken out. But elsewhere in its charge the court fully instructed the jury as to the burden of proof and the preponderance of evidence.

The defendant criticizes other instructions given as proposed or given as modified. They have been examined and are found to be not subject to the objections interposed. Complaint is also made that numerous instructions proposed by the defendant were not given. They constitute an exposition of the law from the defendant's point of view and, where applicable to the facts, were covered by instructions given.

[23] There was no error in denying the defendant's motion for a nonsuit, for reasons hereinbefore stated. There was no error in admitting evidence of custom and usage as the facts developed during the course of the trial. The application to file the second amended complaint to conform to the proofs was addressed to the sound discretion of the trial court, and no abuse of that discretion is shown. No prejudicial error appears from any instruction given or refused. The jury found on sufficient evidence that it was the intention of the plaintiffs to pass the title to the goods at the time the tender was made.

The defendant had the opportunity at the time of rejecting the tender to specify all of the objections which it did not then specify but which it later insisted upon. If those objections had been made at the opportune time, they were of such a character that they could have been obviated by the plaintiffs as contemplated by the statute. Since they were not so made, they were waived.

The judgment is affirmed.

We concur: MYERS, C. J.; WASTE, J.; RICHARDS, J.; LAWLOR, J.; SEAWELL, J.; LENNON, J.

195 Cal. 676

HARNETT v. SACRAMENTO COUNTY et al.
(Sac. 3651.)

(Supreme Court of California. March 27, 1925.)

1. Elections —Electors have equal weight in exercising right of suffrage.

That electors have equal weight in exercising the right of suffrage is cardinal principle of representative government.

2. Statutes 89—Equality of representation required by statute, enacted under constitutional authority, is fundamental requirement of form of government prevailing in state.

Equality of representation required by Pol. Code, § 4029, is fundamental requirement of form of government prevailing in state, and enactment of such section is exercise by Legislature of power conferred by Const. art. 11, § 4.

3. Statutes 89—Practical equality in population in supervisorial districts is not purely local matter.

Practical equality of population in supervisorial districts is not a purely local matter; it being a vital part of government established in counties, which must be adhered to if consistency in form is to be maintained throughout state.

4. Statutes 89—Alteration of any material component part of governmental system in any one county constitutes deviation from uniform system established for counties.

Fact that Const. art. 4, § 1, reserving initiative powers to electors of counties, itself applies to all counties, does not in itself satisfy requirements of article 11, § 4, as to uniformity, since latter section requires establishment by Legislature of system of county government applicable throughout entire state, and alteration of any material component part of system would constitute deviation from uniform system.

5. Statutes 89—Reservation of initiative powers to electors of counties does not authorize legislation in contravention of statute requiring establishment of uniform system of government.

Since Const. art. 4, § 1, reserving initiative powers to electors, and article 11, § 4, provid-

ing Legislature shall establish uniform system of county government, may be harmonized without restricting operation of either, reservation of initiative power to electors of counties does not authorize legislation by them in contravention of Pol. Code, § 4029, passed under authority of article 11, § 4.

6. Statutes ☞89—Electors of county acquire by initiative amendment no greater powers than board of supervisors possess as to matters within statute under uniform government provision of Constitution.

When Legislature has enacted statutes, under constitutional authority to establish uniformity throughout state, electors of county acquire, by Const. art. 4, § 1, no greater powers than board of supervisors possess as to matters within Pol. Code, § 4029, enacted under article 11, § 4, to establish uniform system of county government.

7. Counties ☞18—Valid ordinance creating supervisorial districts not rendered invalid by subsequent inequalities of population.

If supervisorial districts were practically equal when ordinance creating them was passed, subsequent inequalities, resulting from movement of population, would not render ordinance invalid.

8. Counties ☞18—Necessity of redistricting county to avoid present inequalities did not justify proposed ordinance which itself provided for gross inequalities.

Notwithstanding proposed initiative ordinance redistricting county would result in less inequality in population, and that county should be redistricted so as to avoid present inequalities, it could not justify ordinance which itself provided for gross inequalities.

9. Constitutional law ☞70(1)—Passage of legislative act not enjoined solely on ground that it will be void.

Courts will not enjoin passage of legislative act solely on ground that it will be void.

10. Injunction ☞80—Generally courts will not interfere with holding of valid election, where prescribed forms have been complied with.

Generally courts will not interfere with holding election when it is provided for by valid law, and forms prescribed have been complied with.

11. Counties ☞196(3)—Taxpayer may sue to enjoin holding election on ground that it would be useless expenditure of public money.

In view of Code Civ. Proc. § 526a, where it is proposed to hold election for submission of measure to popular vote, which would be inoperative if adopted, court may, in suit by resident taxpayer, enjoin election because it will be useless expenditure and waste of public money.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Charles E. Harnett against the County of Sacramento and others. Judgment

for plaintiff, and defendants appeal. Affirmed.

J. J. Henderson, Dist. Atty., Ben P. Tabor, Asst. Dist. Atty., Theo. W. Chester and J. M. Inman, all of Sacramento, for appellants.

Hughes, Bradford, Cross & Prior, of Sacramento, for respondent.

LENNON, J. Defendants appeal from a judgment enjoining and restraining them from submitting to the electors of the county of Sacramento a measure proposed by initiative petition under the provisions of article 4, § 1, of the Constitution of the state of California. The purpose of the measure is to change the boundaries of three of the five supervisorial districts of the county of Sacramento, leaving the remaining two districts as they now stand.

Judgment was rendered upon the pleadings. From the complaint it appears that the population of Sacramento county is distributed among the five proposed supervisorial districts as follows: District No. 1, 35,187; district No. 2, 34,500; district No. 3, 29,583; district No. 4, 17,877; district No. 5, 11,712. The plaintiff, who is a resident, taxpayer, and qualified elector of proposed supervisorial district No. 2, contends, and the trial court held, that the contemplated election would be a waste of the public money of the county of Sacramento and an improper and illegal expenditure thereof, for the reason that, even if the initiative proposition sought to be submitted at such election were adopted by the electors it would be a nullity, because it would constitute a violation of section 4029 of the Political Code, which provides that:

"The board of supervisors may, by a two-thirds vote of the members of said board, change the boundaries of any or all of the supervisorial districts of a county. Said districts shall be as nearly equal in population as may be. * * *

Article 4, § 1, of the California Constitution, by virtue of which it is sought to submit the proposed ordinance to the electors, after reserving to the people of the state the power to propose laws and amendments to the Constitution, and to reject any act enacted by the Legislature, provides:

"The initiative and referendum powers of the people are hereby further reserved to the electors of each county, city and county, city and town of the state, to be exercised under such procedure as may be provided by law. * * * In the submission to the electors of any measure under this section, all officers shall be guided by the general laws of this state, except as is herein otherwise provided. This section is self-executing, but legislation may be enacted to facilitate its operation, but in no way limiting or restricting either the provisions of this section or the powers herein reserved."

Placing reliance upon this constitutional provision, defendants urge that the state Legislature is without power to limit or restrict the initiative power thus reserved to the people of the various counties, cities, and towns of the state, and therefore that section 4029 of the Political Code, above referred to, has no application to the initiative proposition here under consideration.

[1-6] That electors shall have equal weight in exercising the right of suffrage is a cardinal principle of representative government. *State v. Hitchcock*, 241 Mo. 433, 146 S. W. 40, 64. The matter of equality of representation was regarded as so much a principle of our American system of free government that an unequal division of a county into commissioner districts was held to be void, even where no statute specifically required an even division. *State v. Moorhead*, 99 Neb. 527, 156 N. W. 1067. The equality of representation required by section 4029 of the Political Code is a fundamental requirement of the form of government prevailing in this state, and the enactment of that section of the Code is plainly an exercise by the state Legislature of the power conferred on it by article 11, § 4, of the Constitution, which provides: "The Legislature shall establish a system of county governments, which shall be uniform throughout the state." Practical equality of population in the supervisorial districts is not a purely local matter. It is a vital part of the structure of government which has been established in the counties, and must be adhered to if consistency in form is to be maintained throughout the state. It cannot be said, as contended by defendants, that the fact that article 4, § 1, of the Constitution, reserving initiative powers to the electors of the counties, itself applies alike to all counties, is sufficient to satisfy the requirements of article 11, § 4, as to uniformity, for the latter section requires the establishment by the Legislature of a system of county government applicable throughout the entire state; and the alteration of any material component part of this system in any one or more counties by the electors thereof would constitute a deviation from the uniform system originated by the state Legislature, and contemplated and commanded by article 11, § 4. Since article 4, § 1, and article 11, § 4, of the Constitution may be harmonized without unduly restricting the operation of either, and since there is a total absence of any indication to the contrary in the Constitution, we conclude that the reservation of the initiative power to the electors of the counties does not authorize any legislation by the electors of a county in contravention of any statute passed by the state Legislature under the authority of that section of the Constitution requiring the establishment of a uniform system of county governments, and that section 4029, Political Code, is a statute within the section last men-

tioned. Nothing stated in the case of *Hill v. Board of Supervisors*, 176 Cal. 84, 167 P. 514, is contrary to this conclusion, for the court was there considering the right of the county electors directly to adopt or reject an ordinance passed by the board of supervisors which was unquestionably within the legislative powers of the board. Likewise this conclusion is not in conflict with the cases of *Coulter v. Pool*, 187 Cal. 181, 201 P. 120, and *Scheafer v. Herman*, 172 Cal. 338, 155 P. 1084, for sections 7½ and 8 of article 11, which those cases discuss, expressly provide that sections 4 and 5 of article 11 shall not be operative as to counties and municipalities which adopt charters in accordance with sections 7½ and 8, mentioned above. It is pointed out by defendants that section 4029, Political Code, does not mention the electors of the county, but refers only to the board of supervisors. This fact is immaterial. For the reasons previously stated, when the state Legislature has enacted statutes under its constitutional authority to establish a system of county governments uniform throughout the state, the electors of a county acquire, by virtue of article 4, § 1, of the Constitution, no greater powers than the board of supervisors possess as to the matters within the terms of those particular statutes.

[7, 8] Defendants' answer sets forth the fact that, under the ordinance now in force, the population of Sacramento county is distributed among five supervisorial districts, as follows: District No. 1, 18,966; district No. 2, 19,071; district No. 3, 61,233; district No. 4, 17,877; and district No. 5, 11,712. It is therefore contended that the ordinance now in force is invalid by reason of inequality in population, and that "courts will not declare a legislative apportionment act unconstitutional when there is no prior valid apportionment act to fall back on." *State v. Schnitger*, 16 Wyo. 479, 95 P. 698. The invalidity of the ordinance now in force will not be presumed. It does not appear, from evidence or allegations, when this ordinance was passed, or whether the districts now in existence were unequal in population at that time. If the districts were practically equal in population when the ordinance was passed, subsequent inequalities, resulting from movement of population, would not render the ordinance invalid. While it is true that the proposed ordinance would result in less inequality than now exists, and that the county should be redistricted so as to avoid present inequalities, this cannot justify the proposed ordinance, which itself provides for gross inequalities.

There is also a contention that the ordinance proposes a mere change of boundaries between existing districts and not a redistricting of the county. We believe that the ordinance is in form a complete redistricting, notwithstanding the fact that it does not change the boundaries of two of the five dis-

tricts. It makes important alterations as to districts now known as 1, 2, and 3, and thus alters the situation of districts 4 and 5 with respect to each of the other districts in the county. We are the more inclined to this view when we consider that the proposed ordinance does not provide that the board of supervisors may amend it, and therefore, if adopted, would put it beyond the power of the board to change the boundaries of districts 4 and 5 as well as of the other districts. Const. art. 4, § 1.

[9-11] In addition to defendants' petition for a hearing in this court, there was filed a petition by an amicus curiæ, raising the point that an injunction cannot issue to restrain a legislative act. It is true that courts will not enjoin the passage of an act by the legislative body solely upon the ground that it will be a void enactment, nor as a general rule will they interfere with the holding of an election when the election is provided for by a valid law, and the forms prescribed by that law have been complied with by the authorities. Nevertheless, there are exceptions to these rules. For example, in the case of *Felt v. Waughop*, 225 P. 862, this court interfered to the extent of requiring the omission of the name of a candidate from a ballot, notwithstanding that all prescribed forms had been adequately observed, where it appeared that the candidate would be ineligible to hold office even if elected. Where it is proposed to hold an election for the submission of a measure to the popular vote, and that measure will be wholly void and inoperative even if adopted by the people, the courts may, at the instance of a resident taxpayer, enjoin the holding of the election upon the ground that it will be a useless expenditure and waste of public funds. Code Civ. Proc. § 526a. There is no other adequate remedy for the protection of the rights of the taxpayers in such a situation, and political rights are not curtailed. The present situation obviously merits the relief sought.

The judgment is affirmed.

We concur: MYERS, C. J.; SHENK, J.; RICHARDS, J.; WASTE, J.; SEAWELL, J.; LAWLOR, J.

195 Cal. 672

MYERS v. STRINGHAM et al. (S. F. 11548.)

(Supreme Court of California. March 26, 1925.)

1. Municipal corporations ⚡11(1)—**Ordinance adopted under initiative provision of charter must be such as might legally be adopted by council.**

Where, under initiative provisions of Berkeley city charter, proposed ordinance must first be submitted to council, and may thereafter be submitted to electors in event council refuses

to adopt it, ordinance, which may be adopted under initiative provision, must be such as council could adopt.

2. Municipal corporations ⚡114—**Proposed amendatory ordinance held not to conform to charter requirements.**

Where proposed ordinance under initiative provisions of Berkeley city charter was in effect amendment to section of existing ordinance by adding a subsection, and section itself was not set forth, it was void as not conforming to requirement of charter.

3. Mandamus ⚡16(1)—**Mandamus will not lie to compel examination and certification of proposed ordinance which if passed would be ineffective.**

If proposed ordinance would be void, mandamus will not lie to compel city clerk to examine and certify it under initiative provisions of Berkeley city charter, as writ may not be used to compel performance of act which would have no effect in law.

In Bank.

Original application for writ of mandate by Alfred Myers against Frank D. Stringham and others as members of the City Council of the City of Berkeley and another. Peremptory writ denied, and alternative writ discharged.

Frank V. Cornish, of Berkeley, for petitioner.

E. J. Sinclair, of Berkeley, and James M. Koford, of Oakland, for respondents.

PER CURIAM. The petitioner seeks a writ of mandate to compel the city clerk of the city of Berkeley to examine and certify as sufficient a petition prepared and presented under the initiative provisions of the city charter; also to compel the city council to adopt a proposed ordinance set forth in the petition, or, in the event the proposed ordinance be not adopted, to submit the same to a vote of the electors of the city as provided by law. The proposed ordinance purports to amend Ordinance No. 666, N. S., which is the city's general zoning ordinance, by adding a new subsection to section 3, to be known as subsection (a-59), and by repealing subsection 30 of section 7 of said ordinance. The purpose of the amendment, as shown by the petition herein, is to reclassify certain property on Dwight way near Grove street. Section 1 of the proposed ordinance provides:

"That Ordinance No. 666, N. S., entitled 'An ordinance regulating and districting the location of residences, trades, industries, businesses and the several classes of public and semipublic buildings, and the location of buildings designed for specified uses, and establishing the boundaries of districts for the said purposes, and repealing certain existing ordinances or portions thereof,' be and the same is hereby amended by adding thereto a new subsection to

section 3 to be known as subsection (a-59) to read as follows: Subsection (a-59). Beginning at the point of intersection of the western line of Grove street and the southern line of Dwight way, running thence westerly along said southern line of Dwight way one hundred and fifteen (115) feet; thence one hundred twenty-nine and $\frac{69}{100}$ (129.69) feet southerly parallel with said western line of Grove street; thence easterly one hundred and fifteen (115) feet to said western line of Grove street; thence northerly along said western line of Grove street to the place of beginning; also beginning at the point of intersection of the western line of Grove street and the northern line of Dwight way, running thence westerly along said northern line of Dwight way one hundred thirteen and $\frac{60}{100}$ (113.60) feet; thence northerly one hundred thirty-four and $\frac{80}{100}$ (134.80) feet parallel to said western line of Grove street; thence easterly one hundred thirty-eight and $\frac{83}{100}$ (138.83) feet parallel to said northern line of Dwight way to the said western line of Grove street; thence southerly along said western line of Grove street to the place of beginning."

Section 2 of the proposed ordinance provides:

"Subsection 30 section 7 of said Ordinance No. 666 N. S. is hereby repealed."

The respondent city clerk refuses to examine the petition for the reason, among others, that—

"The proposed ordinance attempts to amend the existing ordinance (666, N. S.) by amending a section or portion of section without setting forth the section in full as provided by article 8 of the charter of the city of Berkeley."

[1] Subsection 10 of section 44 of article 8 of the Charter reads as follows:

"No ordinance shall be revised, re-enacted or amended by reference to its title only; but the ordinance to be revised or re-enacted, or the section or sections thereof to be amended, or the new section or sections to be added thereto, shall be set forth and adopted in the method provided in this section for the adoption of ordinances." Stats. 1909, p. 1229.

Section 44 of the Charter, it is true, purports to govern the action of the city council as the legislative body of the city, and does not purport in terms to govern legislation by the initiative. But under the initiative provisions of the charter the proposed ordinance must first be submitted to the council for its adoption or rejection, and may thereafter be submitted to the electors of the city only in the event the council refuses to adopt it.

Under such circumstances any ordinance which may be adopted under the initiative provisions of the charter must be such an ordinance as might properly and legally be adopted by the council itself. *State v. Reno City Council*, 36 Nev. 334, 136 P. 110, 50 L. R. A. (N. S.) 195.

[2] The proposed ordinance is not in conformity with the requirements of the charter. In effect it is an amendment of a section of the ordinance by adding a subsection and the section itself is not set forth as prescribed. The purpose of the charter provision is plain. It is to compel an ordinance to disclose on its face something of its purpose and effect as a legislative enactment. The wisdom of the requirement is at once apparent from an inspection of the proposed ordinance. The new subsection sought to be added to the section by amendment is no more than a description of certain real property. It does not purport to disclose what the effect of its adoption would be, either on the status of the particular property described, or on its relation to the general zoning classifications in the city. Considered in and by itself, it is unintelligible and meaningless. It cannot be determined from its inspection what is sought to be accomplished. If the petition were examined and certified, and the proposed ordinance were submitted to the council for adoption, and were passed by that body, it is obvious that it would not constitute a valid enactment, because it is not in form in accordance with the requirements of the charter. If the council should refuse to adopt the proposed ordinance and were required to submit it to a vote of the electors of the city, and the requisite number of votes were to be cast in favor thereof, it would still lack the sanction of the charter to give it legality.

[3] If, in any event, the proposed ordinance would be void, mandamus will not lie to compel its examination and certification, for the reason that the writ may not be used to compel the performance of an act which would have no effect in law. *Wilson v. Blake*, 169 Cal. 449, 147 P. 129, Ann. Cas. 1916D, 205; *Hyde v. Wilde*, 51 Cal. App. 82, 196 P. 118; 16 Cal. Jur. 777, and cases cited.

Other points are made in opposition to the issuance of the peremptory writ, but the foregoing discussion and determination renders it unnecessary to consider them.

The peremptory writ is denied, and the alternative writ is discharged.

195 Cal. 680

**GALVIN et al. v. BOARD OF SUP'RS OF
CONTRA COSTA COUNTY et al.**
(S. F. 11326.)

(Supreme Court of California. April 2, 1925.)

1. Statutes $\S$ 35 $\frac{1}{2}$ —Initiative amendments interpreted as providing for same general scope and nature of power reserved to people at large and people of particular locality and same general method for its exercise.

Provisions of Const. art. 4, $\S$ 1, reserving to people powers of initiative and referendum, in so far as they relate to initiative, provide for same general scope and nature of power reserved, respectively, to people of state at large and to people of particular locality and to same general method for its exercise.

2. Statutes $\S$ 35 $\frac{1}{2}$ —Initiative amendment held not to reserve to particular locality greater right to initiate local legislation than that provided for in respect to enactment by that means of state legislation.

Const. art. 4, $\S$ 1, providing for exercise of initiative by local divisions of state government, did not reserve to people of particular localities greater right to initiate local legislation or give other and greater powers in that regard than those possessed by people of state at large, or provide or permit different method for exercise of such powers than that provided for in respect to enactment by that means of state legislation.

3. Counties $\S$ 55—Initiative ordinances, before being submitted to people of county, must first be submitted to board of supervisors for legislative action.

In view of Pol. Code, $\S$ 4058, and Const. art. 4, $\S$ 1, initiative ordinance, before being submitted to people of county for adoption or rejection, must first be submitted to board of supervisors for its legislative action.

4. Constitutional law $\S$ 15—Initiative amendment interpreted in harmony with other organic law of state.

Initiative amendment (Const. art. 4, $\S$ 1), must be interpreted in harmony with other provisions of organic law of state of which it is a part.

5. Counties $\S$ 55—Counties inhibited from adopting local laws in conflict with general laws.

Const. art. 11, $\S$ 11, providing that counties may make and enforce such laws within its limits as are not in conflict with general laws, is inhibition against making laws in conflict with general laws.

6. Counties $\S$ 55—Grant of power to Legislature to enact general and uniform laws is limitation on power of counties to enact ordinances which would destroy uniformity Legislature is required to maintain.

Grant of power to Legislature by Const. art. 11, $\S\S$ 4, 5, to enact general and uniform laws, constitutes in itself limitation on power of counties, whether acting through legislative body or through initiative legislation, to adopt ordinances or regulations which would destroy

uniformity as to matters which Legislature by general and uniform laws is required to create and maintain.

7. Counties $\S$ 55—Legislation submitted by initiative to people of county must be such as supervisors had jurisdiction and power to enact.

Since legislation by electors of counties must first be submitted to board of supervisors for its enactment, it must be such legislation only as supervisors, under Constitution and laws granting, defining, and limiting powers of that body, had jurisdiction and power to enact.

8. Counties $\S$ 55—Board of supervisors, having no jurisdiction to enact ordinance granting franchise for toll bridge across navigable waters between counties, could not submit it to initiative vote of people.

In view of Pol. Code, $\S\S$ 2843-2881, and section 4041, subd. 35, where, until notice of proposed application for franchise for toll bridge across navigable waters, defining boundaries of counties, had been given as required by section 2870, and until hearing has been had thereon under section 2871, and county engineer has acted thereon under St. 1881, p. 76, $\S\S$ 4, 5, board of supervisors had no jurisdiction to enact ordinance granting franchise, it could neither proceed to enact ordinance nor submit it to vote of people.

In Bank.

Original mandamus by John F. Galvin and another against the Board of Supervisors of Contra Costa County and others. Writ denied.

Brittain & Weise, of San Francisco, for petitioners.

Archibald B. Tinning, of Martinez, for defendants.

J. E. Rodgers and A. F. Bray, both of Martinez, amici curiæ, for American Toll Bridge Co.

RICHARDS, J. The petitioners herein apply for a writ of mandate to be directed to the board of supervisors of the county of Contra Costa and the individual members of said board, the respondents herein, commanding them in their said official capacity to submit to a vote of the electors of said county, at a general or special election, a proposed initiative ordinance, a copy of which is attached to said petition, under and pursuant to the provisions of section 1 of article 4 of the state Constitution relating to initiative legislation, and of section 4058 of the Political Code. By the terms of the said ordinance, which accompanies said petition, it is proposed that there be granted to the Northern California Development Company, a corporation, and one of the petitioners herein, a franchise to construct, erect and maintain a toll bridge across the Straits of Carquinez between the county of Contra Costa and the county of Solano, and to take tolls thereon according to a schedule for such tolls

as provided in said proposed ordinance, and which also provides for the location and details of the construction and maintenance of said bridge and for the term of said franchise. The petitioners allege that, having submitted said ordinance and franchise to the said board of supervisors of the county of Contra Costa for enactment or for submission to the electors of said county for their adoption or rejection in an initiative election, at a regular meeting of said board, it and the members thereof have refused to either enact the same or to submit the same to the said electors of said county for their vote thereon; wherefore they apply for this writ. The respondents herein have appeared and demurred to said application, and, while they have also filed an answer herein, denying certain of the averments therein contained, they have, upon the hearing, submitted the cause upon said demurrer and upon the issues of law presented thereby, and to these we shall therefore address ourselves in this decision.

[1-3] The provisions of the state Constitution, under which the petitioners herein assert the right to initiate the legislation embraced in the ordinance in question, and to have the same submitted to the electors of the county of Contra Costa for their adoption or rejection at an initiative election, is that embodied in the amendment to the Constitution adopted in the year 1911, purporting to amend section 1 of article 4 thereof, so as to reserve to the people those powers of legislation which are known as the "initiative and referendum." The provisions thereof applicable to the first of these reserved powers cover the power to initiate amendments to the Constitution, state legislation, and local legislation. These provisions of said amendment to the Constitution, in so far as they relate to the initiative, are to be read together and are to be interpreted as providing for the same general scope and nature of the power reserved respectively to the people of the state at large and to the people of the particular locality, and to the same general method for its exercise. It was held by this court with respect to the referendum clauses of said amendment in the case of *Hopping v. Council of the City of Richmond*, 170 Cal. 605, 609, 150 P. 977, and a like principle of interpretation equally applies to the initiative clauses thereof. When so read and so interpreted it must be concluded that it was not the intention of the framers of the particular portion of said amendment providing for the exercise of the initiative by local divisions of the state government through the use of the more brief and general phrasing thereof to reserve to the people of such particular localities a greater right to initiate local legislation or to reserve or give other or greater powers in that regard than those possessed by the people of the state at large, or

to provide for or permit a different method for the exercise of such powers than that specifically provided for in respect to the enactment by that means of state legislation. We are thus led to the conclusion that, when the framers of this amendment provided therein that proposed initiative legislation in regard to matters of general concern should first be submitted to the state Legislature for enactment before being presented to the people of the state for adoption or rejection at the next ensuing general election, they intended that a like procedure should obtain in the use of the initiative by particular communities in matters of local concern, and that the method and procedure for submission in each case should be substantially the same. The Legislature so interpreted these initiative provisions of the Constitution in the enactment of section 4058 of the Political Code, in the same year in which the said amendment to the Constitution was adopted, and at the session thereof immediately following its adoption. It is this section of the Political Code upon which the petitioners expressly depend for their procedure and with the terms of which they allege themselves to have complied in all the preliminary steps taken for the initiation of the ordinance in question, which they are seeking by this application to compel the board of supervisors of the county of Contra Costa to submit to the electors thereof at an initiative election to be called and held as in said section provided. Section 4057 of the Political Code provides the procedure for the enactment of ordinances directly by boards of supervisors. Section 4058 of said Code provides that—

"Ordinances may also be enacted by and for any county of the state in the manner following."

Then follows the procedure for initiative legislation in compliance with which the signatures of a petition or petitions by the qualified electors of a county to the number of a certain percentage thereof, properly verified, requesting the adoption or submission to the people of the proposed legislation, are to be procured; and which petition or petitions, when signed and certified, shall be presented to the clerk of the county for his examination and certification as to the sufficiency in number and qualifications of the electors signing the same, and which petition or petitions, when so found to be sufficient, and when so certified by said official, shall by him be submitted to the board of supervisors of the county at the next regular session of said board. This being done, the section proceeds to provide that—

"The board of supervisors shall either: (a) Pass such ordinance without alteration at the regular session at which it is presented and within ten days after it is presented; or (b) forthwith the supervisors shall proceed to call

a special election at which such ordinance, without alteration, shall be submitted to a vote of the electors of the county."

The section also provides for certain contingencies upon which the ordinance may be submitted to the electors of the county at the next general election.

[4, 5] It thus far appears that, under the intendment of the initiative amendment to the state Constitution in its application to local legislation, as well as under the express provisions of section 4058 of the Political Code, enacted in order to give effect thereto, initiative ordinances, before being submitted to the people of a county for their adoption or rejection, must first be submitted to the board of supervisors for legislative action in the way of adoption or rejection by said board. This being so, it would seem to follow of necessity that the proposed ordinance must be in the nature of such legislation as the board of supervisors has power to enact. It was in fact so held by this court in the case of *Giddings v. Board of Trustees*, 165 Cal. 695, 133 P. 479, in interpreting the act entitled "An act to provide for direct legislation by cities and towns, etc.," approved January 2, 1912 (St. Ex. Sess. 1911, p. 131), and which in its general terms coincides with the provisions of section 4058 of the Political Code. See, also, *Matter of Ellsworth*, 165 Cal. 677, 686, 133 P. 272. In determining, therefore, whether the petitioners herein, in the course of their effort to have the ordinance in question submitted to the electors of the county of Contra Costa for their approval or rejection at a general or special election, had the right to request that the board of supervisors should themselves enact without any change the proposed measure, and, to have such request granted, we must look elsewhere than to the petition embodying such request. We must look to the Constitution and laws of the state which contain, define, and limit the powers of boards of supervisors of counties such as the county of Contra Costa is. The initiative amendment to the Constitution itself must be interpreted in harmony with the other provisions of the organic law of this state, of which it has become a part. To construe it otherwise would be to break down and destroy the barriers and limitations which the Constitution read as a whole, has cast about legislation, both state and local. For example, the Constitution provides in section 11, of article 11 thereof, that—

"Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

[6] This provision of the Constitution constitutes an inhibition against the adoption by counties, whether acting by means of the initiative or otherwise, of local laws and ordinances which are in conflict with general

laws; and it was clearly not the intendment of the framers of the initiative amendment or of the people who adopted it to wipe out this salutary provision of the Constitution. Again, the Constitution, in sections 4 and 5 of article 11 thereof, provides as follows:

"Sec. 4. The Legislature shall establish a system of county governments, which shall be uniform throughout the state; and by general laws shall provide for township organizations, under which any county may organize whenever a majority of the qualified electors of such county, voting at a general election, shall so determine; and whenever a county shall adopt township organization, the assessment and collection of the revenue shall be made, and the business of such county and the local affairs of the several townships therein shall be managed and transacted, in the manner prescribed by such general laws.

"Sec. 5. The Legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, township, and municipal officers as public convenience may require, and shall prescribe their duties and fix their terms of office."

[7, 8] This grant of power to the Legislature to enact general and uniform laws relating to the matters referred to in the foregoing clauses of the Constitution constitutes in itself a limitation upon the power of counties, whether acting through their regularly constituted legislative bodies, or attempting to act directly through initiative legislation, to adopt ordinances or regulations which would have the effect of destroying the uniformity in regard to such matters which the state Legislature, by the enactment of general and uniform laws, was required to create and maintain. In the case of *Harnett v. Sacramento County*, 235 P. 445, just decided by this court, it was held that section 1 of article 4 of the Constitution, referring to the initiative powers reserved to the electors of counties, could not be held to authorize initiative legislation on the part of the electors of a county in contravention of an enactment of the state Legislature under the authority of the foregoing provisions of the Constitution, providing for the creation and maintenance of a uniform system of county governments. A like principle applies to the initiation generally of local legislation. Since such legislation by the electors of counties must first be submitted to the board of supervisors for its enactment, it follows that it must be such legislation only as the board of supervisors, under the Constitution and laws of the state granting, defining, and limiting the powers of that body, has jurisdiction and power to enact. *Myers v. Stringham* (Cal. Sup.) 235 P. 448 (March 26, 1925). In applying this principle to the immediate matter before us, we find that the proposed initiative ordinance, which the petitioners herein have requested the board of supervisors of the coun-

ty of Contra Costa to enact or to submit to the electors of said county for their action thereon, is an ordinance granting a franchise to one of said petitioners for the erection and maintenance of a toll bridge across the navigable waters of the Carquinez straits, which form the boundary line between the counties of Contra Costa and Solano. The power of the board of supervisors with relation to the grant of franchises of this character are set forth in part 3, tit. 6, c. 4, of the Political Code, and in the sections thereof between 2843 and 2881, inclusive, and also in subdivision 35 of section 4041 of said Code. By the last-named section the general permanent powers of boards of supervisors are defined. It is therein provided:

"4041. The boards of supervisors, in their respective counties shall have jurisdiction and power, under such limitations and restrictions as are prescribed by law: * * *

"35. To grant licenses and franchises for the construction, keeping and taking tolls on roads, bridges, ferries, wharves, chutes, booms and piers, and to grant franchises along and over the public roads and highways for all lawful purposes, upon such terms and conditions and restrictions as in their judgment may be necessary and proper, and in such manner as to prevent the least possible obstruction and inconvenience to the traveling public."

Section 2843 of said Code provides:

"When authority to construct a toll bridge, or to erect and keep a ferry over waters dividing two counties is desired, application must be made to the board of supervisors of that county situated on the left bank descending such bay, river, creek, slough, or arm of the sea."

Section 2844 places the limitations upon the grant of power embraced in the above-quoted provisions thereof which are therein referred to, viz.:

"The board of supervisors must not grant authority to construct or erect a toll bridge or ferry until the notice of such intended application has been given as respectively required in articles two and three of this chapter."

The sections of said Code, embraced in articles 2 and 3 of the chapter thus referred to, define these limitations. Section 2870 provides that:

"Every applicant for authority to construct a toll bridge must publish a notice in at least one newspaper in each county in which the bridge or any part of it is to be, or if no paper is published therein, in an adjoining county, once in each week for six successive weeks, specifying the location, the length, and breadth of the bridge, and the time at which the application hereinafter required will be made. After notice is given, application must be made to the board of supervisors of the proper county, at any meeting specified in the notice, for authority to construct it."

Section 2871 provides for a hearing before said board after the giving of the notice

required by the previous section. It reads as follows:

"On the hearing, any person may appear and be heard. The board may take testimony or authorize it to be taken by any judicial officer of the county, and it may adjourn the hearing from time to time. A copy of the articles of incorporation, certified by the secretary of state, or by the clerk where they are filed, must be attached to and filed with the application if made by a corporation."

Section 2854 of said Code provides:

"The owner of land on either side of the waters to be crossed, and the owner of the land on the left bank descending over the owner of land on the right bank, is entitled to preference in procuring authority to construct a bridge or ferry; but where such owner fails or neglects to apply for such authority within a reasonable time after the necessity therefor arises, the board of supervisors may grant such authority to another."

Section 2875 of said Code contains the following provision:

"All bridges constructed under this chapter crossing navigable streams must be so constructed as not to obstruct navigation, and must have a draw or swing of sufficient space or span to permit the safe, convenient, and expeditious passage at all times of any steamer, vessel, or raft which may navigate the stream or water bridge."

The foregoing provisions of the Political Code were enacted upon its adoption in the year 1872. In the year 1881 the state Legislature adopted a general law entitled "An act to provide for bridges across navigable streams, and across estuaries, ponds, swamps, or arms of bays that may be outside of the line of navigable waters," which act is still in full force and effect. Stats. 1881, p. 76. By section 4 of said act it is provided:

"Whenever the supervisors of any county, or counties, desire to erect a bridge on any public highway, or to grant the privilege so to do to any individual or corporation, across a navigable stream, under the provisions of this act, said board or boards shall notify the state engineer of such purpose, and of the precise point where such bridge is proposed to be located. The state engineer shall, within ten days of the receipt of such notice, designate the width of the draw to be made in such bridge, and also the length of the spans necessary to permit the free flow of water."

Section 5 thereof further provides:

"The communication from the state engineer, fixing the draw and spans, shall be spread upon the minutes of the board, and any bridge constructed at that point shall be in conformity therewith; provided, however, that the state engineer may, upon hearing before him, had upon application of any person or body interested, made within ten days after the receipt by said board of supervisors, of said communication of said engineer, change his first plans, in which case the modified plans must be so spread upon the minutes, and shall stand in

place of the original; provided, however, that before such hearing is had, the said engineer must give ten days' notice by publication in some newspaper published in the county or counties from which the application came, of the time and place of the hearing."

The foregoing provisions of the Political Code and of the general law, above quoted, define and limit the powers of the board of supervisors of the county of Contra Costa in the matter of enacting legislation granting franchises for the erection and maintenance of toll bridges across the navigable waters which form the boundary line between said county and the county of Solano, and provide expressly and exclusively for the procedure which must precede such grant. Until the notice of the proposed application for such franchise has been given as required by section 2870 of said Code, and until a hearing has been had thereon as provided in section 2871 thereof, and until the state engineer has been notified of the purpose of the board of supervisors to make such grant, and has acted thereon in the manner and to the extent provided in the sections of the act of 1881 above referred to, the board of supervisors of the county of Contra Costa have neither jurisdiction nor power to enact any ordinance purporting to grant a franchise for a toll bridge across said navigable waters and between the counties whose contiguous boundaries are defined thereby. It is not shown or claimed by the petitioners herein that the notices required by the foregoing sections of the Political Code or of the general law above referred to have been given, or that in pursuance thereof any such hearing as is therein provided for has been held, or that the state engineer has acted in regard to those matters wherein, by the statute of 1881, his action prior to the grant of the proposed franchise is required, nor are we referred to any authority which would sustain a holding that the giving of such notices, the holding of such hearing, and the notification to and action of the state engineer as to the matters wherein his action is required by said statute, are not jurisdictional prerequisites to the exercise by said board of the power to enact legislation granting said franchise.

The two contentions which the petitioners make in that regard are: First, that these are merely administrative acts on the part of said board, not jurisdictional in their character or requirement. We are unable to approve this contention. It is true that under the terms of section 2843 of the Political Code the board of supervisors of the county upon the left bank of the stream or straits, descending, which is to be spanned by the toll bridge in question, is given preference in the matter of the initiation and enactment of the legislation embracing the grant of a franchise therefor, but the officials, the electors, the residents, and property owners of the adjoining county are also vitally interested

in the matter of granting or refusing to grant such franchise and in the terms and conditions of such grant. The owners of the land on each bank of the waters, at the points thereon where the structure is to be placed, are also vitally interested in the question as to whether such franchise should be granted, and are entitled to notice of the application therefor, to the end that they may have an opportunity to exercise the preferences on the matter of awarding such franchise which is accorded to them by the terms of section 2854 of said Code, or, in case they do not see fit to exercise such preference, to resist, if they are so advised, the granting of a franchise for a structure, the erection of which would compel the transfer or condemnation of the respective holdings. The requirement of notice to the state engineer is equally vital, since the state at large is interested in the construction of bridges across its navigable waters. The second contention of the petitioners, as to the jurisdictional necessity of the notices and hearings above referred, is that as to the notices the initiative ordinance is a substitute for these in the opportunity afforded to the people to vote upon the passage of the ordinance. This, however, is not the fact as to either the people upon the right bank of the strait, nor is it true as to the notice required to be given to the state engineer. As to the latter, the petitioners insist that, in providing for the subsequent approval by the state engineer, of the details of construction of the bridge, this requirement of the statute is satisfied. But this would not be so, for the double reason that the vital requirements of a statute cannot be dispensed with by any sort of substitution, and that the subsequent action of the state engineer, even if allowable, would or might so change the substantial form of the structure as to require the construction of such a bridge as the grantee of the franchise would not be willing to construct, or as the electors would not have been willing to approve. Other reasons might well be suggested, showing that the foregoing prerequisites to action on the part of the board of supervisors of said county, in either adopting an ordinance purporting to grant such a franchise as the petitioners herein are seeking, or in submitting to the electors of their county at an initiative election the question as to whether such franchise should be granted or denied, are jurisdictional, and that, in the absence of a showing that these prerequisites to the exercise of such power have been complied with, the board of supervisors have no power to take either course of action in the premises. The conclusions thus far arrived at render unnecessary a consideration of the question as to whether the so-called Broughton Act (Stats. 1905, p. 777) is applicable to the form and content of the franchise applied for in this particular case.

For the foregoing reasons, we are of the

opinion that the application of the petitioners herein for a writ of mandate must be denied. It is so ordered.

We concur: MYERS, C. J.; LENNON, J.; SEAWELL, J.; SHENK, J.; WASTE, J.; LAWLOR, J.

71 Cal. App. 272

LOMBARDI v. SINANIDES et al.
(Civ. 2894.)

(District Court of Appeal, Third District, California. Feb. 13, 1925.)

1. Deeds ⚡25—Vendor and purchaser ⚡224—Transfer of grantor's "right, title, and interest" is in effect mere deed of quitclaim; grantee under quitclaim deed not innocent purchaser.

The conveyance of the "right, title, and interest" of grantor vests in grantee only what grantor himself could claim, and is in effect a mere deed of quitclaim, and grantee can make no defense to action for rescission by vendee under contract of sale, which was not available to the grantor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Right, Title, and Interest.]

2. Vendor and purchaser ⚡99, 118—Defaulting vendor cannot rescind; default by vendee does not prevent him from rescinding, where vendor first in default.

A vendor, who is in default, cannot terminate right of vendee until vendor has performed or offered to perform his part of contract, and, where vendor was first in default, in that he failed to deliver possession of all land, which he agreed to deliver to vendee, vendee's subsequent default does not preclude him from rescinding.

3. Vendor and purchaser ⚡118—Vendee, defaulting in payments, not precluded from rescinding on ground of alleged misrepresentations of vendor.

A vendee, in default on payments under contract of sale, is not precluded from rescinding on ground of alleged misrepresentations as to boundary line of property involved.

4. Vendor and purchaser ⚡34—Untrue statements by vendor as to boundary line, when without information or belief, constitutes "actual fraud."

Positive untrue statements of vendor as to boundary line of property, when he had no information or belief on the subject, constitutes "actual fraud," within Civ. Code, § 1572.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Actual Fraud.]

5. Contracts ⚡94(1)—Actual or constructive fraud ground for rescinding contract.

Either actual or constructive fraud is sufficient ground for rescission of contract.

6. Vendor and purchaser ⚡31—Misrepresentation as to line by vendor who did not know true line held to entitle vendee to rescission on ground of mutual mistake.

Where vendor misrepresented boundary line, but did not know true line, vendee held entitled to rescission on ground of mutual mistake.

7. Vendor and purchaser ⚡119—Vendee held not guilty of laches in giving notice of rescission.

Delay of a month by vendee in giving notice of rescission, on ground of vendor's misrepresentations as to boundary line, did not constitute laches, where it does not appear that vendor could have suffered any prejudice from such delay.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by A. Lombardi against Sinan Sinanides and W. R. Groshel, in which the last-named defendant filed a cross-complaint. Judgment for defendants, and plaintiff appeals. Reversed.

John A. Steele, of Fresno, for appellant.

T. R. Thomson and J. C. Hammel, both of Fresno, for respondents.

FINCH, P. J. December 28, 1921, the plaintiff and defendant Sinanides entered into an agreement, by the terms of which plaintiff agreed to purchase and Sinanides to sell "the north half of the east half of the west half of the southwest quarter" of a certain section of land, together with certain personal property, for \$21,000; \$2,700 was paid upon the execution of the agreement, and the remainder was to be paid in annual installments of \$1,000 on the 15th day of November of every year thereafter. Plaintiff was "to erect upon said premises a substantial four-room house and barn on or before July 1, 1922," and to pay all taxes which thereafter became a lien upon the premises. There was a mortgage on the premises in the sum of \$6,500, and the agreement provides that the "buyer agrees to assume and agrees to pay said mortgage according to the terms thereof." The agreement provided that "time is expressly made of the essence hereof," and that, upon default by plaintiff in payment of any installment of the purchase price or of taxes upon the premises or in the performance of any other covenant or condition of the agreement, the "seller may consider this agreement at an end, and may re-enter and take possession of said premises, * * * and all payments theretofore made shall be held and retained by seller as and for compensation for the reasonable use and rental of said premises." At the time of the execution of the agreement "Sinanides represented to plaintiff that defendant Sinanides was in possession of all the land described in said contract, and that he would deliver

possession of all thereof to plaintiff, subject to easements for roads and ditches," and that "a certain fence then standing near the east boundary line of said premises was the easterly boundary line thereof; whereas, in truth and in fact, the true easterly boundary line was and is approximately 39 feet east of said fence. * * * The amount of land contained in the described premises set out in said contract is 19.78 acres, according to the government description thereof. * * * The area of the strip of land lying between the true easterly boundary line of said premises" and said fence is 1.20 acres. "At the time of making said contract defendant Sinan Sinanides did not know the true boundary of said premises" and believed that the said fence was upon the true easterly boundary line. The plaintiff believed the representation that the fence was upon the true boundary line and "he would not have entered into said contract had he known that the true easterly boundary line of said premises was not as pointed out to him." Sinanides did not make such representation "with the intent to deceive or defraud plaintiff," nor did he make any representation as to the number of acres contained in the tract of land described in the agreement. He delivered to plaintiff possession of all the land so described, except the 1.20 acres lying east of said fence.

Plaintiff failed to build a barn upon the premises, but placed other permanent improvements thereon of the reasonable value of \$2,000. "Plaintiff discovered a shortage of approximately 1.25 acres in said premises on or about September 1, 1922, and made no complaint thereof to either of the defendants prior to December 29, 1922, and then only to defendant Sinan Sinanides." Thereafter "plaintiff harvested from said premises a crop of raisins during the year 1922 of the reasonable value of \$1,602.48" and, while in possession of the premises, performed labor "in connection with producing a crop of raisins thereon" of the reasonable value of \$741. He "did not discover or ascertain the correct easterly boundary line of said premises until on or about December 1, 1922." December 29, 1922, plaintiff served upon Sinanides a written notice of rescission of the agreement, stating that the strip of land lying between the fence and the easterly boundary of the land "has been held in possession by other parties for a number of years and who claim they have held the easterly portion of said land adversely during this period," offering to restore the premises of which plaintiff had been placed in possession and execute all necessary papers to effect a retransfer, and to account for the rents and profits, and demanding the return of the \$2,700 paid on the purchase price and payment of the reasonable value of the improvements made by plaintiff upon the land. No notice or demand was

served upon defendant Groshell and he had no notice or knowledge of the attempted rescission until this action was commenced. The action is based upon the notice of rescission.

Sinanides denies the alleged false representations and prayed for judgment for costs. Groshell filed a separate answer, denying the alleged false representations, and by way of cross-complaint, alleged that "on or about March 27, 1922, defendant Sinan Sinanides assigned his right, title, and interest in and to said land * * * to W. R. Groshell, defendant and cross-complainant herein, and that said W. R. Groshell is now the owner of said land"; that plaintiff had failed to build a barn on the premises; that he had failed to pay the second installment of taxes for the year 1922-1923; that he had failed to pay the installment of \$1,000 upon the purchase price, which became due November 15, 1922; that, "by reason of said default of plaintiff, * * * cross-complainant has elected to consider said agreement at an end, and he has been released from all obligation in law or in equity to convey said property. All moneys heretofore paid under said agreement are retained as a reasonable rental for use and occupation of said premises." Groshell set up a further cross-complaint in the usual form of an action to quiet title. He prayed for judgment canceling the agreement between plaintiff and Sinanides and quieting cross-complainant's title to the land.

The court found the foregoing facts, including those alleged in the cross-complaints, to be true; that Groshell had no knowledge of plaintiff's rights, except such as appeared upon the face of the agreement, until this action was commenced; and that "plaintiff in March, 1922, had knowledge and notice that * * * Groshell had acquired all the interest of * * * Sinanides in said property." The court made no finding as to the rental value of the premises during the time the plaintiff was in possession thereof. Judgment was entered in accordance with the prayers of defendants and cross-complainant. This appeal is from the judgment, upon the judgment roll alone.

[1] There is neither allegation nor finding that Sinanides assigned his interest in the agreement to Groshell, but, for the purposes of this opinion only, it may be conceded that the assignment of the vendor's interest in the land carried with it his interest in the agreement and the payments to be made thereunder. The transfer of Sinanides' "right, title, and interest in and to said land" to Groshell was, in effect, a mere deed of quitclaim. *O'Sullivan v. Griffith*, 153 Cal. 502, 505, 95 P. 873, 96 P. 323. "It has been uniformly held that a conveyance of the right, title, and interest of the grantor vests in the purchaser only what the grantor himself could claim. * * * This con-

struction is in accord with the obvious meaning of the language. The grantee in such a deed necessarily takes only what the grantor then had, and subject to all defects and equities which could then have been asserted against the grantor." Allison v. Thomas, 72 Cal. 562, 564, 14 P. 309, 310 (1 Am. St. Rep. 89); Southern Pacific Co. v. Dore, 34 Cal. App. 521, 168 P. 147; O'Sullivan v. Griffith, supra. It follows that Groshell could make no defense in this action which was not available to Sinanides.

[2] Respondent contends that a vendee in default cannot rescind; but a vendor, who is in default, cannot terminate the right of the vendee until the former has performed or offered to perform his part of the contract. Krotzer v. Clark, 178 Cal. 736, 739, 174 P. 657. In this case the vendor was first in default, in that he failed to deliver possession of all the land which he agreed to deliver to plaintiff. It is true the court found that Sinanides had kept and performed all the covenants and conditions of the agreement on his part, but this general finding is overcome by the express finding that Sinanides represented that he would deliver possession of all the land described in the agreement, but that, in fact, he placed the plaintiff in possession of only 18.58 acres thereof. The consideration failed to the extent of the 1.20 acres not so delivered. The default of Sinanides was a material one. According to the purchase price of the land, the value of the 1.20 acres is more than \$1,500.

[3] Neither did plaintiff's default preclude him from rescinding on the ground of the alleged misrepresentation of Sinanides. In the denial of a hearing by the Supreme Court in De Bairos v. Barlin, 46 Cal. App. 665, 674, 190 P. 188, 192, where the facts were similar to those of the instant case, it is said that—

The rule invoked "applies only to cases where a rescission is sought or claimed by one party to an executory contract on the ground of a breach of the contract by the other party. * * * We know of no case which holds that such rule applies to a case where the vendee in default on payments due on the contract seeks to avoid and rescind it for fraud of the vendor in procuring its execution, or for mistake inducing its execution."

The complaint alleged and the court found that the misrepresentation as to the easterly boundary line of the land was, in fact, made by Sinanides. The complaint alleged that—

"The true easterly boundary line of the premises described in said contract was and is approximately 40 feet east of the line as represented and pointed out by defendant Sinan Sinanides."

The denial of this allegation in the answer of Sinanides is as follows:

Cal. Rep. 233-236 P.—35

"The defendant states that he has no information or belief upon the subject sufficient to enable him to answer the same, and, placing his denial upon that ground, he denies said allegations, and each and every part thereof."

The court found that—

"At the time of making said contract, the defendant Sinan Sinanides did not know the true boundary of said premises; * * * that said representations as to said boundary lines were untrue, but, at the time of making said statements, and at all times thereafter, until the commencement of this action, said defendant Sinan Sinanides believed said statements to be true."

[4] The positive untrue statement of Sinanides as to the boundary line, when he had "no information or belief upon the subject," constituted actual fraud. Section 1572 of the Civil Code provides:

"Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: * * * 2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true."

In Spreckels v. Gorrill, 152 Cal. 383, 387, 92 P. 1011, 1013, it is said:

"If one makes material false statements to another, to induce that other to buy an article, and which does induce him to buy to his injury, the defrauding party, either knowing them to be untrue, or believing them to be true, but having no sufficient ground for such belief, he will not be protected from liability for his fraudulent conduct by the fact that he did not intend to deceive the other party. Having actually deceived such other party and having profited by such deceit, he cannot be allowed to retain the advantage, or defeat liability, on the ground that he acted in good faith without actual intent to deceive."

[5] Fraud, either actual or constructive, is a sufficient ground for rescission of a contract. In a note appearing in Ann. Cas. 1913C, 63, where a large number of cases are cited, it is said:

"In equity it is generally held that, where a vendor of realty makes a false representation of a material fact, it is not a good defense to an action by the vendee seeking relief that such representation was innocently made. * * * This rule is most frequently applied in actions for the rescission of contracts, it being held that a false representation by a vendor of realty of a material fact constituting an inducement to the contract of purchase, and on which the purchaser had the right to rely, is a ground for the rescission of his contract by a court of equity, and that, too, though the party making the representation may have been ignorant as to whether it was true or false; the real inquiry being not whether the vendor knew the representation to be false, but wheth-

er the vendee believed it to be true and was misled by it in entering into the contract."

"A party will always be held to make good his statement in the form in which he makes it. If he states a thing as true in general terms without qualification, then he is presumed to do so upon his own knowledge, or at his own peril, and must make good his assertion." *Alvarez v. Brannan*, 7 Cal. 503, 507.

In *Muller v. Palmer*, 144 Cal. 305, 312, 77 P. 954, 957, after quoting the foregoing language, it is said:

"The same rule is laid down by all the authorities."

In *De Bairos v. Barlin*, *supra*, page 670 (190 P. 190) it is said:

"Constructive fraud is defined by our Code as 'any breach of duty which without an actual fraudulent intent gains an advantage to the person in fault * * * by misleading another to his prejudice.' Section 1573, Civ. Code. It was certainly a breach of the vendor's duty not to inform himself correctly regarding the boundaries of the land he was seeking to sell."

In *Del Grande v. Castelhun*, 56 Cal. App. 366, 367, 205 P. 18, an action to rescind a contract, it is said:

"On the merits of the case, it is said that the evidence is insufficient to support the finding of fraud, because there is no showing of a confidential relation between the parties or of appellant's knowledge of the falsity of the representations. Under the particular circumstances, it was not necessary to show either. One dealing with the owner of real property may assume that he knows the true boundaries, and may rely on his representations to that extent."

In *Scott v. Delta Land, etc., Co.*, 57 Cal. App. 320, 328, 207 P. 389, 392, it is said:

"Aside from the provisions of section 1572 of the Civil Code, it is not established by the weight of authority in the United States that a party to a contract may innocently and with belief in the truth of his statements misrepresent to the opposite party conditions material to the consideration to be rendered by the former and escape liability. In a civil action, the good faith of the party who procures the assent of another to the making of a contract by material misrepresentations is of no moment."

Hearings in the Supreme Court were denied in the last three cases cited.

[6] It may be further stated that the complaint, supplemented by the answer of Sinanides, to the effect that he did not know the true boundary line, states facts sufficient to constitute a cause of action for rescission on the ground of mutual mistake, and the findings are sufficient to support a judgment rescinding the contract on that ground.

[7] Respondent further contends that the plaintiff waived his right to rescind by remaining in possession and harvesting the

grape crop on the land after he discovered the shortage in acreage. The court found that there was no misrepresentation as to the acreage contained in the tract and therefore the mere shortage gave the plaintiff no right to rescind. Government subdivisions of land are often found to be short in acreage. The court found that the plaintiff did not discover the location of the true boundary line, and that he had not been placed in possession of all the land described in the agreement until December 1, 1922, and that he gave notice of rescission on the 29th of that month. It may be presumed that the grape crop was completely harvested by the 1st of December. It does not appear that the defendants could have suffered any prejudice from the delay of less than a month in giving notice of rescission. Mere delay for so short a time does not amount to laches. *Stone v. McCarty*, 64 Cal. App. 158, 168, 220 P. 690; *French v. Freeman*, 191 Cal. 579, 589, 217 P. 515.

In the absence of a finding as to the rental value of the premises while in plaintiff's possession, there is no basis upon which to direct the entry of judgment in favor of plaintiff. All the parties should be given leave to amend their pleadings, if they so request, in order to more certainly determine their respective rights.

The judgment is reversed.

We concur: PLUMMER, J.; HART, J.

71 Cal. App. 281

Ex parte NORTHCOTT. (Cr. 1246.)

(District Court of Appeal, First District, Division 1, California. Feb. 14, 1925.)

1. Habeas corpus ☞4—Error in exercising jurisdiction not reviewable in application for habeas corpus.

Failure of trial court to follow Pen. Code, § 1164, in receiving verdict, being merely error in exercise of jurisdiction, could not be reviewed on writ of habeas corpus, but should have been presented on appeal from judgment.

2. Habeas corpus ☞4—Conviction after affirmation cannot be collaterally attacked on habeas corpus for error reviewable on appeal.

Conviction, after affirmation on appeal, cannot be collaterally attacked on habeas corpus for error reviewable on appeal.

3. Criminal law ☞240—Lack of probable cause for holding accused on preliminary examination held not to avoid conviction.

Holding of accused by committing magistrate before whom preliminary examination was conducted, without reasonable or probable cause, held not to avoid conviction, which is founded entirely on evidence adduced at trial and verdict of jury.

4. Constitutional law §250—Criminal law §1206(1)—Indeterminate Sentence Law not unconstitutional as depriving of equal protection of law.

Indeterminate Sentence Law, Pen. Code, § 1168, is not violative of equal protection of the law clauses of federal and state Constitutions, as depriving one convicted of crime of benefits and privileges conferred by section 1588, providing for credits for good behavior; for it operates uniformly against all of the class to which it applies.

5. Statutes §68, 71—"General law" defined; requirement of uniformity satisfied if law applies to all of class alike.

A law is "general" which applies to all of a class, the classification being a proper one, and the requirement of uniformity is satisfied, if it applies to all of the class alike.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General Law.]

Application for writ of habeas corpus in behalf of Ephraim Northcott, directed to Warden of San Quentin Prison, to secure release of petitioner on ground of error by court in receiving verdict. Writ denied.

Ernest B. D. Spagnoli and Walter F. Lynch, both of San Francisco, for petitioner.

KNIGHT, J. This is an application for a writ of habeas corpus. The petitioner is confined in the California state prison at San Quentin under an indeterminate sentence for the crime of murder in the second degree, after having been tried and convicted by a jury in the superior court of San Mateo county. An appeal was taken from the judgment of conviction and the order denying a motion for a new trial, in which all errors alleged to have been committed prior thereto were reviewed, and on February 2, 1920, said judgment and order were duly affirmed. *People v. Northcutt*, 45 Cal. App. 706, 189 P. 704.

[1, 2] The petitioner now alleges in this application that the trial court, in receiving the verdict, failed to follow the procedure prescribed by section 1164 of the Penal Code, and that therefore the judgment is void. Assuming such allegation to be true, and that the requirements of said section were not complied with, such omission did not divest the court of jurisdiction. It amounted to nothing more than an error committed in the exercise of jurisdiction, which error should have been presented for review upon the appeal from the judgment. A writ of habeas corpus may not be invoked to inquire into mere errors committed in the exercise of jurisdiction. *Ex parte Philbrook*, 47 Cal. App. 678, 191 P. 77. Furthermore, a judgment of conviction, after affirmance on appeal, cannot be collaterally attacked on habeas corpus, for grounds which were re-

viewable on that appeal even though they were not mentioned in the decision thereof. *Matter of Application of Smith*, 161 Cal. 208, 118 P. 710.

[3] Secondly, the petition alleges that said judgment of conviction is void because the magistrate before whom the preliminary examination was conducted held the petitioner for trial without reasonable or probable cause. The point is without merit. It appears that petitioner is now being held as a prisoner in the state prison pursuant to a commitment issued by the superior court, based upon the judgment of conviction obtained therein. Said judgment is not related to, nor is it dependent upon, the order of the committing magistrate holding the defendant to answer for trial; its foundation being in the evidence adduced at the trial and the verdict of the jury, and not in the proceedings occurring before the committing magistrate.

[4, 5] Lastly, it is alleged that the Indeterminate Sentence Law (section 1168, Pen. Code), under which petitioner was sentenced, is repugnant to the "equal protection of the law" clauses of the federal and state Constitutions (Const. U. S. Amend. 14, § 1; Const. Cal. art. 1, § 13) because it deprives petitioner of "the benefits and privileges which are conferred by section 1588 of the Penal Code. * * * That Code section granted to prisoners confined in the state prison a statutory right to credits for good behavior. The Supreme Court, in the case of *In re Lee*, 177 Cal. 690, 171 P. 958, held that the Indeterminate Sentence Law was constitutional, and in so holding declared that its provisions repealed by implication the provisions of said section 1588, and substituted "the discretion of the * * * board of prison directors for an absolute statutory right, thus making what had been before a right now a matter of grace." *In re Mann*, 192 Cal. 165, 219 P. 71. The case of *In re Lee*, supra, further established the proposition that the deprivation of the right theretofore conferred upon prisoners by said section 1588 operated uniformly against all prisoners who are sentenced under said Indeterminate Sentence Law; and that being so, it is obvious said law does not contravene the constitutional inhibition relied upon by petitioner.

"It has been repeatedly held that a law is general which applied to all of a class—the classification being a proper one—and the requirement of uniformity is satisfied if it applies to all of the class alike." 5 Cal. Jur. p. 819.

Illustrative of the legality of such laws may be cited statutes which by their terms apply only to that class of prisoners serving life sentences. *People v. Finley*, 153 Cal. 59,

94 P. 248; *Finley v. California*, 222 U. S. 28, 32 S. Ct. 13, 56 L. Ed. 75.

The mere fact that said Indeterminate Sentence Law does not apply to persons who are convicted of offenses which were committed prior to the enactment of said law (In re Lee, *supra*), and also to persons convicted of crimes the punishment for which the statute fixes no minimum or maximum penalty (*People v. Sama*, 189 Cal. 153, 207 P. 893), does not affect the situation, for the simple reason that the character of those cases constitutes a different class.

The application for the writ is denied.

We concur: TYLER, P. J.; ST. SURE, J.

71 Cal. App. 490

Ex parte KINNEY. (Cr. 1253.)

(District Court of Appeal, First District, Division 1, California. March 3, 1925.)

1. Criminal law §168—Judgment of conviction not void as involving double jeopardy.

Where petitioner for habeas corpus had been convicted on several charges of burglaries and receiving stolen goods, but the stolen goods were the fruits of the burglaries, and court granted new trial as to the stolen goods charges, denied new trial as to burglary charges, and sentenced on each burglary conviction, the judgment was not void as violating Const. art. 1, § 13, as to double jeopardy, in that two separate felony charges were based upon one alleged act.

2. Criminal law §964—New trial on one of two charges based on same act held not to require new trial as to other.

Where accused was charged with burglaries and receiving stolen goods, the latter being the fruits of the burglaries, but charges were embodied in independent counts upon which separate verdicts were rendered, grant of new trial as to charges of receiving stolen goods did not operate to set aside convictions for burglary.

3. Habeas corpus §96—Nonjurisdictional errors not available.

Errors not jurisdictional will not be inquired into in habeas corpus proceeding.

Application on petition of Myrtle Kinney for writ of habeas corpus to require release from imprisonment on charge of burglary. Writ denied.

James P. Montgomery, of Oakland, for petitioner.

KNIGHT, J. Application for a writ of habeas corpus.

The petitioner, Myrtle Kinney, was accused, with one George Hart, in San Diego county, of seven separate acts of burglary and seven separate charges of receiving stolen goods, upon which they were jointly tried and convicted. The stolen goods alleged to have been wrongfully received by defendants were the fruits of the burglaries set forth in the information. Upon motion of defendants the trial court granted a new trial as to the charges of receiving stolen goods, denied a new trial as to the charges of burglary, and thereupon sentenced the defendants to indeterminate sentences on each conviction of burglary. Appeals from said convictions were announced by the defendants, but not perfected.

It is alleged in the petition for the issuance of the writ that the judgment entered in said action was and is void for the following reasons: First, that two separate felony charges are based upon one alleged act, and that therefore petitioner's conviction thereon was "in contravention of article 1, § 13. of the Constitution of the State of California, wherein it is provided that 'no person shall be twice put in jeopardy for the same offense'"; secondly, "that the granting of a new trial on seven counts for alleged possession of stolen goods, ipso facto, granted a new trial on the seven counts for alleged burglary"; thirdly, that there was no evidence proving that petitioner was guilty of any of the alleged burglaries.

[1-3] We find no merit in any of petitioner's contentions. It is manifest that she has suffered no prejudice from the charges of receiving stolen goods for the reason that as to them a new trial was granted. But the granting of a new trial on those charges did not operate to set aside the convictions on the charges of burglary, because the latter charges were embodied in independent counts upon which separate verdicts were rendered, and consequently constituted distinct judgments of conviction. *People v. Dillon* (Cal. App.) 229 P. 974. And in any event the petition for the writ must be denied for the reason that the errors complained of are not jurisdictional, but, if errors at all, relate merely to the exercise of jurisdiction and therefore may not be inquired into in a habeas corpus proceeding. *Ex parte Philbrook*, 47 Cal. App. 678, 191 P. 77; *In re Ephraim Northcott* (Cal. App.) 235 P. 458.

For the reasons above stated, the application for the writ is denied.

I concur: TYLER, P. J.

71 Cal. App. 393

WHITE et al. v. ARDZROONI et al.
(Civ. 2885.)

(District Court of Appeal, Third District, California. Feb. 24, 1925.)

1. Evidence $\hookrightarrow$ 461(1)—Parol evidence admissible to ascertain intention of parties and construe writing.

Parol evidence is admissible to show situation of parties and circumstances under which a written instrument was executed for purpose of ascertaining intention of parties and properly construing writing.

2. Evidence $\hookrightarrow$ 448—Parol evidence inadmissible where instrument clear and unambiguous.

Where written instrument is clear and unambiguous on its face, parol evidence is inadmissible to give it a construction other than that which it plainly expresses; but it must be interpreted according to its terms, and will be enforced without resorting to proof of surrounding circumstances.

3. Appeal and error $\hookrightarrow$ 1170(7)—Error, if any, in admitting parol evidence to aid in interpreting written contract, held not to require reversal where defendants not taken by surprise and no injury shown.

In suit on written contract, where plaintiff did not allege an ambiguity in such contract, but both plaintiff and defendants presented opposing constructions thereof, error, if any, in admitting parol evidence to aid court in interpreting such contract, does not require reversal, in view of Const. art. 6, § 4½, since defendants were not taken by surprise by admission of such evidence, and they do not show any injury by reason of its admission.

4. Appeal and error $\hookrightarrow$ 1052(5)—Error, if any, in admitting parol evidence to aid in construction of written contract, harmless where contract correctly interpreted.

Where interpretation placed on written contract by trial court was correct, admission of parol evidence to aid in its construction, if error, was harmless.

5. Factors $\hookrightarrow$ 30—Defendants held to have guaranteed plaintiff grape growers a certain stated sum for grapes shipped to defendants to be handled by latter.

Under contract between plaintiff grape growers and defendants, whereby plaintiffs agreed to deliver grapes to defendants in good merchantable and marketable condition, which defendants agreed to sell for highest market price available, with a minimum guaranteed price, *held*, that defendants undertook to guarantee such stated price to plaintiffs, defendants' compensation to be gained from whatever sums might be realized over and above such guaranteed prices; as any other construction would make a "jug-handled" agreement, in which the brokers took all the opportunities for profits and the grower took all the chances for losses.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Action by George N. White and others against E. S. Ardzrooni and another, doing business under the firm name and style of Ardzrooni Bros., and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Williams & Fenstermacher, of Fresno, E. O. Hansen, and Dan F. Conway, of Fresno, for appellants.

Fee & Ring and Wm. C. Ring, all of Madera, for respondents.

PLUMMER, J. On the 6th day of September, 1922, the plaintiffs, being the owners of a certain vineyard, entered into a contract for the delivery to the defendant of two varieties of grapes then being and growing on said vineyard. This contract is in the following words and figures, to wit:

"This certifies that R. Lewis and G. N. White, of Lewis & White Garage, of Madera, agree to deliver and consign to Ardzrooni Bros., all the hereinafter mentioned fruit crops which the grower agrees to harvest at his own expense all of the said fruit and deliver in good merchantable and marketable condition, and quality at Rattlesnake or Italian Swiss Madera, not later than October 20, 1922, all fruits found not suitable for marketing is to be weighed back and deducted from total deliveries.

Estimated Quality Tons.	Variety.	Minimum Guaranteed Price per Pound or Ton.
100	Carrigan	\$60.00
500	Muscats	20.00

"Mutual Stipulation Supplementing This Agreement.

"Ardzrooni Bros. agree to pay picking expenses at time of harvest and settlement to be made consignee as fast as returns are made.

"In consideration therefore, Ardzrooni Bros. agree to use their best efforts to obtain the highest market price available in transcontinental markets for said fruit. It is further agreed that after all packing and marketing expenses have been deducted and a commission of (5 per cent.) 5 per cent. is allowed to Ardzrooni Bros., out of the gross proceeds, as compensation for marketing services, the balance of net proceeds shall be paid to it being understood that title and ownership of the fruits herein mentioned vests in the name of the grower and until proceeds have been actually received all risk and liability for diminishing returns or loss lies with the grower herein mentioned.

"Time is of the essence of this agreement and no understanding other than herein expressed shall vary or modify this transaction.

"Signed in duplicate this 6th day of September, 1922. George N. White. R. Lewis. B. M. Hooper, Grower.

"O. K. Ardzrooni Bros., Agents, by Leo Sarkisian."

The grapes referred to in said agreement having been delivered by the plaintiffs to the defendants and payment not having been made therefor, this action was begun to recover the amount claimed by the plaintiffs to be due. Plaintiffs had judgment, and from this judgment the defendants appeal.

The controversy between the parties, as shown by their pleadings, presents two questions: (1) Whether or not the plaintiffs were entitled to at least the amounts claimed to be due them by the defendants for each ton of grapes delivered without deductions for brokerage, defendants' commissions, and market expenses, though defendants did not succeed in selling the grapes for a price sufficient to meet these charges; and (2) the amounts which defendants were entitled to deduct from the returns for marketing expenses, brokerage, and commissions in those cases where they were entitled to deduct any amount. The plaintiffs in their complaint set forth their interpretation of the contract to the effect that they were entitled to the guaranteed prices mentioned in the contract irrespective of whether the selling prices obtained by the defendants in transcontinental markets equaled the stipulated guaranteed prices; in other words, that the guaranteed price was net to the growers and the commissions, expenses, etc., incurred by the defendants were to be obtained, if any, out of selling prices in excess thereof. On the part of the defendants, it is set forth in their pleadings that the guaranteed price did not mean a net sum to the growers, but that their commissions and expenses should be deducted therefrom, and that the guaranteed price was a basis of calculation rather than a stipulation as to the amounts to be paid to the plaintiffs for the different varieties of grapes mentioned in the contract.

The trial court in its findings determined that the defendants promised and guaranteed in said contract to pay the plaintiffs not less than the sum of \$60 per ton for each ton of Carrigan grapes and the sum of \$20 per ton for each ton of Muscat grapes delivered to the defendants in good merchantable and marketable condition at the places designated, and that such guaranteed minimum prices were not subject to any deductions for or on account of commissions alleged to be earned by the defendants or expenses incurred by them; that the plaintiffs were to pay the expenses of harvesting and delivering the grapes; and that settlement was to be made upon each shipment as returns were made for the same.

Upon the trial of the case there was offered and admitted in evidence testimony of the surrounding circumstances leading up to the execution of the contract and under which it was executed for the purpose of ascertaining the intentions of the parties and also for the purpose of properly construing the written agreement. The trial court, being of the opinion that the contract was ambiguous, admitted such oral testimony to aid it in construing the terms thereof and for the purpose of being able to declare its true legal purport and meaning. We do not find any testimony in the transcript, and none has been pointed out to us, which tends in any particular to

vary or contradict its terms. The appellants objected to the admission of the oral testimony to which we have referred on the ground that the contract was not ambiguous, and that such testimony was not admissible to vary the terms of the written instrument. In this particular the appellants' objection, while possibly technically good on the grounds which we shall hereafter mention, was not well taken on the theory that the offered testimony tended to either contradict or vary the terms of the written instrument. In the briefs presented to us upon this appeal, the objection is urged that the offered testimony was not within the allegations of the plaintiffs' complaint, that the question of any ambiguity or uncertainty in the written instrument was not expressly alleged, and therefore it was an error on the part of the trial court to admit the same.

[1, 2] The rule as to the admission of oral testimony for the purpose of aiding the court in arriving at a correct interpretation thereof is well set forth in 22 C. J. p. 1186 et seq., § 1590, as follows:

"Parol evidence is admissible to show the situation of the parties and the circumstances under which a written instrument was executed, for the purpose of ascertaining the intentions of the parties and properly construing the writing. In other words, the court may, by receiving evidence of the circumstances under which the writing was made, place itself in the situation of the parties who made it, and to that extent look in upon their minds and so judge of the meaning of the words, and of the correct application of the language to the things described, from the point of view of the parties who wrote or executed the instrument. Such evidence is received, not for the purpose of importing into the writing an intention not expressed therein, but simply with the view of elucidating the meaning of the words employed; and in its admission the line which separates evidence which aids the interpretation of what is in the instrument from direct evidence of intention independent of the instrument must be kept steadily in view, the duty of the court being to declare the meaning of what is written in the instrument and not of what was intended to be written. Accordingly where the instrument is clear and unambiguous on its face, and no intimation is given of a disclosure of a latent ambiguity, no evidence is admissible to give to it a construction other than that which is plainly expressed. It must be interpreted according to its terms, and it will be enforced without resorting to proof of the surrounding circumstances."

By this rule it will be seen that if the instrument is clear and unambiguous on its face, and no intimation is given of a disclosure of a latent ambiguity, the evidence referred to is inadmissible.

[3] While, as just stated, the complaint contains no specific allegations of any claimed ambiguity in the written instrument, the complaint and the answer in this case are

antithetical and present direct and opposing constructions alleged as the correct construction or interpretation to be placed upon the written instrument, and therefore the defendants were not taken by surprise by the proffer of testimony to support the interpretation or aid the court in interpreting the instrument upon which the action was being prosecuted; hence, if the appellants' contention be correct, that admission of such testimony was error, it does not necessarily lead to reversal. Section 4½ of article 6 of the Constitution is applicable here, in providing that—

"No judgment shall be set aside, or new trial granted, * * * for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

Appellants in this case do not argue that any injustice has resulted by reason of the admission of the testimony referred to, but confine themselves to the following succinct statement of the cause of complaint:

"The points to be raised on this appeal are few. Briefly, appellant's principal contention can be summoned up in this one statement: Where a party in his pleading relies solely upon an alleged written contract between himself and the other party, he is bound by his pleading and cannot object to treatment of the writing as the whole contract of the parties, and hence he cannot introduce parol evidence to vary said contract. In short, it is our contention that the court erred in allowing the plaintiffs in the case at bar to introduce evidence to the effect that the contract referred to and specifically pleaded in plaintiffs' first amended complaint did not state the whole agreement between the parties. It is our earnest contention that the plaintiffs in the case at bar were not entitled under their pleading to inject evidence into the trial of the case pertaining to a matter not referred to in their complaint. We would go further and say, irrespective of whether or not the court was of the opinion that the contract was ambiguous, it was none the less error to allow the plaintiffs to go outside their pleadings in order to sustain their theory of the case."

It will be noticed that their whole ground of appeal is based upon the theory that parol evidence is not admissible to vary the terms of the written contract and also that, irrespective of whether or not the court was of the opinion that the contract was ambiguous, it was none the less error to allow plaintiffs to go outside of their pleadings. The first objection, as we have stated, was not raised at the time of the introduction of the testimony, and overlooks the fact that the testimony was admitted to explain, not to vary the writing, and the second objection is governed by the constitutional provision which we have quoted, unless prejudicial in-

jury has thereby been suffered by the appellants. That they have been thus injured is not set forth in the appellants' brief, and we cannot assume that the appellants have been injured in the absence of any claim to that effect, and in the absence of anything being called to our attention which would lead to that conclusion. There is no controversy in this case as to the fact that oral testimony is properly admissible as to the surrounding circumstances attendant upon the execution of the written instrument in order to determine the true intent and meaning thereof, whenever the writing is ambiguous.

[4] Irrespective of whether the court did or did not err in admitting oral testimony touching upon the construction which should be given to the written instrument, we have arrived at the conclusion that the interpretation placed thereon by the trial court is correct and, as stated in *Provident G. Min. Co. v. Manhattan S. Co.*, 168 Cal. 304, 142 P. 884:

"In an action by the seller to recover the purchase price due under such contract, the admission of evidence touching the circumstances surrounding the execution of the contract, which tended to confirm its proper legal construction, is without injury."

[5] Thus, if the guaranteed price in the contract entered into between the plaintiffs and the defendants has the meaning given to it by the trial court, the fact that the oral testimony of the surrounding circumstances admitted by the court tended to confirm the correctness of the construction of the instrument as finally given in this case, then the appellants are in no wise injured. The writing itself provides for a minimum guaranteed price. If deductions were to be made from the guaranteed price, then that term in the written agreement would become practically meaningless. We think the true construction of the instrument, and which carries out the intention of the parties, to be that the defendants undertook to guarantee certain returns to the growers for the grapes to be handled by them and were to be compensated out of whatever sums might be realized over and above such guaranteed prices. If this be not true, then the grower had no guaranteed price. Any other construction would make the instrument a "jug-handled" agreement, in which the defendants were to be compensated in any event, and the growers took all the chances of losses and the brokers all the opportunities for profit.

If the written instrument means what is now claimed by the appellants that it means and what appellants claim in their answer, then, and in that case, the writing is ambiguous, because that construction does not appear upon its face, and did not necessarily appear upon its face to the trial court, and therefore the oral testimony admitted by the trial court was properly admitted, and an

examination of that testimony shows that it very strongly supported the interpretation of the written instrument given by the trial court herein.

In conclusion, the appellants claim that the judgment must be reversed in so far as it is in favor of the plaintiff Hopper. This claim arises, however, by reason of the fact that the writer of the appellants' opening brief appears not to have been the attorney conducting the trial in the lower court, because the transcript shows that it was there stipulated that the plaintiffs in this case are the parties entitled to recover in the event that the court awards judgment as claimed in plaintiffs' complaint.

The judgment and order of the trial court are hereby affirmed.

We concur: FINCH, P. J.; HART, J.

71 Cal. App. 445

McKEON v. O'TOOLE et al. (Civ. 4899.)

(District Court of Appeal, First District, Division 2, California. Feb. 26, 1925.)

Municipal corporations — 197—**"Veteran"** taking promotional examination entitled to additional credits, although he had not served three months in army.

Provision of San Francisco Charter, art. 13, § 22, requiring three months' service in army or navy before veterans are entitled to preference in appointment to police or fire departments, does not apply to subsequent clause in same section allowing additional credits to veterans taking promotional examinations, and a hoseman who had taken such examination is entitled to additional credits, although he had served less than one month in army.

Application by Joseph B. McKeon for writ of mandate against John J. O'Toole and others. Writ granted.

William A. Kelly, of San Francisco, for petitioner.

George Lull, City Atty., and Maurice T. Dooling, Jr., Deputy City Atty., both of San Francisco, for respondents.

LANGDON, P. J. A petition for a writ of mandate has been filed herein, praying that such writ be issued requiring the civil service commission of the city and county of San Francisco to give to petitioner a credit of three points upon his examination for lieutenant in the fire department; and, after having so credited petitioner, to revise his standing upon the register of eligibles, accordingly, so as to give him first place upon such register for appointment to said position of lieutenant.

The petitioner alleges that he is a hoseman in the fire department of this city and county, which is a rank below the rank of lieu-

tenant therein; that he has taken the civil service examination for lieutenant, and has obtained a grade in such examination which placed him seventh upon the list of "eligibles"; that petitioner is a veteran as said term is used in section 22 of article 13 of the Charter of the City and County of San Francisco, having served in the army of the United States in time of war and received an honorable discharge from said service; that by reason of said service petitioner is entitled to a credit of three points in said examination; that since the adoption of the list of eligibles for appointment to the rank of lieutenant, three persons upon said list have been appointed to the rank of lieutenant, and, if petitioner is accorded the three credits to which he claims he is entitled, he will be first upon the list of eligibles.

The respondents deny that the petitioner is a veteran as said term is used in said section of said charter, and this is the only issue in the present controversy. Upon said question, evidence was taken before a commissioner and transmitted to this court. There is no dispute about the facts. The petitioner was drafted into the army of the United States on September 22, 1917, and sent to Camp Lewis. Before leaving San Francisco, and again upon arrival at Camp Lewis, he took the oath of allegiance. At Camp Lewis he did regular duty in the army—drilling, training, and standing guard duty until October 12, 1917, when he was honorably discharged because of physical disability.

Section 22 of article 13 is as follows:

"The term 'veteran' as used in this section shall be taken to mean any person who has served in the army, the navy or the marine corps of the United States in time of war, or in any expedition of the armed forces of the United States in time of war, or in any expedition of the armed forces of the United States and received an honorable discharge or certificate of honorable active service.

"The civil service commission shall by rule establish preferences for veterans as follows: In the case of entrance examinations to establish eligible lists in the police and fire departments, veterans who become eligible for appointment by attaining the passing mark established for the examination, and whose services as veterans exceeds three months, shall be classified on such eligible lists in the relative order of the individual ratings attained, and ahead of all non-veterans passing such examinations, and shall be eligible for appointment on the basis of such order of standing on such eligible lists. * * *

"In the case of all other entrance examinations, veterans with thirty days or more of service * * * who become eligible for appointment by attaining the passing mark established for the examination, shall be allowed an additional credit of five points, which shall be added to the percentages attained in such examinations by such veterans. * * * All

ties shall be decided in favor of veterans; provided, however, *in the case of promotional examinations credit of three points shall be allowed to veterans * * ** who shall have been in the city and county service prior to July 1, 1920."

The portion of the section last italicized is the one involved here. The precise question is: Does the word "veterans" in connection with promotional examination credits, carry with it, by implication, the limitation applied previously in the case of entrance examinations for the police and fire departments; i. e., "whose service as veterans exceeds three months"?

There are no authorities available upon this peculiar question. It seems reasonable to conclude, with the attorney for respondents, that it was, perhaps, intended by those who framed the charter amendment in question that the limitation of three months' service should attach in the case of a veteran seeking promotion, but we may not guess at unexpressed intentions and read, by implications, into the charter provisions which do not appear therein. The plain language is that in case of promotional examinations a credit of three points shall be allowed to "veterans," and a "veteran" is defined in the amendment as a person "who has served in the army * * * of the United States in time of war, * * * and received an honorable discharge. * * *" The petitioner is such a person. The inconsistency of requiring three months' service in the army for an allowance of credits in the case of entrance examinations and of merely requiring service in the army without limitation of time for the allowance of credits in promotional examinations may cause us to believe that the charter provisions under consideration may not exactly express the intention of those who drafted them nor of those who adopted them at the polls. But, be that as it may, we are not at liberty to read our surmise into the charter.

The writ of mandate is granted as prayed.

We concur: STURTEVANT, J.; NOURSE, J.

71 Cal. App. 381

COULTER v. COLLINS et al. (Civ. 4287.)

(District Court of Appeal, Second District, Division 1, California. Feb. 21, 1925.)

Usury § 137—Borrower not entitled to recover treble damages for execution of note exceeding legal interest rate; "thing of value."

Borrower *held* not entitled to recover three times amount of bonus, included in note secured by trust deed, exaction of which was in excess of interest rate allowed by St. 1919, p. lxxxiii; Deering's Gen. Laws 1923, Act 3757, where court by declaring rescission under Civ. Code, § 39, annulled note and trust deed, and

no part of money loaned or interest had been paid; neither note nor deed constituting a "thing of value" within section 3 of Act 3757, providing for treble damages.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Thing of Value.]

Appeal from Superior Court, Los Angeles County; E. A. Luce, Judge.

Action by John H. Coulter, as the guardian of the person and estate of M. Marie Tomblin, an incompetent, against O. D. Collins and another. From the judgment plaintiff appeals. Affirmed.

Frank C. Hill, Richard Hartley, and Geo. S. Hupp, all of Los Angeles, for appellant.

Hugh L. Dickson and Duke Stone, both of Los Angeles, for respondents.

CONREY, P. J. Appeal from a judgment entered in an action brought to obtain a decree of annulment of a contract made in violation of the usury law, and to recover treble damages.

The act known as the usury law was an initiative measure submitted and approved at the general election of November 5, 1918. Stats. 1919, lxxxiii; Deering's Gen. Laws (1923 Ed.) Act 3757. This act repealed sections 1917, 1918, 1919, and 1920 of the Civil Code, all relating to interest. The usury law, after prescribing certain limits or rates of interest that can be charged, and particularly limiting contract interest to not exceeding 12 per cent. per annum, provides in section 2 as follows:

"Any agreement or contract of any nature in conflict with the provisions of this section shall be null and void as to any agreement or stipulation therein contained to pay interest and no action at law to recover interest in any sum shall be maintained and the debt cannot be declared due until the full period of time it was contracted for has elapsed."

Section 3 of the act reads in part as follows:

"Rights of person paying illegal interest. Every person, * * * who for any loan or forbearance of money, goods or things in action shall have paid or delivered any greater sum or value than is allowed to be received under the preceding sections, one and two, may either in person or his or its personal representative, recover in an action at law against the person * * * who shall have taken or received the same, * * * treble the amount of the money so paid or value delivered in violation of said sections, providing such action shall be brought within one year after such payment or delivery."

The facts of this case as determined by the court in its findings of fact are as follows: On or about March 1, 1921, M. Marie Tomblin was an incompetent person, and by reason of mental disease, and unsound mind

was incapable of managing her affairs or property or of safeguarding or protecting her business interests or assenting to or making contracts; but was not wholly without understanding. In November, 1921, she was by decree of court judicially determined to be an incompetent person, and the plaintiff, Coulter, was appointed guardian of her person and estate. On March 1, 1921, said Mrs. Tomblin, being at that time in financial difficulties, borrowed from J. O. Mouser and O. D. Collins the sum of \$25,000. In consideration of said loan the borrower executed to the lenders a 60-day note for the sum of \$35,000, with interest at 7 per cent. per annum, and to secure the same executed a deed of trust on certain real property owned by her in the city of Los Angeles. Nothing was ever paid on account of said note. Prior to the commencement of this action Mouser transferred to Collins his interest in the note and trust deed. In August, 1921, pursuant to notice of default in payment of the note, and pursuant to other notice given in accordance with the terms of the trust deed, the real property described in said deed was advertised to be sold by the trustee, and said sale was about to take place at the time of the commencement of this action. At all times mentioned in the complaint, the real property was of the value of \$54,000, but was incumbered by a mortgage of \$12,000; the same being a lien prior to said trust deed.

At the time of the making of said promissory note and trust deed, the said Mouser and Collins, well knowing the financial condition of Mrs. Tomblin, and that she was in dire financial difficulties, demanded and exacted from her, as a condition for lending her the sum of \$25,000 for the period of 60 days, that she agree to pay them a bonus of \$10,000, and that the promissory note should be for \$35,000, to be secured by said trust deed. Said Tomblin being then and there in the mental condition aforesaid, and being greatly in need of money, executed and delivered said note and trust deed, but received therefor no other consideration than the sum of \$25,000. The court found that by means of said transactions "thereby said Mouser and Collins did exact and receive of and from the said M. Marie Tomblin things in action greater by \$10,000 than is allowed to be received under the usury law of the state of California"; and that the exaction of said bonus was inequitable, illegal, void, and usurious.

By reason of the facts thus found and its conclusions of law thereon, the court by its judgment declared the note and trust deed to be "void, rescinded, canceled and annulled"; that defendant Collins recover from "the plaintiffs" the sum of \$25,000, without interest. Plaintiff also had judgment for costs. There is a cross-complaint in the action.

The plaintiff in his amended complaint demanded that he have judgment against the defendants for the sum of \$30,000 as damages in treble the amount of said bonus, and that said damages be set off against any amount adjudicated to be due the defendants, and that plaintiff have judgment for the overplus, if any. His appeal is based solely upon the failure of the court to allow those damages. The contention of appellant is that under the findings of the court the plaintiff was entitled to recover said \$30,000 damages, and that by offsetting the \$25,000 due defendants, a net judgment should have been entered in favor of the plaintiff in the sum of \$5,000.

The appeal thus presents a single question, the answer to which must be found in the terms of the said act known as the "usury law." It will be remembered that no part of the money loaned has been repaid and no interest thereon has been paid. Nevertheless appellant claims and contends that by executing the note and by executing the trust deed, the borrower thereby delivered to the lenders for said loan a "greater sum or value" than the statute allows; that because the trust deed was a thing of value, the delivery thereof created the condition under which the borrower became entitled to recover from the lender, "treble the amount of the money so paid or value delivered in violation of said sections."

Let it be assumed, in accordance with the contention of appellant, that the exaction of the bonus was in the nature of an interest demand, in excess of the interest rate allowed by law. Nevertheless, in the absence of any payment made, we think that the right to treble damages did not accrue. Recognizing that the plaintiff's ward, although of unsound mind when she borrowed the money, was not entirely without understanding and her incapacity had not been judicially determined, the court, in effect, declared a rescission. Civ. Code, § 39. By the judgment, from which defendants did not appeal, the note and trust deed are annulled. It is not consistent that appellant should be permitted to proceed on that theory, and at the same time recover as damages thrice the amount of the bonus that was included in the note. We do not need the decisions cited by appellant to convince us that ordinarily a trust deed is "a thing of value." But no authority has been produced holding that, under such a statute as the one here considered, the note given for a loan, or any instrument of security therefor, is "a thing of value" paid or delivered, within the terms and intention of the statute providing for such damages.

The judgment is affirmed.

We concur: HOUSER, J.; CURTIS, J.

71 Cal. App. 402

PEOPLE v. BLANCHARD. (Cr. 1202.)

(District Court of Appeal, First District, Division 1, California. Feb. 25, 1925.)

1. Criminal law ☞1159(4)—Accomplice testimony held sufficiently corroborated to withstand reversal.

In prosecution for sending prisoners hack saws to aid them in making their escape, in violation of Pen. Code, §§ 108, 110, accomplice testimony held sufficiently corroborated to withstand reversal on appeal.

2. Criminal law ☞427(3)—Failure to prove conspiracy before showing further acts in pursuance thereof not reversible error, where conspiracy later established.

Though it is proper to first establish conspiracy before evidence of further acts done in pursuance thereof are admitted, reversible error will not be predicated on different order, if conspiracy is later established.

3. Criminal law ☞1169(7)—Erroneous admission of extrajudicial declarations out of presence of defendant not reversible, where introduced by coconspirators to establish conspiracy.

Error in admission of extrajudicial declarations out of presence of defendant does not require reversal, where introduced by alleged coconspirators to establish conspiracy.

4. Criminal law ☞829(1)—Requested instructions, covered by given instructions, properly refused.

Requested instructions, covered by given instructions, were properly refused.

5. Criminal law ☞757(4)—Requested instruction to view testimony of accomplice with distrust properly refused.

A requested instruction that testimony of an accomplice ought to be viewed with distrust is a charge as to matters of fact, and was properly refused.

6. Criminal law ☞742(2)—Whether witness an accomplice for jury.

Though court might properly have specifically charged that a certain witness was an accomplice, such charge was not mandatory, since, where facts are in dispute, it is for jury to determine whether such witness is an accomplice.

7. Criminal law ☞768(3)—Court's remark to jury held not improper as directing them to hurry.

Remark of court to jury that, thanks to gentlemen conducting case, jury would be able to get home early because facts were few and they would be able to decide quickly guilt or innocence of defendant, when taken in connection with instruction admonishing jury to calmly and carefully consider evidence before them, held not improper as directing jury to hurry.

8. Criminal law ☞1037(1)—Assignment that question asked defendant was misconduct cannot be first made on appeal.

Where district attorney's questioning of defendant as to former conviction and as to al-

leged charges on which he was presently wanted were shown to have been seriously asked, and hence were proper, unless asked in bad faith, defendant cannot assign such questions as misconduct for first time on appeal.

9. Criminal law ☞413(1)—Defendant's diary properly excluded under rule excluding self-serving declarations.

Defendant's diary was properly excluded under rule that oral or written declarations of a defendant, not falling under specific exceptions to rule, are not admissible in his favor as self-serving.

10. Witnesses ☞392(1)—Reading of statement from defendant's diary to impeach defendant's testimony held proper.

Action of district attorney in reading statement from defendant's diary to impeach defendant's testimony held proper, since it was an independent declaration against interest, and admissible as such, and use of method provided in Code Civ. Proc. § 1854, was unnecessary, especially where court stated that diary might be used to refresh memory, as permitted under section 2047.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Francis Blanchard was convicted of violating Pen. Code, § 110, and he appeals. Affirmed.

Daniel W. Hone, of San Francisco, Wm. F. Kiessig, of Berkeley, (B. W. Kemper, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

ST. SURE, J. Appeal by defendant, Blanchard, from conviction, on separate trial, under information brought jointly against him and two others, for violation of section 110, Penal Code, viz.:

"Every person who carries or sends into a prison, jail, public training school, or reformatory, anything useful to aid a prisoner or inmate in making his escape, with intent thereby to facilitate the escape of any prisoner or inmate confined therein, is punishable as provided in section one hundred and eight."

Section 108 provides punishment of imprisonment in the state prison not to exceed 10 years, and fine not to exceed \$10,000.

The information charged that appellant did willfully and wrongfully carry to and send into the San Mateo county jail two hack saws useful to aid certain prisoners therein in making their escape from said jail.

The evidence shows that James Clinton, Maurice Allen, and George Dawson were legally imprisoned in the San Mateo county jail on charge of crime committed in that county on which they were arrested in San Francisco and thence brought to San Mateo county under proper legal process.

The sheriff testified that on February 23,

1924, the appellant visited Dawson at the jail. Appellant also testified to this visit, and that he was asked by Dawson at that time to bring saws to the jail, which request he refused. He admitted having known Humphrey, one of the defendants under the joint information herein, for a short time, and that he saw the latter between six and ten times prior to and immediately following the 23d, at his own room, at one of which times, and at that place, there were a can of milk and two hack saw blades. A discussion was had as to the possibility of putting the blades into the can of milk, or other means of getting the blades into the jail. He stated:

"There was a discussion as to—if those blades could be put into a milk can, and no one had any suggestions to make as to how it could be done. It seemed implausible, and my advice was that the thing be forgotten, and that everything be thrown away, and the discussion dropped on that subject."

Later he stated he had reason to believe the blades were thrown away, because he saw Humphrey throw something away. On further question he testified he had reason to believe "now" that it was the can of milk.

Appellant admitted that following his arrest he had denied acquaintance with Humphrey, and also denied any conversation between himself and Dawson regarding saws. He admitted that he had previously been convicted of a felony. He stated that his visit to the jail on the 23d was with relation to some pawn tickets which the San Francisco police had sent him, and that his first visit from Humphrey, whom he had not theretofore known, was occasioned by Dawson, one of the prisoners, sending Humphrey to him to arrange about attorneys. He stated that he and Humphrey were out one evening "looking for three people." He did not name the people. His employer for 4 years testified as to his honesty, as did a woman in whose home she testified he had lived for 3 years. They stated they knew nothing of his former conviction, nor of any charges on which he was presently wanted in San Francisco.

[1] To this point, and standing alone, has been stated the evidence on which reliance must be placed as corroborating the evidence to show guilt of the charge and a conspiracy necessary to its proof given by four people who either might have been instructed by the court or found by the jury to be accomplices either in the conspiracy or the crime itself. Taken with the bare evidence, as stated, were the inferences the jury might draw from statements denying acquaintance with Humphrey and conversation with Dawson at the time of arrest but testified to on the trial; the fact that pawn tickets were sent him by the police in San Francisco, which

fact he stated was the occasion of his visit to Dawson; and his association with one stated to be a stranger to him theretofore, but known by him to have been arrested with the prisoners and with whom he discussed the matter of the possibility of getting saws into the jail, and whom he thereafter continued to see. In this connection is a discrepancy as to the occasion on which he stated Humphrey brought the can of milk and saws to his room; it being stated as the 26th, 27th, or 28th, and later, in other connection, positively and certainly stated to be the 25th. There was unexplained the evident lack of connection between his testified continuous residence from the age of a few weeks to the time of trial with his aunt, and the visits testified to "up to my room" and the testimony of the character witness not shown to be his aunt that he lived in her home for 3 years; circumstances probably noted by the jury. We cannot say, as matter of law, with the above and other inferences which might be drawn by the jury, or disbelief by them of the statements of appellant on disputed points, that this was not sufficient corroboration, though standing by itself as a cold record it may be slight and entitled to but little weight. There was ample evidence by those who might be considered accomplices of both the conspiracy and the crime here charged.

[2, 3] Part of the same evidence, given here as corroboration of the main charge, was also corroborative of the testimony of one or more of the conspirators to establish the conspiracy said to be necessary as foundation for proof of the main charge. As the main charge, so the conspiracy was testified to by a coconspirator or accomplice, and the corroboration served to establish it. The proper order of proof to have the conspiracy first established before evidence of further acts done in pursuance thereof is not deemed to be essential, and reversible error will not be predicated on a different order if the conspiracy be later established. *People v. Donnelly*, 143 Cal. 394, at 397, 398, 77 P. 177; *People v. Carson*, 155 Cal. 164, 171, 99 P. 970. In this connection, error in the admission of extrajudicial declarations out of the presence of defendant, in evidence by coconspirators to establish the conspiracy, becomes insufficient for reversal.

[4-6] Appellant's main argument is grounded on the foregoing propositions: He further complains of error in refusal to give instructions, and in prejudice resulting from instructions given. The first of the requested instructions was as to the weight to be given the testimony of appellant. The point was covered by other instruction given by the court, and the request was not improperly refused for that reason alone. The seventh requested instruction that "the testimony of

an accomplice ought to be viewed with distrust" has been held to be a charge as to matters of fact and unconstitutional. *Hirshfeld v. Dana* (Cal. Sup.) 223 P. 451. The jury were properly instructed on the prohibition against conviction on the testimony of an accomplice, as to who are principals, and the code definition of accomplices. Though it might have been proper for the court to charge specifically that Humphrey was an accomplice, the cases have not held that it is mandatory to do so; the general rule being that it is for the jury to determine where the facts are in any dispute. *People v. Coffey*, 161 Cal. 433, 436, 119 P. 901, 39 L. R. A. (N. S.) 704; *People v. Truax*, 30 Cal. App. 471, 158 P. 510. It has been held not to be reversible error to so charge. *Vails v. State*, 59 Tex. Cr. R. 340, 128 S. W. 1117.

[7, 8] A remark of the court to the effect that the jury, thanks to the gentlemen conducting the case, would be able to get home early because the facts were few, and they would be able to decide quickly the guilt or innocence of defendant, does not bear appellant's construction of it as a mandate to hurry and prejudicial to due consideration. The instructions are to be taken as a whole, and the concluding instruction admonished the jury in terms to "calmly and carefully consider the evidence before you. * * * Discuss the evidence as presented to you as a business proposition, not acrimoniously, but in a calm manner, and pass upon the question of the guilt or innocence of this defendant." The same may be said regarding the attack on the instruction given by the court with reference to the presumption of innocence attaching, and the opening of opportunity for character attack on defendant by himself putting his character in evidence. We think it bore no such construction as appellant claims for it as comment on the character of the defendant as bad. In this connection also objection was made to the question of the district attorney as to former conviction of appellant and as to alleged charges on which he was presently wanted in San Francisco. The question was asked on cross-examination after character evidence had been introduced by appellant, and was shown to have been seriously asked. Appel-

lant admitted the former conviction. The questions were proper, unless asked in bad faith, and so assigned as misconduct. There was no such assignment made, and the point may not be first taken advantage of on appeal.

Alleged error as to the admission of evidence has been covered in discussion of the evidence of conspiracy testified to by coconspirators.

[9, 10] Attack is made on the refusal of the trial court to allow the introduction of a diary kept by appellant, in appellant's behalf, and the "indirection" by which the district attorney used the same matter to prove appellant's acquaintance with Humphrey. It is well settled that oral or written declarations of a defendant, not falling under specific exceptions to the rule, are not admissible in his favor as self-serving. The diary constituted such declarations. The district attorney did not introduce the diary in evidence; it is true that he asked a question of defendant, reading a statement from a page of the diary, but it was asked on one point to impeach the appellant's testimony on that one point, and in the form, "Did you, on the 15th day of February, 1924, write the following language, in your own wording: 'Nothing unusual today. Humphrey came up in eve. Sat around and played records?'" The appellant answered, "Yes."

It might well, so far as the diary was concerned, have been written anywhere else, and the question could have been asked with the same effect. It was an independent declaration against interest, admissible as such. The use of section 1854, Code of Civil Procedure, was not necessary. As to section 2047, Code of Civil Procedure, concerning the refreshing of memory by the use of writings, the court explicitly stated that the diary might be used for that purpose.

The jury found the defendant guilty, and motion for probation was denied.

Taken as a whole, and with the mandate of section 4½ of article 6 of the Constitution before us, we are of the opinion that the judgment of conviction should be affirmed.

It is so ordered.

We concur: TYLER, P. J.; KNIGHT, J.

196 Cal. 62

SAMUEL EDWARDS ASSOCIATES v. RAILROAD COMMISSION OF CALIFORNIA et al. (L. A. 8207.)

(Supreme Court of California. April 16, 1925.)

1. Waters and water courses ⇨254—Evidence held to justify finding water company was operating as public utility.

Evidence held to justify finding of Railroad Commission that water company was operating as public utility under St. 1913, p. 85, §§ 2 and 3.

2. Waters and water courses ⇨254—That waters were once considered as appurtenant to land of first users not inconsistent with subsequent dedication to public use.

That in early history of water company water may have been considered as appurtenant to land of first users is not inconsistent with theory of subsequent dedication to public use.

3. Waters and water courses ⇨254—Dedication to public use may arise from dealings of owners.

Dedication of property to public use may arise by implication from acts of owners and their dealings and relations to such property, without regard to statutes; test being in case of water companies whether those offering service have expressly or impliedly held themselves out as engaging in business of supplying water to public as class.

4. Waters and water courses ⇨254—Waters subject to dedication not revoked retain impress of public use.

Waters subject to dedication to public use, which has not been revoked, retain impress of such use.

5. Waters and water courses ⇨254—Dedication of water to public use cannot be revoked without consent of beneficiaries.

Dedication of water to public use cannot be revoked without consent of all beneficiaries of such use.

6. Waters and water courses ⇨254—Evidence held to establish water company had held itself out as willing to sell, giving customers right to insist on continuance of supply.

Evidence held to establish that water company had consciously offered to sell water to all those within area of its service, giving customers right to insist on continuance of supply.

7. Waters and water courses ⇨217—Objections not urged before Commission in proceeding to establish water rates should not be urged on appeal.

Grounds not urged before Commission in proceeding to fix water rates chargeable by public utility should not, under Public Utilities Act, § 66, be urged on appeal.

8. Waters and water courses ⇨252—Corporation organized by owners of water rights held not to have taken rights as trustee for distribution at cost to original owners.

Contention that corporation organized by individual owners of water rights took such rights to extent necessary to supply original

owners, as trustee, to operate system and distribute water at substantially cost of operation, so that, on loss of its corporate capacity from failure to pay license tax, those continuing its affairs took such rights, impressed with trust in favor of original owners, held not sustained by evidence.

9. Waters and water courses ⇨217—Decision of Railroad Commission in proceeding to fix water rates as to effect of evidence is binding and conclusive on reviewing court in certiorari proceeding.

Where evidence is substantial and justifies inference of existence of facts necessary to jurisdiction of Railroad Commission in proceeding to fix water rates, then, under law regarding proceedings in certiorari, Commission's decision as to effect of such evidence is binding and conclusive on reviewing court.

In Bank.

Certiorari by the Samuel Edwards Associates and others to annul an order of the Railroad Commission of California, establishing public utility and fixing rates, as respects the Piru Water Company and others. Orders of the Commission affirmed.

Farrand & Slosson, of Los Angeles, and Hugh Ward Lutz, for petitioner.

Hugh Gordon and Carl I. Wheat, both of San Francisco, for respondent Railroad Commission.

R. M. Clarke and D. G. Bowker, both of Los Angeles, for respondent Piru Water Co.

WASTE, J. In this proceeding, petitioners, who are consumers of irrigation water in Ventura county, seek annulment of certain orders of the respondent Railroad Commission, declaring that Piru Water Company, a defunct corporation, and the individual respondents are conducting and operating a public utility, and fixing the rates to be charged for water supplied to consumers for irrigation purposes.

From the return of the Railroad Commission, filed in response to the writ issued herein, it appears that on May 24, 1923, the Piru Water Company and the individual respondents herein filed with the Railroad Commission a petition representing that the water company was engaged in the business of supplying, delivering, and selling water in the county of Ventura, and owned and operated a system for supplying and selling water, known as the Piru Water Company System. It was further alleged that the rate of \$8 per acre per year for water, charged to its consumers, did not afford the company or its stockholders a reasonable return on its property; wherefore it prayed for an order authorizing the applicants to make such increase in rates for water delivered through the system as would afford a reasonable return on the investment. A public hearing was had, at which, in opposition to the application, it

was contended by the protestants that the Piru Water Company, by reason of having forfeited its charter through failure to pay corporation taxes, had had no corporate existence for a period of 18 years, and that during all of that period it had been carried on in all respects as a mutual company, and was not subject to regulation by the Railroad Commission. The Commission declined to enter into a discussion as to the legal status of the utility as a corporation, or to fix the ownership other than to find that it was not a mutual company, but that, on the contrary the owners of the system were operating a public utility water company, as defined in the Public Utilities Act (St. [Ex. Sess.] 1911, p. 18), and, as such, were subject to regulation by it. It further found that the rates charged by the utility were unjust and unreasonable, and that the company was entitled to an increase, which it authorized in an order made on the third day of October, 1923.

Certain of the protestants, among them these petitioners, filed an application for a rehearing before the Commission, which was granted. After another public hearing, the matter was resubmitted, and the Commission entered a new order, in which it found that no new evidence had been introduced which justified it in modifying or changing its order theretofore made. Consequently, on the fifth day of June, 1924, it made its order, affirming its decision of October 3, 1923. These orders and the proceedings leading thereto the petitioners seek to have reviewed.

As the basis of its conclusion, the Commission found the following facts:

"The evidence indicates that the pioneer settlers in Ventura county, located west of Piru Creek, in the area locally known as the 'Piru and Buckhorn District,' appropriated and diverted water from Piru Creek for the irrigation of their lands. The notice of appropriation was signed by Prudencio Dominguez on January 9, 1875, and thereafter the landowners constructed ditches for irrigation use; the water system being commonly known as the 'Piru Water Ditch.' On June 29, 1887, Robert Strathearn, R. P. Strathearn, J. M. Horton, Hugh Warring and Prudencio Dominguez executed articles of incorporation of the Piru Water Company, and in return for its 2,600 shares of capital stock of the par value of \$10 per share, issued to themselves, transferred to the company their interests in the Piru water ditch.

"The articles of incorporation of the company stated that the purpose for which the company was formed was 'to acquire and conduct water by means of ditches and flumes from the Piru river in and upon the lands lying between said river and the Sespe river in Ventura county, Cal., and to sell, use, and dispose of said water for the purpose of irrigation, stock, household, and general domestic use.'

"The by-laws of the company, adopted March 19, 1888, provided for the election of officers and directors, their duties; and, among other things, that the board of directors 'shall declare

dividends whenever the surplus profits shall admit of it.'

"Shortly thereafter David C. Cook acquired from Robert Strathearn a large portion of the land which was irrigated by the ditch, and from Strathearn and others in excess of 1,800 of the 2,000 shares of stock of Piru Water Company. He held this stock until 1900 or 1901, when he disposed of his land holdings and stock to the Piru Oil & Land Company.

"The Piru Oil & Land Company sold parcels of the land which had been irrigated through Piru Water Company's system, sometimes transferring stock to the buyer and sometimes not. In 1922 it sold its last remaining tract of land to Hugh Warring, together with approximately 1,749 shares of the stock of Piru Water Company.

"In the early stages of its history the Piru Water Company had an open earth ditch system, which was improved from time to time by the construction of concrete and terra cotta pipe lines to replace sections of ditch. It has supplied water, not only to stockholders, but to some consumers who own no stock. The rates charged in the earlier years provided for a lower price for water to stockholders than to non-stockholders. This distinction in rates was apparently wiped out about 1910, and at the present time all consumers pay a rate of \$8 per acre for four irrigations per annum, when sufficient water is available.

"No dividends were ever paid upon the stock of the company, and only one assessment, amounting to a total of \$500, has been levied against the stockholders. Improvements of the property have been paid for entirely out of earnings, with the exception of a few instances, where the company has paid for the pipe, and consumers have furnished the labor of installation of extensions of the system.

"In 1896 an action was commenced in the superior court of Ventura county, entitled Hargrave et al. v. Cook et al. In this action the Piru Water Company was a party defendant. The judgment in this action decreed that Piru Water Company was the owner of 285 inches of water, measured under a four-inch head, of Piru Creek, and that this water was appurtenant to certain parcels of land through which the company's ditch ran.

"In 1905 the Piru Water Company failed to pay the license tax required by statute, and has never paid any license tax since. It was stipulated at the hearing in this proceeding that it had forfeited its charter in 1905, and that it has never been revived or restored to corporate capacity. Since that time the affairs of the concern have been carried on substantially as before; the stockholders meeting annually, as was the practice during the period prior to 1905. It appears that consumers who were nonstockholders attended many of these meetings, and in some cases voted with the stockholders. Rates were fixed through agreement at these meetings."

In the earlier stages of its history, the Piru Water Company had a primitive system of delivery of water, and its charges to the consumers were just about enough to defray the upkeep and expense of maintenance. It supplied water, not only to its stockholders, as found by the Commission, but to nonstock-

holders owning land adjoining the property of the original incorporators. From its records it seems quite definitely established that, during the earlier period of its existence, it charged the nonstock-owning consumers more than it charged its stockholders for the same service. Since 1910, it appears no discrimination in charges has been made. No effort seems to have been made at any time to fix rates that would enable the company to do anything more than cover its operating expenses. No dividends were ever paid. The whole system, as it was at the time application was made to the Railroad Commission for an adjustment of rates, had been built up out of funds provided by the consumers, irrespective of their holdings of stock; their contribution being in proportion to their respective use of water. The most extensive and expensive improvements to the system were made after the corporation forfeited its charter. No previous application had been made to have the water rates fixed by the Commission. On these facts, the protestants against the increase in rates argued that the water system had never been dedicated to a public use, but that it had always been regarded by the water consumers as a mutual water company. Their contention was, therefore, that the Commission had no jurisdiction of the matter. At the same time, they were compelled to admit that the water company did not fall within the strict interpretation of section 2 of the act providing for the regulation of water companies (Stats. 1913, p. 84), defining what kind of a water company is not a public utility.

The record returned by the Commission clearly establishes that there never was any relation between the shares of stock of the company, owned by landowners, and the acreage irrigated. From the inception of the enterprise, there was "a holding out" to sell water to any applicant within the area adjacent to the system and within the limits of supply. At the time of the hearing, the owners of 28.5 per cent. of the irrigated land had no interest whatever in the water system. The deeds from the original owners of the water rights to the company specifically declared that the company might use the water rights, ditches, and lands granted for rights of way to supply any who might desire to purchase water from the Piru Water Company. The recital of purposes for which the corporation was formed did not limit the sale, use, and disposition of the water to those who might hold stock in the corporation. In the early minutes of the corporation there is a notation that household water might be sold to "new customers." In 1891, in an action (*Hargrave et al. v. Cook et al.*) brought in the superior court of Ventura county by the lower riparian appropriators on Piru creek to determine the respective rights of the parties to the waters of the creek, the company, in its answer, alleged that it had

diverted the waters for the purpose of furnishing same to its stockholders and others for irrigation and domestic uses, and it sought to have it decreed that it be entitled to divert a designated number of inches of water for distribution to its stockholders and others, as alleged. In the judgment in that action it was declared that the ditch and right of the water company to divert water was appurtenant to the lands of the original incorporators, and that the water company was the owner of and entitled to divert continuously, by means of its ditch, 285 inches of water for irrigation and domestic purposes upon such lands, "and, when not necessary for such uses upon the said lands, to use the same upon any other lands or for any other purposes," as against the plaintiffs in the action. There is no evidence that the water company ever refused to sell water to any owner or occupier of land within its irrigable area; and there is evidence that it continually served many persons who were not stockholders. No distinction was ever made between landowners with stock and those without stock in the company, when it came to extending its system and rendering service. The Piru Oil & Land Company, which, for many years, was the largest stockholder of the water company, and a landholder under the system, sold much of its land separate from the stock, and later sold its remaining stock to other parties.

[1, 2] We are satisfied that, on the evidence before it, the respondent Commission was fully justified in holding that the applicants before it were conducting a public utility. The act providing for the regulation of water companies (Stats. 1913, p. 84, § 3) provides that:

"Whenever any private corporation or association organized for the purpose of delivering water solely to its stockholders or members at cost does deliver water to others than its stockholders or members for compensation, such private corporation or association becomes a public utility and subject to the terms of the Public Utilities Act and the jurisdiction, control and regulation of the railroad commission of the state of California."

Clearly, the Piru Water Company, and those continuing to conduct its affairs after it forfeited its charter, come within the meaning and definition of the act. The company was not organized for the purpose of delivering water solely to its stockholders at cost. Since its organization, it has at all times been willing to, and has actually sold, water to every one who applied. So far as the record indicates, it never refused to supply water to any one when it was able to meet the demand. The fact that in the early history of the company the water may have been considered appurtenant to the land of the first users is not inconsistent with the theory of a subsequent dedication to public use.

Traber v. Railroad Commission, 183 Cal. 304, 312, 191 P. 366. In that case the court said:

"The offer of the company was a general offer to any and all persons who should apply for the water upon its terms for their lands. Whether in all cases such an offer would constitute a dedication to public use or not, it is clear that evidence of such offer and acceptance is sufficient to justify a finding of such dedication."

Reference was made, in the finding of the Commission, to the declared purposes of the Piru Water Company, as set out in its articles of incorporation. The whole history of the enterprise, from the time the original owners of the water formed the corporation until the present, affords substantial evidence of such a carrying into effect of the originally declared purposes of the pioneer holders of the water, and of the corporation formed by them, to justify a finding that the water acquired and utilized by the corporation, was, from its inception, dedicated to a public use, and that such corporation was a public utility. *Williamson et al. v. Railroad Commission*, 193 Cal. 22, 222 P. 803; *Brewer v. Railroad Commission*, 190 Cal. 60, 80, 210 P. 511.

[3] Property may be shown to have been devoted to a public use by implication from the acts of its owners and their dealings and relations to such property, without regard to statutory provisions. *Franscioni v. Soledad Land & Water Co.*, 170 Cal. 221, 227, 149 P. 161; *Camp Rincon Resort Co. v. Eshleman*, 172 Cal. 561, 563, 158 P. 186; *Palermo Land & Water Co. v. Railroad Commission*, 173 Cal. 380, 384, 160 P. 228. The test to be applied in a case like this is whether or not those offering the service have expressly or impliedly held themselves out as engaging in the business of supplying the water to the public as a class, "not necessarily to all of the public, but to any limited portion of it, such portion, for example, as could be served by his system, as contradistinguished from his holding himself out as serving or ready to serve only particular individuals, either as a matter of accommodation or for other reasons peculiar and particular to them. [Citing cases.] The rule, of course, is that if there was any evidence before the Commission which would justify its finding, its order cannot be annulled." *Van Hoosear v. Railroad Commission*, 184 Cal. 553, 554, 194 P. 1003, 1004.

[4-6] If it be a fact, as was found by the Commission, that the Piru Water Company at its inception, or at any subsequent time, dedicated its water to a public use, and such dedication has not since been revoked, said waters have since continued to retain the impress of a public use. *Williamson v. Railroad Commission*, supra; *Allen v. Railroad Commission*, 179 Cal. 68, 175 P. 466, 3 A. L. R. 249. Having dedicated its water to a public use,

the company could not revoke such dedication, and convert its waters into a private use, without the consent of all the beneficiaries of such use. *Brewer v. Railroad Commission*, supra; *Franscioni v. Soledad L. & W. Co.*, supra. No attempt at such revocation has been shown. We are fully satisfied that the Piru Water System was not operated as a private water company within the doctrine laid down in *Thayer v. California Dev. Co.*, 164 Cal. 117, 128 P. 21, and *Allen v. Railroad Commission*, supra. We therefore deem it unnecessary to distinguish these and other cases cited by the petitioners. The evidence heard by the Commission satisfactorily establishes the fact that the water company at times consciously offered and held itself out to sell water to all those within the area of its service. The consumers to whom it has heretofore sold water have a right to insist upon the continuance of the supply to their lands. *Butte County Water Users' Ass'n v. Railroad Commission*, 185 Cal. 218, 224, 235, 196 P. 265. Being a public utility, it was within the jurisdiction of the respondent Railroad Commission in the matter of the fixing of rates.

[7] When these petitioners were before the Commission in opposition to the making of any order fixing water rates, the ground of their protest was that the Piru Water System was, in fact, a privately owned mutual water company, and therefore not subject to the jurisdiction of the rate-making body. *Stats.* 1913, c. 80, p. 85. They have shifted their ground, and are here contending that the evidence shows that the corporation held the system and water rights to the extent necessary to supply the original landowners, under the system, as trustee for the owners of the land, to operate the system and distribute the water at substantially the cost of operation, maintenance, replacement, and improvements, and that after it ceased to exist as a corporation, by reason of the non-payment of its license tax, those succeeding it, who are the individual respondents here, assumed the same obligation. That contention was not made in the first instance before the Commission, nor was it embodied in the grounds advanced on petition for rehearing. Under the mandatory provision of the Public Utilities Act (section 66), petitioners should not urge or rely on it in this court; but we have given it careful consideration nevertheless.

[8] Petitioners admit that no express written agreements were ever entered into by the water company, or its successors, and the landowners, which would establish the relationship they not contend for, but argue that such an agreement is to be implied. They cite *Hildreth v. Montecito Creek Water Co.*, 139 Cal. 22, 72 P. 395, in support of their position. The case is not in point. It is true the court there held, by way of dictum—for

the decision went off on a point of pleading—that the owners of private rights to waters in a stream may join together to form a corporation to construct diversion and other necessary works, making the corporation their agent to collect and distribute water, while reserving to themselves and retaining their individual ownership in the respective water rights. There is no doubt that that may be done, but in the instant case all the private water rights of the incorporators of the Piru Water Company were specifically deeded to the company, and became its property, to be devoted to the general purposes for which it was formed. In *Copeland v. Fairview Land, etc., Co.*, 165 Cal. 148, 131 P. 119, also cited by the petitioners, the facts were essentially different from those involved in the case here. The owner of the tracts formed a water company and transferred to it the riparian rights of the land along the river, taking in return all the stock of the water company. It continued to sell parcels of land, together with a proportional number of shares of water stock. There were recitals in the certificates that the holders thereof should be entitled to receive a proportional share of the water "belonging to" the water company. The court said (page 161 [131 P. 124]) that the device "was a scheme for the apportionment of the water right to the several parcels of land so that each could thereafter be conveniently sold with its proper share of the water right," and that for such purpose the landowner "stood in the relation of trustee for the owners of the several parcels of land so conveyed." In neither of these cases was the court called upon to consider a situation arising out of facts similar to those of the case now here.

[9] We are not convinced that the petitioners, by shifting their ground from the position they took before the Commission to that taken by them in this court, placed themselves in a more advantageous situation than they were in before the rate-making body. In the last analysis, they are met by the evidence and the well-established principles of law we have already sufficiently discussed. Where evidence in proof of facts is substantial in character and justifies the inference or conclusion that the facts necessary to the jurisdiction of the Commission did exist, then, under the general principles of law regarding proceedings in certiorari, its decision as to the effect of such evidence is binding and conclusive on the reviewing court. *Traver v. Railroad Commission*, 183 Cal. 304, 307, 191 P. 366.

The orders of the Commission are affirmed.

We concur: MYERS, C. J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; LAWLOR, J.; LENNON, J.

71 Cal. App. 439

TOLLEY v. ENGERT et al. (Civ. 4480.)

(District Court of Appeal, First District, Division 1, California. Feb. 26, 1925. Hearing Denied by Supreme Court April 27, 1925.)

Master and servant ☞333—Verdict against automobile stage company, but exonerating codefendant driver, held to require new trial as to both.

Verdict against automobile stage company for death of one struck by stage, but exonerating codefendant driver, held to require reversal of judgment thereon and new trial as to both defendants.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Bertha Belle Tolley against M. V. Engert and the Pickwick Stages, Northern Division, Incorporated. From a judgment against the last-named defendant, it appeals. Reversed and remanded.

See, also, 235 P. 652.

Hearing denied by Supreme Court; Lennon, J., dissenting.

J. E. McCurdy, of San Mateo, Theodore Hale and Barry J. Colding, both of San Francisco, and B. P. Gibbs, of Los Angeles, for appellant.

Franklin Swart, of Redwood City, and John H. Machado, of San Jose, for respondent.

CABANISS, Presiding Justice pro tem. This action was brought by Bertha Belle Tolley, widow, and the other plaintiffs, children, of Walter Ennor Tolley, deceased, to recover damages resulting from his death due to the alleged careless and negligent operation of an automobile stage owned by the defendant Pickwick Stages, and driven by the defendant Engert, as its servant and employee. The complaint further alleges in substance that, as deceased, mounted upon a bicycle, was passing southerly along the right-hand side of a public highway at or near its intersection with Santa Inez avenue in the city of San Mateo, a passenger automobile stage driven by Engert was moving southerly, directly behind said decedent; and that thereupon the defendant Engert, while driving the stage recklessly and at an unlawful rate of speed, attempted to pass decedent, who was struck, run upon, and killed by the stage. The owner denies the negligence charge, and also sets up contributory negligence. The verdict was in this form: "We, the jury, * * * find for the plaintiff, Bertha Belle Tolley, and against the defendant Pickwick Stages * * * in the sum of \$1,000, and we exonerate the driver, M. V. Engert."

This eccentric and self-stultifying verdict is the counterpart of one considered in *Bradley v. Rosenthal & Sunset Telephone Co.*, 154 Cal. 420, 97 P. 876, 129 Am. St. Rep. 171. In

his opinion, written in that case, Judge Henshaw approvingly quotes the following argument presented by appellant, Sunset Telephone Company:

"Appellant argues that the evidence establishes without conflict that if it be responsible at all it is responsible solely because of the relationship of principal and agent found to exist between itself and the codefendant Rosenthal; that not one word of evidence tends to establish any direct personal participation, personal knowledge or personal culpability upon its part, or that its employee Rosenthal was in any way carrying out its express instructions in the particular matter for the doing of which negligence is charged; that under such circumstances the employer is liable only because of the rule of law which holds him responsible, as well for the undirected as for the directed act of the agent within the scope of his employment; that in such kind of cases where there have been no express instructions for the doing of the act complained of in the particular way, the principal and agent, master and servant, are not joint tort-feasors as the law employs that term. The employee's responsibility is primary. He is responsible because he committed the wrongful or negligent act. The employer's responsibility is secondary, in the sense that he has committed no moral wrong, but under the law is held accountable for his agent's conduct. While both may be sued in a single action, a verdict exonerating the agent, must necessarily exonerate the principal, since the verdict exonerating the agent is a declaration that he has done no wrong, and the principal cannot be responsible for the agent if the agent has committed no tort."

Of this argument Judge Henshaw says:

"These legal propositions, it will be seen, receive universal recognition. Applying them to the present case, appellant argues that the verdict of the jury in favor of Rosenthal must be construed as their finding that he was not negligent, and as the appellant could be responsible only because Rosenthal was its agent, the judgment against it must be reversed, and upon the authority of *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, this court should order a like judgment in favor of it."

The opinion elaborates and indorses the above quoted excerpts; and the order was that the judgment in favor of Rosenthal and that against the appellant (the employer) be reversed and the cause remanded for a new trial. By parity of reasoning a new trial must be had in the instant case as to both defendants. This we may order because here, as in *Bradley v. Rosenthal*, supra, both defendants are before the court—the respondent in another action (No. 4663), 235 P. 652, this day decided, having appealed from the verdict and judgment in favor of defendant Engert.

As for the reasons above stated, this action must be reversed, we will not consider appellant's contention that the court should have directed a verdict in favor of defend-

ants, further than to say that the court was warranted in denying the motion.

The formal order is that judgment be reversed and the action remanded for a new trial.

We concur: KNIGHT, J.; ST. SURE, J.

71 Cal. App. 442

TOLLEY et al. v. ENGERT et al. (Civ. 4663.)

(District Court of Appeal, First District, Division 1, California. Feb. 26, 1925. Hearing Denied by Supreme Court April 27, 1925.)

Death §86(2)—Adult daughters held entitled to damages for loss of deceased father's training and guidance.

Adult daughters, maintained by father in family home without charge, though both were employed and capable of self-support, and married daughter, not member of her father's household, held entitled to damages for his death and consequent loss of his training and guidance.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Berthe Belle Tolley and others against M. V. Engert and another. Judgment for the named defendant, and against codefendant, and from an order denying a motion for a new trial as to both, plaintiffs appeal. Reversed and remanded.

Hearing denied by Supreme Court; LENNON, J., dissenting.

Franklin Swart, of Redwood City, and John H. Machado, of San Jose, for appellants.

J. E. McCurdy, of San Mateo, Theodore Hale and Barry J. Colding, both of San Francisco, and B. P. Gibbs, of Los Angeles, for respondents.

CABANISS, Presiding Justice pro tem. This appeal from an order denying appellant's motion for a new trial as to both respondents is one of two taken in the same action, the other appeal, by defendant Pickwick Stage Company, having been this day determined (see opinion today filed in appeal No. 4480, 235 P. 651). For the reasons stated in the companion opinion (appeal No. 4480) the cause should be remanded for a new trial—that is to say (and this we add to avoid misunderstanding), as to both defendants, in view of the form of the verdict returned in the case.

Appellants complain that several instructions were erroneously given to their prejudice, and others properly requested by them, refused. We think these criticisms untenable except as to one instruction later herein to be noted. The plaintiffs sued in the capacity

of widow, Berthe Belle Tolley, and daughters and sole surviving heirs of Walter Ennor Tolley. The evidence having to do with the earning capacity and family relation existing at the time of his death between decedent and plaintiffs is to the effect that he was then 52 years of age, in good health, and earning from several responsible and permanent employments approximately \$200 per month; that the household consisted of said Tolley, the wife, and two of the three adult daughters, Elsie and Alice Tolley, all of whom were comfortably maintained by the father in the family home without charge or cost, though both daughters were employed and capable of maintaining themselves; that the third daughter was a married woman and not a member of her father's household; and it is gatherable from the record that the decedent was a kindly husband and father, of the home-loving type. Appellant contends that the court erred in giving the following instruction:

"The only plaintiff that you will consider in this case is the wife; there is no evidence before the court to show that the three children were dependent on the father at all, so you will not consider any evidence as to them, as to whether or not they are entitled to anything—that you will not consider for any purpose."

In thus eliminating the children the court erred. In support of this statement it is sufficient to cite *Redfield v. Oakland*, 110 Cal. 277, and to quote therefrom, pp. 288, 289, 42 P. 822, 825, the following:

"It is contended, however, that no special or any circumstances were shown which would cause the children to depend upon their mother after they arrived at majority, or that after that time they would suffer loss from her death. It is true that the only evidence which tended to show an injury to the children resulting from the loss of the mother was her care and labor bestowed upon them, her education, her character, her ability to train and guide them, and efforts for their welfare; and, in applying such testimony, the jurors were authorized to draw such conclusions therefrom as their intelligence, experience, and observation should justify.

"Nor are we prepared to say that her intelligent care and assistance would be less valuable to them at the critical period of their lives when they are about to enter, or have entered, upon a more or less distinct and separate life, after attaining their majority. Besides, the statute does not limit the right to prosecute the action, or to recover damages, to minor children or minor heirs."

This language applies to instant case notwithstanding that the deceased parent in the *Redfield* Case was the mother, as the training and guidance of his daughters by a devoted father does not differ in kind, though it may in degree, from that of a good, dutiful mother.

It is ordered that judgment be reversed and the cause remanded for new trial.

We concur: KNIGHT, J.; ST. SURE, J.

71 Cal. App. 389

MURPHY v. MURPHY et ux. (Civ. 2908.)

(District Court of Appeal, Third District, California. Feb. 24, 1925. Rehearing Denied March 26, 1925. Hearing Denied by Supreme Court April 23, 1925.)

1. Husband and wife §262(1)—Property in wife's name presumed purchased by her separate funds.

Under Civ. Code, §§ 162-164, property in name of wife will be presumed to be her separate property and purchased by her separate funds, and therefore, in absence of allegation of fraudulent conveyance to her, judgment against husband will not be held lien against her property.

2. Fraudulent conveyances §278(2)—Conveyance will not be presumed fraudulent.

In absence of allegation or proof of fraud, conveyance from husband to wife, though made after judgment has been entered against him, will not be presumed fraudulent.

3. Costs §32(1)—Plaintiff entitled to costs on recovery of judgment for more than \$300.

Where plaintiff recovered judgment for more than \$300, though failing to have it declared lien on property, she was entitled to costs of suit as of course, in view of Code Civ. Proc. §§ 1022, 1033.

4. Paupers §37(2)—Attorney's fees not allowable in action to renew judgment.

In action by daughter against father to renew a judgment for maintenance, not being action for maintenance under Civ. Code, § 206, attorney's fees held not allowable, in view of Code Civ. Proc. § 1021; there being no agreement of parties, especially in absence of showing of necessity as required by Civ. Code, § 137, in divorce action.

5. Limitation of actions §182(5)—Statute of limitations waived on failure to plead it.

Statute of limitations, being strictly affirmative defense, will be waived on failure to plead it, and court could not apply it to deprive plaintiff of installments due under judgment in action to renew same, where not pleaded.

Appeal from Superior Court, San Joaquin County; J. A. Smith, Judge.

Action by Lulu Mignon Murphy against S. S. Murphy and wife. From part of a judgment for plaintiff, she appeals. Reversed and remanded, with directions to render.

A. P. Hayne and B. M. Bainbridge, both of Stockton, for appellant.

John R. Cronin, of Stockton, for respondents.

THOMPSON, Justice pro tem. This is a proceeding in the nature of an action to renew a judgment for maintenance of a dependent daughter, and to declare said judgment to be a lien upon certain real property standing in the name of the wife of the judgment debtor. The appeal is from part of the judgment only which holds that the statute of limitations has barred the first two installments of the original judgment, and for failure on the part of the trial court to declare the judgment a lien upon the real property described in the complaint, and for failure to award plaintiff her costs and counsel fees. The appeal is from the judgment roll alone. No evidence is before this court. A demurrer was sustained as to defendant Alice K. Murphy without leave to amend. From the judgment of dismissal entered pursuant thereto, the plaintiff appealed. On appeal that judgment of dismissal was affirmed. 57 Cal. App. 182, 207 P. 43. The material portions of the complaint here involved appear in that opinion of this court.

The plaintiff is the daughter of the defendant S. S. Murphy. In an action for maintenance under the provisions of section 206 of the Civil Code of the state of California, filed March 13, 1911, the plaintiff secured a judgment against her father for the sum of \$15 per month. This judgment was entered nunc pro tunc as of March 21, 1912. The present case was commenced July 23, 1919. The trial court found that said judgment for maintenance was paid and satisfied to May 5, 1914, and rendered judgment in favor of plaintiff and against the defendant S. S. Murphy for the accrued and unpaid installments, with interest from August 5, 1914, to November 5, 1923, in the aggregate sum of \$2,234.28. The trial court held that the statute of limitations had run against the two installments immediately prior to August 5, 1914, and found that the judgment did not create a lien, and failed to award plaintiff her costs or counsel fees.

The statute of limitations was not pleaded by the defendant by either demurrer or answer.

[1, 2] Since the defendant Alice K. Murphy is no longer a party to this action, and there is no allegation of fraudulent conveyance of property to her the presumption of law is that the property standing in her name was purchased by her separate funds, and that it is her separate property. Sections 162-164, Civ. Code. The court therefore properly found there was no lien against her property.

Even though we assume that the 10-acre almond tract described in the complaint was transferred from S. S. Murphy to his wife after the entry of the original judgment, still, in the absence of an allegation or proof of

fraud, we cannot hold that the conveyance was void. Fraud is never presumed. It must be alleged and proven. 12 Cal. Jur. 800; *Albertoli v. Branham*, 80 Cal. 631, 22 P. 404, 13 Am. St. Rep. 200; *Murphy v. Murphy*, 57 Cal. App. 185, 207 P. 43.

[3] Having recovered a judgment for more than \$300, plaintiff was entitled to her costs of suit as of course, without any order of court. Section 1022, Code Civ. Proc. She was entitled to file her memorandum of costs as provided by section 1033, Code of Civil Procedure.

[4] This is not an action in which the court is authorized by statute to allow attorney's fees. Except where attorney's fees are specifically allowed by statute, or by contract of the parties, they are not recoverable by a successful litigant as costs or otherwise. 7 Cal. Jur. 286. The compensation of attorneys is left to the agreement of parties. Section 1021, Code Civ. Proc. This is an action to renew a judgment. It is not an action for maintenance under section 206 of the Civil Code. Even though in such an action attorney's fees were recoverable as in an action of divorce by a wife against her husband, pursuant to section 137, Civil Code, yet such allowance is dependent upon a showing of a "necessity for the prosecution of the action." No such showing of necessity was made in this case. Under no circumstances could the court allow attorney's fees in this class of case.

[5] The trial court found that the original judgment was paid only to May 5, 1914, but disallowed the first two installments due thereafter, on the ground that the statute of limitations had run against them. This statute was not set up as a defense by either demurrer or answer. The defendant is therefore presumed to have waived it. The defense of the statute of limitations is strictly affirmative in its nature. In order to make it available, it must be pleaded. The court cannot of its own motion apply the defense of this statute for the benefit of one who has failed to plead it. It is a personal privilege which may be urged by demurrer where the limitation appears upon the face of the complaint or by answer where it does not so appear. Otherwise the defense is waived. 18 Stand. Ency. of Proc. 1036; 16 Cal. Jur. 603; *Manning v. Dallas*, 73 Cal. 420, 15 P. 34. These two omitted installments should have been included in the judgment.

The judgment is therefore reversed, with directions to the trial court to enter its judgment in favor of plaintiff for \$2,234.28, plus the two installments of \$15 each, together with accrued interest thereon.

We concur: FINCH, P. J.; HART, J.

71 Cal. App. 418

SHROPSHIRE et al. v. SUPERIOR COURT OF THE STATE IN AND FOR THE COUNTY OF RIVERSIDE et al. (Civ. 5012.)

(District Court of Appeal, Second District, Division 1, California. Feb. 25, 1925.)

1. Certiorari ⇐6—Writ of review not available to party who has had right of appeal.

Code Civ. Proc. § 1068, providing that the writ of review may not be granted in any case where the party demanding such writ has a right of appeal, *held* applicable, where such party has had a right of appeal.

2. Certiorari ⇐5(1)—Judgment for physician for services held not reviewable, in view of right of appeal.

Superior court's judgment for physician for services rendered on appeal from justice's court *held* not reviewable by writ of review on theory that the court had no jurisdiction under the Workmen's Compensation, Insurance, and Safety Act of 1917, § 17, subd. (b) (Laws 1917, p. 846), since facts relied on could have been established by evidence in the justice's court, and there was a right of appeal from justice's court to superior court precluding issuance of writ of review, under Code Civ. Proc. § 1068.

Writ of Review to Superior Court, Riverside County; Wm. H. Ellis, Judge.

Application by M. M. Shropshire and M. Y. Kellam, Jr., partners, for certiorari against the Superior Court of the State in and for the County of Riverside, Hon. Wm. H. Ellis, Judge thereof, and another, to review a judgment of such court. Writ denied.

William Guthrie, of San Bernardino, for petitioners.

CONREY, P. J. Petitioners ask for a writ of certiorari to review a judgment of the superior court.

The facts as shown by the petition are as follows: In the justice's court of San Geronio township, in the county of Riverside, one J. W. Cook, a physician, sued petitioners on a claim for an amount stated as the reasonable value of professional services performed by him for one Roy Henderson. It was alleged that the plaintiff rendered those services at the special instance and request of the defendants. Judgment having been rendered in favor of Cook, the defendants appealed to the superior court on questions of law and fact. At the trial in the superior court the evidence proved conclusively that the services of the plaintiff were required and rendered by reason of injuries received by Henderson while in the employ of the defendants; that at the time of the injuries Henderson was performing services growing out of and incidental to his employ-

ment, and was acting in the course of his employment. Therefore both petitioners and Henderson were subject to the compensation provisions of the Workmen's Compensation, Insurance, and Safety Act of 1917 (St. 1917, p. 831). The petition alleges that by reason of said facts the superior court did not have jurisdiction to render the judgment which it rendered against petitioners as the result of said trial in the superior court, and it is further alleged that petitioners have no other plain, speedy, or adequate remedy at law. The petition further alleges that the evidence produced at the trial in the superior court proved conclusively that no agreement was made by petitioners with Dr. Cook wherein and whereby the amount to be paid for his said surgical and medical services was fixed.

Petitioners rely upon section 17, subd. (b), of the Workmen's Compensation, Insurance, and Safety Act of 1917, which provides that the jurisdiction of the Industrial Accident Commission shall include any controversy concerning compensation or concerning any right or liability arising out of or incident thereto, jurisdiction over which is fixed by this act in the Commission, "unless an express agreement shall have been made between the persons or institutions rendering such treatment and the employer or insurance carrier fixing the amount to be paid for the services." Workmen's Compensation, Insurance, and Safety Act of 1917, Deering's Gen. Laws (1923 Ed.) Act 4749.

The contention is that, as soon as the evidence established the fact that no such agreement had been made fixing the amount to be paid for the services of the plaintiff, the superior court should have dismissed the action for want of jurisdiction. And, further, upon the point that this court in a certiorari proceeding may examine the evidence to test the jurisdiction, counsel for petitioners refers to the decision of the Supreme Court in the matter of the Estate of Paulsen, 179 Cal. 528, 178 P. 143.

[1, 2] Let it be assumed, for the purposes of this decision, that we are in agreement with counsel for petitioners concerning both of these propositions. Nevertheless, we think that the petition should be denied. The writ of review may not be granted in any case where the party demanding such writ has a right of appeal. Code Civ. Proc. § 1068. This includes a case where the party has had a right of appeal. For aught that appears in the petition, it may be that the same facts which were shown by the evidence in the superior court were also produced in evidence before the justice's court. Or, if they did not so appear, it was in the power of the defendants to have established or offered to have established those facts by evidence in the justice's court.

They were facts therefore either actually included in the appeal to the superior court, or, if they were not so included, they were omitted because the defendants failed to produce them. Under such circumstances, although there is no right of appeal from the judgment of the superior court, it cannot be said that for that reason the case was one in which there was no right of appeal, for there was a right of appeal from the justice's court to the superior court.

The petition is denied.

We concur: HOUSER, J.; CURTIS, J.

71 Cal. App. 488

EVERS v. STRATTON. (Civ. 4365.)

(District Court of Appeal, Second District, Division 1, California. Feb. 26, 1925.)

1. Appeal and error $\S$ 931(1), 1010(1)—District Court of Appeal unauthorized to interfere with judgment, if supported by substantial evidence.

Every intendment is in favor of judgment, and, if there is any substantial evidence to support findings of fact on which judgment is founded, District Court of Appeal is unauthorized to interfere.

2. Appeal and error $\S$ 931(1)—Appellate court must take evidence most favorable to respondent.

Appellate court must take evidence most favorable to respondent.

3. Negligence $\S$ 122(1)—Contributory negligence not presumed.

Contributory negligence of plaintiff is not presumed.

4. Appeal and error $\S$ 994(3), 1012(1)—Credibility of witnesses and weight of evidence held for trial judge, where case tried without jury.

Credibility of witnesses and weight of evidence rested exclusively with trial judge, where case was tried without jury.

5. Municipal corporations $\S$ 705(10)—Pedestrian accountable for care of reasonably prudent person.

Plaintiff, struck by automobile crossing street after dark during heavy traffic, accountable for such care as would have been exercised by a reasonably prudent person similarly situated.

6. Appeal and error $\S$ 1010(1)—Evidence held to raise question for court as to pedestrian's contributory negligence in crossing street.

Evidence held to raise question for court, trying case without jury, as to pedestrian's contributory negligence in crossing street after dark during heavy traffic.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Ida Pauline Evers against O. W. Stratton. Judgment for plaintiff, and defendant appeals. Affirmed.

Jennings & Belcher, of Los Angeles, for appellant.

Fred Mansur and E. B. Drake, both of Los Angeles, for respondent.

HOUSER, J. Plaintiff recovered judgment against defendant in an action for damages for personal injuries, and defendant appeals.

Practically the only uncontroverted fact in the case is that plaintiff was struck by defendant's automobile at a street intersection in the city of Los Angeles. Sufficient evidence, however, was introduced on the trial, from which the judge was justified in concluding that the following were the circumstances surrounding the happening of the accident from which plaintiff sustained the injuries of which she complains: At an intersection of two streets plaintiff wished to cross one of such streets upon which there was heavy automobile traffic, as well as considerable traffic by street cars. Just before plaintiff attempted to make the crossing, a street car stopped for the discharge of passengers on the side of the street nearer to plaintiff. Thereupon several automobiles, which were traveling two or three abreast in the same direction as was the street car, stopped in the rear of the street car. Either immediately before or immediately after the street car had thus stopped, plaintiff either walked rapidly or ran into the street at a point near the front end of the street car. After the street car had discharged such of its passengers as wished to alight therefrom at the street intersection at which plaintiff was standing, the street car and the several automobiles which had stopped in the rear of the street car started forward, and plaintiff, who had remained in the street near the front end of the stopped street car, was struck by defendant's automobile. There was testimony which warranted the conclusion that, after plaintiff had reached a position near the front end of the street car, she had not moved until the accident occurred, and that, during the time she was thus situated, plaintiff was in the exercise of ordinary care for her own safety. She testified:

"Q. After you started across the street, after you had stepped down from the sidewalk into the street, did you look for automobiles? A. Yes, I did; I looked all around for the way for me to go.

"Q. Did you keep on looking for the way for you to go? A. I did; many, many times.

"Q. Were you walking at the time? A. I knew in that car track I was all right, and I stayed there and waited.

"Q. And you were standing still at the time the automobile ran into you? A. Yes; that is right.

"Q. Can you tell me about how long you had been standing still? A. I waited at least four minutes. There was so many automobiles—I waited about four minutes; I did not have my watch, but it was a long time."

Another witness testified:

"I seen the car stop just before or about the time of this accident. * * * I seen a lady standing there, but don't know who she was. It was the lady that was afterwards taken away from there. I seen the lady standing right across from the little church where the vestibule is, clear to the track; probably about four or five feet away from the street car track. And when the car stopped, if my recollection is right, everybody started to move, a lot of machines held up by the street car. Now, probably there was four or five cars started to move at one time. I couldn't tell. I didn't count them. What I saw was a lady standing there, the machines coming up, and of course there was one machine hit the lady—that is a sure thing. I couldn't tell whether it was going fast or slow. I know where there is a crosswalk there. Respecting right near the crosswalk, she was this side, west. I could not tell the distance she was from the crosswalk. She stopped for the street car to pass. The street car had gone on. At the time the machines started up, it looked to me like four or five, but there was some more back of that. There was a whole lot of cars tied up on account of the street car. I mean they were practically abreast. As she stood there on the north from the car track, she did not move any at all until she was hit by this machine. * * * Oh, I seen her before the car started, but, when the street car went between me and her, I couldn't see her. The next thing I heard was a crash. Somebody—something hit somebody. I could easy say that. And of course I seen no more woman there, or no more lady. The last I saw of this lady standing in the street at the point 'C' was before the street car pulled between me and the lady. After that I wouldn't say whether I have seen her or not."

[1-4] From the evidence appellant assumes an entirely different state of facts, and therefrom he argues that plaintiff was guilty of contributory negligence and consequently that no recovery could be had by her for the injuries which she sustained. A great many authorities, not only from this state, but as well from other jurisdictions, are cited and parts thereof quoted by appellant to sustain his position based upon what he urges that the evidence shows were the facts in the case. But the difficulty encountered in appellant's position is that every intendment is in favor of the judgment of the court, and that, if there is any substantial evidence to support the findings of fact upon which the judgment is founded, this court is unauthorized to interfere. In determining the question of plaintiff's alleged contributory negligence, this court "must take the evidence most favorable to the plaintiff." *Haines v. Fewkes*, 190 Cal. 477, 478, 213 P. 490. It should be remembered that the contributory negligence

of plaintiff is not presumed, but, to the contrary, that defendant was obliged to bear the burden of establishing such facts that the legal conclusion of contributory negligence would follow therefrom. The case was tried without a jury, and consequently the credibility to be given to the testimony of the several witnesses and the weight of the evidence rested exclusively with the trial judge. His ultimate conclusion of fact was:

"That it is not true that the plaintiff was guilty of contributory negligence as alleged in the defendant's separate and second defense; nor was she guilty of contributory negligence at all at the time and place of accident; nor was she guilty of any negligence, contributory or otherwise, at the time and place of said accident."

A case similar in its facts is that of *Haines v. Fewkes*, 190 Cal. 477, 213 P. 490. It there appears that a woman was injured by being struck by an automobile at a street intersection. She recovered judgment, and the defendant in the action appealed. The theory of the appellant was that the plaintiff started through a line of traffic and ran in front of his automobile before he had the opportunity to either discover her or to stop his machine. In the course of the opinion the court said:

"There was evidence to support this view, but in considering the appeal we must take the evidence most favorable to the plaintiff. According to her testimony the accident occurred about 5:30 p. m., December 10, 1920, when it was comparatively dark and the headlights of the automobiles were lighted. She passed rapidly and successfully through the stream of traffic on the west side of Figueroa, proceeding south, which, she states, was an almost continuous procession, reaching the center of the street where she stopped midway between the north and south bound tracks of the electric railway on Figueroa street, paused a few moments, and then stepped forward to a position between the rails of the north-bound track. There, looking southward, she saw approaching her two automobiles, with headlights lighted, near the east curb of Figueroa street, proceeding northward; that she was not in the line of their travel; that while she remained standing at this point she was struck by the defendant's automobile, which had apparently swerved over toward her from the position in which she first saw it. It is apparent from this statement that she was guilty of no contributory negligence, but that she was making the best of her way across the street through the very heavy traffic on the street at that time."

[5, 6] Considering the instant case, it is perhaps true that a very cautious person would not have ventured into the street in close proximity to the street car at a time and in such circumstances as were present just prior to the happening of the accident in question. But plaintiff's conduct in the premises is not to be judged by such a standard. She is to be held accountable for such

care only as would have been exercised by a reasonably prudent person similarly situated as was the plaintiff. Assuming what must be conceded, that plaintiff had an equal right with defendant in the use of the street, and that, as her evidence indicates, she was keeping a reasonable lookout to the end that she might not be struck and injured by a passing automobile, it cannot be said as a matter of law that plaintiff was not in the exercise of reasonable care for her own safety. It follows that she was not guilty of contributory negligence.

No other points being presented for reversal, it is ordered that the judgment be and the same is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

71 Cal. App. 367

PEOPLE v. COHEN. (Cr. 1190.)

(District Court of Appeal, First District, Division 2, California. Feb. 20, 1925. Hearing Denied by Supreme Court April 20, 1925.)

1. Embezzlement ⚡6 — Express company checks held "property" subject to embezzlement.

Express company checks, which had not been signed or countersigned by original payee, but in other respects were complete, held "property" subject to embezzlement, being evidence of debt, within Pen. Code, § 7, subds. 10, 12, and sections 484, 503, 510, 514.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property.]

2. Criminal law ⚡320—Laws of another state presumed same.

Laws of another state, not introduced in evidence, will be presumed the same as laws of California.

3. Associations ⚡3 — Partnership ⚡44 — Written articles of association or partnership, of unincorporated organization, not presumed.

That an unincorporated organization has written articles of association or partnership will not be presumed.

4. Embezzlement ⚡35—Failure to prove general ownership as alleged immaterial, where special ownership pleaded.

In prosecution for embezzlement of checks executed by American Express Company to Bank of Italy, failure to prove capacity of American Express Company held immaterial in view of allegation of special ownership in Bank of Italy.

5. Criminal law ⚡400(1)—Oral evidence of character of maker of checks, alleged embezzled, as an unincorporated association proper.

In prosecution for embezzlement of express company checks, oral evidence that company was unincorporated association held proper as against contention that it was not the best evi-

dence, but that articles of agreement should have been introduced; the case not presenting a controversy between the parties signing the articles of incorporation.

6. Corporations ⚡32(3)—Oral evidence admissible to show corporation de facto.

Oral evidence is admissible to show that company is corporation de facto.

7. Embezzlement ⚡38—Evidence as to character of unincorporated association not incompetent, irrelevant, and immaterial.

In prosecution for embezzlement of express company checks, testimony as to character of company showing it a de facto corporation, organized as a nonstock company, held not incompetent, irrelevant, and immaterial.

8. Embezzlement ⚡35—Names of members of association having general ownership in property claimed embezzled immaterial.

In prosecution for embezzlement of checks executed by American Express Company, an association, pleading and proof of names of persons comprising association were not required.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

Abraham L. Cohen was convicted of embezzlement, and he appeals. Affirmed.

Russell P. Tyler, of San Francisco, Anthony Caminetti, and Albert T. Roche, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

STURTEVANT, J. The defendant was indicted on a charge of embezzlement. From an order denying him a new trial and from a judgment of conviction he has appealed.

[1] The first point which he calls to our attention and which he contends was a reversible error is this, he claims that the properties which it was alleged he embezzled were of such a nature and in such form that they amounted to mere scraps of paper and had no value. That contention is based on these facts:

On the 27th day of February, 1922, the defendant was a clerk, agent, or servant of the Bank of Italy, a corporation organized and existing under the laws of the state of California. On that date there came into his possession, care, custody, and control certain indentures of various different numbers, some for the face value of \$100, others for \$50, others for \$20 and still others in the sum of \$10, and all aggregating the sum of \$3,000. For all the purposes of this case the form of each instrument, except as to the number, the date and place of cashing, and the person to whom paid, was at the time of the trial as follows:

"When countersigned below with this signature: Lewis Luce. Before cashing write here city and date: —, 19—. American Express

Company (at its paying agencies): Pay this check from our balance to the order of Weber & Heilbronner, 42nd St. & Madison Ave., \$100.00, one hundred dollars. Jas. F. Fargo, Treasurer. Countersigned here in presence of person cashing: Lewis Luce."

When the American Express Company delivered the indentures to the Bank of Italy no one of them was signed or countersigned, Lewis Luce, or otherwise. Neither was the name of the payee inserted, nor was anything inserted in the blank at the top for the date and place of cashing. In all other respects the indenture was in the form as hereinabove set out. It will be observed that one of the checks was susceptible of having the blanks filled in by a holder, rightfully or wrongfully, and thereupon the instrument would become on its face the check of the American Express Company. Ordinarily the signature at the top would be inserted at the time the check was issued by the bank or other agency having authority to issue the same. Nevertheless such blank could be filled in (if perchance the instrument came into his possession) by any one at any time. It was the theory of the prosecution that the name "Lewis Luce" was inserted in each place by the defendant, and that the name is a fictitious name. The appellant contends that, because an additional crime had to be committed before one of the checks could properly be cashed, that then and for that reason, the appropriation by the appellant of the checks before they were signed or countersigned did not constitute embezzlement. However, a most cursory reading of the checks before the appropriation thereof discloses that they were in form checks executed in blank. Because the blanks thereof were filled in by a wrongdoer in a false manner does not alter the main fact.

"Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted." Pen. Code, § 503.

"Any evidence of debt, negotiable by delivery only, and actually executed, is the subject of embezzlement, whether it has been delivered or issued as a valuable instrument or not." Pen. Code, § 510.

"Every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled; and where the property embezzled is an evidence of debt or right of action, the sum due upon it or secured to be paid by it must be taken as its value. * * * Pen. Code, § 514.

"The word 'property' includes both real and personal property." Pen. Code, § 7, subd. 10.

"The words 'personal property' include * * * evidences of debt." Pen. Code, § 7, subd. 12.

"Larceny is the felonious stealing, taking, carrying, leading, or driving away the personal property of another." Pen. Code, § 484.

It is settled law in California that a check is an evidence of debt that may be sued on. *Nassano v. Tuolumne County Bank*, 20 Cal.

App. 603, 130 P. 29. There is nothing in the point that at the time the checks were taken from the Bank of Italy they had not been signed nor countersigned. In a case almost parallel in its facts it was so held. *People v. Hart*, 28 Cal. App. 335, 152 P. 947. In other jurisdictions which have similar statutory provisions to those cited above the same ruling obtains. 36 C. J., p. 744, § 27; *Roberts v. State*, 181 Ind. 520, 104 N. E. 970; *Fulshear v. State*, 59 Tex. Cr. R. 376, 128 S. W. 134; *State v. McClellan*, 82 Vt. 361, 73 A. 993, 23 L. R. A. (N. S.) 1063. In the case last cited, 82 Vt. 363, 73 A. 993, 23 L. R. A. (N. S.) at page 1065, the Supreme Court of Vermont says:

"The respondent argues that the value of stolen property is to be determined by its condition when taken; that a check payable to order is an incomplete instrument as long as it remains undorsed; that no one could have drawn the money on the check in question—not even the payee—and that consequently it was only of nominal value. * * * The holder of a paper thus transferred can enforce his right, by a suit in equity in his own name or by a suit at law in the name of the payee. All these considerations point to the conclusion that this check as it existed at the time of the taking was of substantial, and not nominal, value. Moreover, the law treats it as something more than a paper of nominal value in the hands of the wrong giver. If the respondent were sued for it in trover, he could not say that its value was merely nominal. He would be held for its actual value to the lawful owner, which *prima facie* would be the amount due on it. * * *

[2-4] The second point made by the appellant is that the evidence introduced was incompetent and insufficient to prove the incorporation of American Express Company. To understand the importance of that contention, it is necessary to state the charge in the indictment. That pleading contained the following allegations:

"* * * The said Abraham L. Cohen on or about the 27th day of February, A. D. 1922, at the city and county of San Francisco, state of California, was the clerk, agent and servant of the Bank of Italy, a corporation then and there and at all times herein referred to organized and existing under and by virtue of the laws of the state of California, and then and there, to wit, on or about the 27th day of February, 1922, in said city and county of San Francisco, there came into the possession, care, custody, and control of him, the said Abraham L. Cohen, American Express Company's Traveler's Checks * * * all of the value of \$3,000 in gold coin of the United States the personal property of the American Express Company, an unincorporated association of more than seven persons organized and existing under the laws of the state of New York, which said personal property was then and there held by said Bank of Italy in trust for said American Express Company and he, * * * etc.

In the first place, it will be noted that it is alleged that the American Express Com-

pany is not incorporated, but that it is organized and existing under the laws of the state of New York. The laws of that state were not introduced in evidence. In the absence of such evidence, it will be presumed that the laws of New York are the same as the laws of California. If an organization is not incorporated, we cannot assume, in the absence of proof to the contrary, that it has written articles of association, or partnership, or otherwise. In the second place it will be noted that the indictment pleaded a general ownership in the American Express Company, and a special ownership in the Bank of Italy. It may be conceded that the pleader was bound to plead facts showing the general ownership or special ownership. The pleader was not bound to plead both ways. As to the special ownership in the Bank of Italy, the record presents no point whatever. The allegation of general ownership in the American Express Company can therefore be treated as surplusage. So treating it we may concede that there was a failure of proof as to the capacity of the American Express Company, and notwithstanding that fact the appellant has not been injured.

[5, 6] In the third place the evidence objected to was given by F. G. Athearn, Esq. That witness testified that he had been practicing law in San Francisco since 1912, and that the American Express Company, to his knowledge, had been doing business in the state of California since 1913 or 1914; and that it had so conducted business during the time mentioned as an unincorporated association consisting of more than seven persons organized under the laws of the state of New York. To each question the appellant objected, and afterwards moved to strike out the testimony. The appellant contended that oral testimony was not the best evidence. Conceding for the moment that the American Express Company is an organization purporting to be organized under a statute of New York, and that it is an organization similar to a nonstock corporation as known in California, and that it has, or should have, articles of incorporation, the appellant's contention is without merit, because the case on trial did not present a controversy between the parties who had signed the articles of incorporation. *Bituminized B. & T. Co. v. Simons Brick Co.*, 183 Cal. 687, 693, 192 P. 528.

[7] Again, if the objection on the ground stated were good then oral evidence would not be admissible to show that the American Express Company is a corporation de facto. But the contrary is the rule. *People v. Oldham*, 111 Cal. 648, 44 P. 312. Further objecting to the evidence given by the witness, the appellant contended that the evidence was incompetent, irrelevant, and immaterial.

But it was competent, relevant, and material as tending to prove that the American Express Company was a de facto corporation organized as a nonstock company or, if it be the fact, that the American Express Company is a fictitious name under which seven or more persons transact business. The trial court therefore did not err in overruling the objection or in denying the motion to strike out.

[8] Moreover, it is settled law in this state that it was not necessary for the pleader to plead the names of the persons comprising the association called American Express Company, nor was the prosecution bound to introduce proof as to the names of the members of the association. *People v. Mahlman*, 82 Cal. 585, 23 P. 145.

We find no error in the record.
The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

71 Cal. App. 517

CRAIG v. SHEA. (Civ. 4799.)

(District Court of Appeal, First District, Division 2. California. March 4, 1925.)

1. Appeal and error $\hookrightarrow$ 1201(1)—Refusal to allow amendment held not abuse of discretion.

It is not an abuse of discretion to refuse amendment of a complaint, which had been on file nearly eight years, where plaintiff on retrial, after reversal permitting amendment, first contended that the complaint was sufficient, and only sought to amend after trial court had held complaint insufficient.

2. Fraud $\hookrightarrow$ 42—Complaint held insufficient to state cause of action for actual fraud.

Complaint, which alleges that defendant represented walnut trees to be from 12 to 18 years old and income therefrom to be 12 to 18 per cent. of purchase price, that plaintiff was not familiar with age of trees or value of land and so informed defendant, that plaintiff, relying on such representations, purchased grove, and that neither age of trees nor income was as represented, and contained no allegation of the untruth of the representations or fraudulent intent of the defendant, is insufficient to state a cause of action for actual fraud as defined by Civ. Code, § 1572.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Emogene A. Craig, executrix of the estate of J. H. Craig, against R. P. Shea. From a judgment for defendant, plaintiff appeals. Affirmed.

Hugo D. Newhouse and Russell P. Tyler, both of San Francisco, for appellant.

Dryer & Castle and David D. Stuart, all of Los Angeles, for respondent.

STURTEVANT, J. This is an action to recover damages for false representations alleged to have been made by the vendor to the vendee in the sale of a walnut grove.

The action was commenced in the early part of 1915. An amended complaint was filed May 26, 1915. Later the defendant answered the amended complaint and thereafter a judgment was rendered in favor of the plaintiff for the sum of \$3,750. An appeal was taken from that judgment and the judgment was reversed (Craig v. Shea, 45 Cal. App. 351, 188 P. 73) on December 31, 1919. The record does not disclose that any further proceedings were had until the 15th day of March, 1923. From the recitals of the judgment as printed in the clerk's transcript, the action came on regularly for trial in the lower court on the date last mentioned. The record before us is not clear, but, as we understand from the abbreviated recitals, it appears that upon the calling of the case for trial the defendant objected to the introduction of any evidence by the plaintiff, because the amended complaint did not state a cause of action. The appellant's counsel did not seriously oppose the objection, but, in the arguments before the trial court, counsel admitted that the amended complaint was defective, and stated item by item the amendments that should be made. The objection was sustained. Thereupon counsel asked permission to amend, and stated the amendments which plaintiff proposed to make. The judgment further recites that thereafter counsel for defendant moved said court to enter a judgment of nonsuit, because the plaintiff had introduced no evidence and none could be admitted upon a pleading which did not state facts sufficient to constitute a cause of action. That motion was granted and the plaintiff has appealed therefrom.

[1] At this time the appellant complains because the trial court did not, on March 15, 1923, grant her permission to amend. She claims that the refusal was an abuse of discretion. In the first place it will be borne in mind that the amended complaint on which she attempted to go to trial is the same pleading that was before this court in Craig v. Shea, supra. In writing that decision Mr. Justice Wood, speaking for the court, said:

"Plaintiff should be permitted to amend the complaint. It is unnecessary to lengthen the opinion by pointing out the defects, for they were discovered by counsel at the time of drawing his proposed findings."

That language was placed of record December 31, 1919. Thereafter the plaintiff took no action looking toward the amendment of her complaint, but slept on her rights until the action was called for trial the second time. Then, in the trial court, she first contended that her pleading was altogether

sufficient, and continued to maintain that position until the trial court held otherwise. Thereupon she did, for the first time, ask leave to amend. When the trial court had denied that permission, she took an appeal, and in this court, in one and the same breath, she again claims that her pleading is sufficient, and in the next breath she asks that we hold that the trial court abused its discretion in not allowing her to amend. On such a record we do not hesitate in holding that the trial court did not abuse its discretion in refusing the appellant permission to amend. The appellant also complains because the trial court did not allow her to introduce any evidence. In reply to that point, the respondent contended in the trial court, and now contends, that the amended complaint does not state facts sufficient to constitute a cause of action.

[2] Plaintiff's allegations purporting to charge fraud are the following:

(1) "That heretofore, to wit, prior to the 6th day of April, 1914, the defendants were the owners and in the possession of that certain real property situate, lying and being in the county of Los Angeles, state of California, and bounded and described as follows, to wit, (description) together with improvements thereon consisting of walnut trees, 20 and 40 years old, also certain buildings and other improvements.

(2) "That theretofore, to wit, on or about the 4th day of April, 1914, the defendants, by themselves and their agents, represented to your affiant that the said walnut trees, located on said property, were about equally divided between 12 and 18 years old. That said defendants further represented that the income from said property ranged from 12 per cent. to 18 per cent. per annum upon the asking price, to wit, thirty thousand dollars (\$30,000).

(3) "That at all times mentioned in this complaint, your affiant has never been and is not now familiar with or able to determine the age of walnut trees or the comparative value of land planted to walnut trees of the age of 18 or the age of 40 years or more.

(4) "Your affiant avers that on or about the 6th day of April, 1914, plaintiff, having implicit faith and confidence in the honesty of the defendants and in the truthfulness of the representations of said defendants and their agents, and relying upon said representations, purchased said above-described property together with the improvements thereon for the sum of twenty-five thousand dollars (\$25,000.00).

(5) "That at the time of the purchase of said property hereinabove described, your affiant represented to the agents of said defendants that he knew nothing of the value of walnut property or of the age of trees or of the probable returns of walnut groves, and further represented that he was purchasing said property based upon the representations made to him by said agents.

(6) "Your affiant is informed and believes, and therefore alleges on information and belief, that a portion of said orchard, to wit, 15 acres thereof, is planted to trees of the age of over 40 years, the remainder thereof, to wit, 15 acres, being planted to trees of the age of over 20 years.

(7) "Your affiant further avers that the annual income from said property for the year ending December 31, 1914, was less than 4 per cent. of the purchase price of said property."

The fourth paragraph above quoted is an allegation that:

"Your affiant avers that on or about the 6th day of April, 1914, plaintiff * * * purchased said above-described property together with the improvements thereon for the sum of \$25,000."

The rest of the contents of that paragraph is merely a recital and not an allegation. 1 C. J. 1149. In paragraph two it is alleged that the defendants "further represented that the income from said property ranged from 12 per cent. to 18 per cent. per annum upon the asking price, to wit, \$30,000." The complaint contains no allegation that such representation was untrue. The allegations of paragraph seven are a statement of what the income thereafter was, and not an allegation as to what the income had been prior to the making of the purchase. In the entire pleading the word "fraudulently" is not used. No words of similar import are used. The pleading on its face is an attempt to plead actual fraud. To plead that cause of action it is necessary to plead a fraudulent intent. Civ. Code, § 1572; *Harding v. Robinson*, 175 Cal. 534, 539, 166 P. 808, and cases there cited. The trial court was clearly correct in holding that the amended complaint did not state a cause of action.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

71 Cal. App. 474

HEARD v. TATE. (Civ. 4907.)

(District Court of Appeal, First District, Division 2, California. Feb. 27, 1925. Hearing Denied by Supreme Court April 27, 1925.)

Bills and notes §523—Findings that payee's agent fraudulently obtained note from her, with maker's knowledge, held supported by evidence.

In action on note given in part payment for property exchanged and subsequently transferred by payee to agent, who negotiated exchange for her, evidence held to support findings that agent obtained note by fraudulent means, with defendant maker's knowledge.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Estrella E. Heard against C. R. Tate. Judgment for plaintiff, and defendant appeals. Affirmed.

Jesse Robinson, of Oakland, for appellant.
O. G. Follker and E. C. Miles, both of Oakland, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover the amount due on a promissory note. The defendant appeared and answered; a trial was had before the judge sitting without a jury, and from a judgment in favor of the plaintiff the defendant has appealed under section 953a of the Code of Civil Procedure.

As stated by the appellant, the record presents two points: First, was fraud proved or shown with respect to appellant? second, were certain findings supported by the evidence. Prior to the first day of June, 1921, C. R. Tate and J. E. Nichols were real estate agents. At that time Edith M. Heard, the mother of the plaintiff, was the owner of lands in the city of Santa Cruz of an alleged value of \$45,000, mortgaged in the sum of \$6,000. At the same time the defendant was the owner of lands in San Joaquin county of an alleged value of \$20,000, mortgaged in the sum of \$18,000. Thereafter J. E. Nichols asked Mrs. Heard to employ him as agent to negotiate an exchange, which she did, and as a result of the employment her lands were exchanged for the defendant's lands, and a part of the payment was the promissory note for the face value of \$1,000, which is involved in this case, and also a note and mortgage in the sum of \$15,000. After that transaction had been completed, Nichols approached Mrs. Heard and undertook to negotiate another exchange. At this time Tate and Nichols were occupying the same office in Oakland. Nichols' written authorization dated March 30, 1922, recited that Mrs. Heard was the owner of the above note and mortgage in the sum of \$15,000, also a house and lot in Sunnyvale of the alleged value of \$2,000, also a quantity of hay of an alleged value of \$300, also the promissory note in the sum of \$1,000, which is the subject of this suit. One Roddick was the owner of an apartment house known as 560 Thirty-Third street in Oakland. J. E. Nichols at the same time owned some worthless real estate contracts of the face value of \$7,000 or more. When the defendant offered the above-mentioned written authorization in evidence, it contained a covenant authorizing Nichols to keep for his own use any portion of the properties owned by Mrs. Heard, which he was not compelled to turn over to Roddick. Later Nichols reported to her that Roddick would not accept the accrued interest on the mortgage note, \$525; that he would not accept the promissory note, \$1,000; that he would not accept the hay, \$300; that he would not accept the Sunnyvale property, \$2,000; but, if she would transfer those items to him, that he would turn over to Roddick properties to make up the difference. She acted on his statement so made to her. She executed a deed to the Sunnyvale property to Nichols, and Nichols erased the name of the grantee

and inserted the name of the defendant. The promissory note in the sum of \$1,000 was at Santa Cruz. Later Nichols told Mrs. Heard that, owing to a business transaction which he had with this defendant, he would like the plaintiff to execute a writing as follows:

"April 25, 1922. Mr. C. R. Tate, Oakland, Calif. Dear Sir: This is to certify that I have sold that certain note signed by yourself to myself for \$1,000 due on demand and dated on or about December 1, 1921. This note I sold to Mr. J. E. Nichols and I will turn over to you the said note in a few days as it is in Santa Cruz and I have sent for it but it has not arrived as yet and when it comes I will return it to you so this will act as a receipt in full for the same. I am giving you this letter so that you and J. E. Nichols can transact your business without delay. Yours truly, Edith M. Heard."

Still later Nichols wrote below Mrs. Heard's signature: "The above said note is paid in full. J. E. Nichols."

Within a month after Mrs. Heard had signed the paper quoted above, her attorney, Mr. Netherton, met Nichols in Santa Cruz and had a talk with him, and later repeated the conversation to Mrs. Heard. Thereupon such court proceedings were commenced that later Mr. Netherton had a talk with Tate. In that conversation Mr. Netherton testified:

"I asked him if he didn't know all the time that he was dealing with Mr. Nichols, that Nichols had defrauded Mrs. Heard out of many thousands of dollars. He said he did."

In the same conversation Mr. Netherton said:

"In my opinion, Mr. Tate, you have no title to that property [the Sunnyvale property] whatever, but the deed which you hold is a forgery for the reason that I have ascertained that Mr. Nichols erased his name from the deed and wrote yours in."

In another place Mr. Netherton testified regarding the same conversation:

"We discussed at this conversation the matter of the deal by which Mr. Tate came into possession of the Santa Cruz property, and Mr. Tate said at that time that he told Mr. Nichols when that deal was done that he hadn't favored putting that deal over on a widow woman, and that he couldn't understand why Mrs. Heard wanted the Manteca property, and that Nichols' reply was that Mrs. Heard was going to let him farm; that was the reason they wanted the Manteca property. * * * I asked Mr. Tate if it wasn't a fact that he had office room for some time with Mr. Nichols and if he didn't know his unsavory reputation; he said he had ascertained it while he was in the office and that his friends had told him of the unsavory reputation of Nichols and advised him to get out of the office, which he said he had done."

Estrelle E. Heard, called as a witness in her own behalf, testified that the agreement of exchange when signed by herself and

mother had a blank space, and that the passage which we have mentioned above authorizing Nichols to keep for his own use any portion of the properties owned by Mrs. Heard which were listed in the agreement and which he was not compelled to turn over to Roddick was not on the paper at the time she and her mother signed it, and that the passage was inserted afterwards over their signatures. She further testified that her mother had so much confidence in Nichols that she did not read the instrument before she signed it. She would guess at them. She took his word for them. As to the alteration of the deed, she testified that in a conversation between Mrs. Heard and the defendant the defendant stated that he "thought, to save the expense of making a new deed and revenue stamps and so forth, he would insert his name in the deed."

Mrs. Edith Heard testified that at one time Nichols said that he put one over on Roddick; that the contracts which he gave him were not worth the paper they were written on. She also testified that Nichols did not pay to Roddick anything excepting the \$15,000 mortgage, although Nichols represented to her that he was to pay Roddick the mortgage and \$3,825, consisting of the other properties which we have mentioned above, or the equivalent thereof. She also testified that the defendant had stated to her that the change in the deed "was simply done in regard to save expense in making out a new deed; they [Nichols and Tate] did not see what difference it made." She stated that she had signed papers in blank for Nichols, but, on being asked if the agreement to exchange was one of those papers, she answered that she did not believe it would be one of them.

The defendant Tate took the stand in his own behalf, and testified that the change in the deed, made by erasing the name of Nichols and inserting the name of Tate, "was initialed by the same initials as the notary who had acknowledged Mrs. Heard's signature. * * * There appeared on the margin the initials of either Mrs. Heard or the notary." However, the deed being presented, no initials appeared on the margin thereof.

If the trial court believed Miss Heard as a witness, he was entitled to draw the conclusion that Nichols made large amounts of secret profits while acting as the agent of Mrs. Heard, and that among the profits which he attempted to so acquire was the note in suit. If the trial court believed the testimony of Mr. Netherton, then the trial court was bound to reach the conclusion that Tate knew all the time that he was dealing with Nichols that Nichols defrauded Mrs. Heard out of many thousands of dollars. If the trial court took into consideration that during all of these times Tate and Nichols occupied the same office, and if it took into consideration all of the other circumstances which we have enumerated, certainly the

trial court was at liberty to infer that among the other properties which Tate knew Nichols had obtained by fraudulent means the note in suit was one of the items. For these reasons Tate stood in no better position than Nichols. It is patent, therefore, that the trial court made no error in making findings 3, 4, and 6, the findings complained of.

The judgment appealed from is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

71 Cal. App. 386

O'CONNELL v. JUDNICH et al. (Civ. 5106.)

(District Court of Appeal, First District, Division 1, California. Feb. 24, 1925.)

Attorney and client ⚡58—**Constitutional law** ⚡87—**Enactment, prohibiting disbarred attorney from personally appearing in court in his own behalf, held unconstitutional.**

Code Civ. Proc. § 300, prohibiting disbarred attorney from appearing in his own behalf as plaintiff, in action where subject has been assigned subsequent to entry of judgment of disbarment, *held* unconstitutional interference with right to lawfully acquire and protect property guaranteed by Const. art. 1, § 1.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Daniel O'Connell against Antone Judnich and another. Judgment for defendants, and plaintiff appeals. Reversed.

Daniel O'Connell, of San Francisco, pro. per.

J. E. Manning and Wilford H. Tully, both of San Francisco, for respondents.

TYLER, P. J. Action for money had and received.

What is described as a bill of particulars forms a part of the complaint. Recitals contained therein allege Anna M. O'Connell to have been the owner of certain real property which, together with all her right, title, and interest thereto and therein, she assigned to the plaintiff. Other recitals are to the effect that, with full knowledge of such facts, defendants have collected certain rents and sold the property, in consequence of which there is in their hands a total sum of \$4,321.91, to which plaintiff is entitled. The complaint concludes without a prayer.

Defendant Antone Judnich demurred upon numerous grounds. At the same time a motion was filed to strike the complaint from the files upon the ground that plaintiff was a disbarred attorney, and as such, under section 300 of the Code of Civil Procedure, had no right to prosecute the action. This motion was granted by reason of a judgment of disbarment at that time existing against

plaintiff, who now appeals from the final judgment entered upon such order.

The section of the Code invoked reads as follows.

"No person who has been an attorney and counselor shall, while a judgment of disbarment or suspension is in force, appear in his own behalf as plaintiff in the prosecution of any action where the subject of said action has been assigned to him subsequent to the entry of the judgment of disbarment or suspension."

This act became effective August 17, 1923. The original complaint, it is admitted, was filed prior to the time when the act took effect, but the amendment to the complaint was filed subsequent thereto and on the 31st day of August, 1923. It is here urged that the judgment of dismissal was erroneous and void, for the reason that the section involved is violative of several sections of the federal and state Constitutions. In this contention we are of the opinion that appellant is correct.

Mr. Kerr, in an editorial note to the section in his Annotations to the Code of Civil Procedure, states that the provision is thought to be plainly unconstitutional (1) as class legislation and (2) as invading a fundamental right guaranteeing to every citizen the right to personally conduct his own business if he so desires.

The very first section of the Constitution of this state declares that all persons have certain inalienable rights, among which are the rights to acquire and protect property. The right to acquire and protect property must of necessity include the right to use all proper and legal means to accomplish those ends. While the Legislature may in its discretion, for the public good, regulate the pursuit of a remedy, it cannot thereby destroy the right. One of the prime objects of the courts is to protect the constitutional rights of the citizen. To say that one may not defend his own property is a usurpation of power by the Legislature. If by legislation a right vouchsafed by the Constitution could be so abridged or limited, the right would not be an absolute or inalienable one, but a mere privilege revocable at the will of the lawmaking body.

It is suggested by respondent that to permit appellant to act as his own attorney in the pursuit of his property is to permit him to do by indirection that which he has been directly forbidden to do.

While the right to practice law is not a constitutional right but rather a mere statutory privilege, the plaintiff here does not purport to be practicing law. He is not acting as an attorney. One acts as such only when he represents another, not when he appears for himself. Appellant, having the right to lawfully acquire property, has under the Constitution the equal right to its

perfect enjoyment, and, as a necessary incident to that right, the full power accorded to all of appearing in person to prosecute or defend all actions for its protection or preservation. *Philbrook v. Sup. Ct.*, 111 Cal. 31, 43 P. 402. In so far, therefore, as the section purports to prevent one from personally appearing in a court of justice in pursuit or defense of a constitutional right, whether of person or property, it must be regarded as unconstitutional.

For the reasons given, the judgment is reversed.

We concur: ST. SURE, J.; KNIGHT, J.

71 Cal. App. 284

GILMORE v. PEARSON, Treasurer.
(Civ. 4931.)

(District Court of Appeal, Second District, Division 2, California. Feb. 14, 1925.)

1. Municipal corporations ☞108—Salary of one elected after passage of ordinance increasing salary but before taking effect of ordinance under referendum law not increased.

Under Act Jan. 2, 1912, amended Act May 3, 1915 (St. 1915, p. 319), ordinance increasing city clerk's salary was not effective until 30 days after final passage, notwithstanding there was no petition for referendum, and under Const. art. 11, § 9, and Municipal Corporation Act, § 855 (St. 1909, p. 148), increase in salary of city clerk elected after passage but before it became effective would not be allowable, but his salary would be that fixed by the former ordinance; the constitutional and statutory inhibition not being rendered inapplicable by the fact that the mischief sought to be remedied thereby would not exist, where the ordinance was passed prior to the office holders' election.

2. Municipal corporations ☞108—Ordinance has no validity as a law during period when it remains subject to referendum.

Ordinance has no validity as a law during period when it remains subject to referendum.

3. Municipal corporations ☞164—Provisions against increase in salary of officer after election require law fixing compensation to be in force at date of election.

Const. art. 11, § 9, and Municipal Corporation Act, § 855 (St. 1909, p. 148), prohibiting increase of compensation of officer after his election, means that the law fixing the officer's compensation must be in force at the date of his election.

Application for writ of mandate on petition of Paul Gilmore against Richard W. Pearson, as Treasurer of the City of Whittier, to compel payment of salary as City Clerk. Writ denied.

William M. Hiatt, Edmund H. Hinshaw, and Ralph F. Graham, all of Los Angeles, for petitioner.

Arthur G. Wray and Moore & Woods, all of Whittier, for respondent.

FINLAYSON, P. J. This is a proceeding in mandamus, commenced in this court, to compel respondent, as treasurer of the city of Whittier, to pay to petitioner, the city clerk of that city, the sum of \$600, which he claims to be due him as salary for two months commencing, respectively, April 21 and May 21, 1924.

The city of Whittier is a city of the sixth class, organized under the general laws of this state relating to municipal corporations. At the general municipal election held April 14, 1924, petitioner was elected to the office of city clerk for the term commencing April 21, 1924. Prior to his election the board of trustees, by an ordinance adopted by it and approved by its president on February 9, 1920, had fixed the salary of the city clerk at the sum of \$150 per month. Thereafter, on April 7, 1924, an ordinance was adopted by the board of trustees and approved by its president whereby the salary of the clerk was increased to the sum of \$300 per month. No referendum petition was ever presented to the board protesting against the passage of the last-mentioned ordinance. Petitioner claims that under the terms of that ordinance the salary of the city clerk was increased from \$150 to \$300 per month, and that therefore he should be paid for the two months in question a total sum of \$600.

[1] It is contended by respondent that the ordinance passed by the board of trustees and approved April 7, 1924, did not take effect until 30 days after its passage; that it became effective, therefore, after petitioner's election and during his term of office; and that for this reason the increase in salary did not and does not apply to him, because section 9 of article 11 of the state Constitution declares that:

"The compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office."

A similar provision is contained in that part of the Municipal Corporation Act which relates to cities of the sixth class; it being declared in section 855 of that act that:

"The clerk, treasurer, marshal, and recorder shall severally receive, at stated times, a compensation, to be fixed by ordinance by the board of trustees, which compensation shall not be increased or diminished after their election, or during their several terms of office." Stats. 1909, p. 148.

The act providing for direct legislation by cities and towns—the act of January 2, 1912, as amended by the act approved May 3, 1915 (Stats. 1915, p. 319)—provides for the enactment of ordinances by the initiative method, and also for a referendum upon ordinances passed by the legislative body of a

city or town. In the provisions dealing with the referendum we find the following:

"No ordinance passed by the legislative body of a city or town [with exceptions which are inapplicable to the present case] shall go into effect before thirty days from its final passage"; and if, during such 30 days, a petition signed by the requisite number of qualified voters, protesting against the passage of the ordinance, be presented to the legislative body of the city or town, the ordinance "shall thereupon be suspended from going into operation," and it shall be the duty of the legislative body to reconsider the ordinance, and, if it shall not thereupon entirely repeal the ordinance, the legislative body shall submit it to a vote of the electors at a regular municipal election or at a special election to be called for that purpose, "and such ordinance shall not go into effect or become operative unless a majority of the voters voting upon the same shall vote in favor thereof."

Without citing any authority to sustain his position, petitioner advances the novel contention that the ordinance which increased the city clerk's salary "was merely in a state of suspended animation during the thirty days necessary for the invocation of the referendum," and that upon the failure of the electors to take the steps necessary to procure a referendum vote the ordinance immediately took effect as of the date of its passage—April 7, 1924. Wherefore he claims that the increase of salary was in force prior to his election and before the commencement of his term of office. The claim is devoid of merit. The act providing for direct legislation unequivocally declares that no ordinance of this character shall "go into effect" before 30 days from its final passage. An ordinance speaks for the first time when it goes into effect. Until then it is not a law and has no force for any purpose.

[2] "A statute has not, *ex proprio vigore*, any force until it becomes a law of the land, and that is when, by its terms, it takes effect." Gilbert v. Ackerman, 159 N. Y. 118, 53 N. E. 753, 45 L. R. A. 118, 120. "A statute must be understood as beginning to speak the moment it takes effect, and not before." Price v. Hopkin, 13 Mich. 318. See, also, Miller v. Kister, 68 Cal. 145, 8 P. 813. "It must have the same construction as if passed on the day when it took effect." Rice v. Ruddiman, 10 Mich. 135, 136. "It was as though the Legislature was in session on the day the act took effect and passed the law on that day." Nickerson v. Winslow, 22 Wyo. 259, 138 P. 184, 140 P. 834. "The act of March 9th did not in terms prescribe when it should take effect, and hence *did not become a law* [italics ours] until the sixtieth day thereafter." Santa Cruz Water Co. v. Kron, 74 Cal. 223, 15 P. 772. "* * * An ordinance or statute during the period when it remains subject to referendum, has no validity as a law." Cline v. Lewis, 175 Cal. 320, 165 P. 916. "The decisions are uniform in

this state that, until the time arrives when it is to take effect and be in force, a statute which has been passed by both houses of the Legislature and approved by the Governor has no force whatever for any purpose, and all acts purporting to have been done under it prior to that time are void." Harrison v. Colgan, 148 Cal. 76, 82 P. 677. Mr. Bishop lays down the general rule in the following language:

"A statute which is to become a law at a future date is a nullity in the meantime, and does not even operate as notice to persons to be affected by it, nor does a repealing clause in it put an end to the law to be repealed." Bishop, Stat. Crimes, § 31.

"A law speaks for the first time when it goes into effect. Whether it has a retroactive effect depends not upon when it speaks, but how it speaks. This act of 1911 does not speak retroactively." Walker v. Lanning, 74 Wash. 253, 133 P. 462.

[3] In the light of reason and of the above authorities the operative effect of this ordinance must be determined as of the time when it became a law; i. e., when it went into effect, which was 30 days after its passage. Until then the ordinance, notwithstanding its "final passage" by the board of trustees, had not become a law and had no force. Until it became a law, the compensation fixed for the office of city clerk remained at the sum at which it had been fixed by the ordinance of February 9, 1920—the sum of \$150 per month. It follows, therefore, that the increase in the city clerk's compensation took place after, and not before, petitioner's election and the commencement of his term of office, and that, as to him or any other incumbent during the term for which petitioner was elected, the old ordinance measures and determines the compensation to be paid the city clerk.

It next is contended by petitioner that neither section 9 of article 11 of the Constitution nor the corresponding provision in section 855 of the Municipal Corporation Act is applicable for the reason that, so it is claimed, the mischief sought to be prevented by the inhibition of the organic law and of the statute is not a possibility where, as here, the ordinance increasing the compensation is passed prior to the office holder's election. This argument was put forward by counsel in Harrison v. Colgan, *supra*, and was decided adversely to petitioner's contention. Our Constitution expressly declares that its provisions are mandatory and prohibitory. Whatever may have been the reason for the inhibition, the people in their Constitution and the legislators in their statutory enactment have declared, in terms plain and positive, that the compensation of a municipal officer shall not be increased after his election. This means that the law fixing the compensation must be in force at the date of the officer's election. "The Constitution,"

says the court in *Cline v. Lewis*, supra, "clearly implies that there must be a law in force, fixing the compensation of every county and township officer at the date of his election." In *Harrison v. Colgan*, supra, the court says:

"But, in any event, the Constitution plainly forbids an increase during the term, and no exception is made in favor of a law passed before the term begins, but not in force until afterwards." See, also, *Woods v. Potter*, 8 Cal. App. 46, 95 P. 1125.

It follows from the foregoing that no incumbent of the office during the term for which petitioner was elected is entitled to receive the increase in compensation provided for in the later ordinance.

The alternative writ of mandate is discharged and the peremptory writ is denied.

We concur: WORKS, J.; CRAIG, J.

71 Cal. App. 557

MATOT et al. v. INGLEWOOD SCHOOL DIST. OF LOS ANGELES COUNTY et al. (Civ. 4918.)

(District Court of Appeal, Second District, Division 2, California. March 6, 1925. Hearing Denied by Supreme Court May 4, 1925.)

Schools and school districts  **32—Territory outside of city of sixth class, when annexed to city, becomes part of city school district.**

Under Pol. Code, § 1576, as amended by St. 1917, p. 208, territory outside of city of sixth class, when annexed to such city, becomes part of the school district comprised by the city to which the territory is annexed.

Application for a writ of mandate by Bertha Klumpf Matot and another, minors, by A. Frances Matot, their guardian ad litem, and others, against the Inglewood School District of the County of Los Angeles, and W. W. Hodgkins and others. Writ granted.

Kenneth E. Matot, Marshall Stimson, Noel C. Edwards, and W. C. Hintze, all of Los Angeles (Allen, Allen & Eagan, of Los Angeles, of counsel), for petitioners.

Edward T. Bishop, County Counsel, of Los Angeles, and J. H. O'Connor, Asst. County Counsel, of Hynes, for respondents.

CRAIG, J. The city of Inglewood is a municipal corporation of the sixth class, within the county of Los Angeles, and prior to August 22, 1924, its boundaries were admittedly coterminous with those of the Inglewood school district. On that date certain territory lying within the limits of Jefferson school district, and embracing the residence property of petitioners, was annexed to the city of Inglewood. After said annexation

the above-named minors enrolled as pupils of Inglewood school district, but respondents ejected them therefrom on the ground that they were pupils of the Jefferson district, and not entitled to attend the Inglewood school. An alternative writ of mandate issued herein, based upon a petition alleging the foregoing facts and a stipulation of the parties that the annexed territory is still a part of the Jefferson school district, unless such annexation had the effect of removing the same therefrom and adding it to Inglewood school district.

Petitioners contend that, by virtue of said annexation to the city of Inglewood, the respondent school district was similarly extended, and therefore that they no longer reside in the Jefferson district, and they invoke the provisions of section 1576 of the Political Code as authority for their alleged right to attend school in the respondent district. The part of said section here involved reads as follows:

"Every city or incorporated town, except cities and towns of the sixth class, unless subdivided by the legislative authority thereof, shall constitute a separate school district which shall be governed by the board of education or board of school trustees of such city or incorporated town; *provided, however, that in no instance shall the territory within an incorporated city of the sixth class be in more than one school district.*"

The italicized proviso was added to said section in 1917 (St. 1917, p. 208), prior to which amendment the section did not apply to cities of the sixth class, but every other city or incorporated town constituted a separate school district, unless subdivided by its legislative authority. Following the addition of the prohibitory clause, said section, not only excepted cities of the sixth class from permissive legislative subdivision for school purposes, but expressly forbade that territory embraced in a city of the sixth class should be in two or more school districts. And said act of 1917 contains a further significant provision:

"That whenever a city or town shall be incorporated, except a city or town of the sixth class, the board of supervisors of the county may annex thereto, for school purposes only, the remainder, or any part of the remainder, of the district or districts from which such city or incorporated town was organized, whenever a majority of the heads of families residing therein shall petition for such annexation."

If, therefore, respondents are correct in their theory that the annexed territory is not now in the Inglewood school district, it must follow that, under the provisions of the statute as amended, it is no longer in any school district, since, if embraced in the Jefferson district, the city of Inglewood, since the annexation, lies within two districts, and this cannot be, under the prohibition of the pro-

vision above quoted. If we read the whole statute, of which the quotation from section 1576 Political Code is a part, it appears to have been intended that neither municipal nor county legislative authority may extend the limits of a city of the sixth class, without extending the boundaries of the single school district which must be coextensive with it. A further consideration opposed to respondents' contention is that, if an original school district be not enlarged to embody added territory, annexation to a city of the sixth class would be impossible, though expressly authorized by statute.

Petitioners rely upon *Mitchell v. Henry*, 184 Cal. 266, 269, 193 P. 502, 503, wherein the question here presented was not decided, but the Supreme Court said it would be reasonable to conclude that the prohibition against more than one school district in a city of the sixth class is limited to the matter of forming school districts, and does not extend to a forbidding of the creation or extension of a city when such creation or extension will happen to have the purely incidental effect of causing the territory of the city to be divided between two school districts. It was therefore further said, however:

"In the second place, a not unreasonable construction of the code section is that by it the annexed territory is upon annexation ipso facto taken out from the school district of which it was before a part and made part of the district of which the city is either the whole or a part. This, in fact, would seem to be the probable effect in the case of the annexation of territory to a city other than one of the sixth class. Such cities have each as a part of its municipal organization a school department. Even in the absence of any express statute on the matter, it would seem likely on the principle declared in *Petition of East Fruitvale Sanitary District*, 158 Cal. 453, 111 P. 368, that it would not be permitted that the municipal school organization and an entirely distinct school organization should both function within the same municipality at the same time, and that the annexed territory by virtue of the mere fact of its annexation would pass under the jurisdiction of the municipal school department. It would seem probable that this would also follow from the language of the code section under consideration that 'every city * * * except cities and towns of the sixth class * * * shall constitute a separate school district.'

"It may be said that the reason for the distinction which the portion of the section just quoted makes between cities of the sixth class and others is that the former do not have school departments as parts of their organizations, and that for this reason likewise the rule of the *Sanitary District Case* mentioned would not apply to such cities. This is true, but it might well be replied that the prohibition of the section on a city of the sixth class being in more than one school district means that nevertheless the same rule shall apply as to it, so that, when territory is annexed to it, it follows as an incident that the territory becomes a part of the same school district as the city."

From the provisions of the law quoted, and others to which it is not necessary here to make reference, it is apparent that the Legislature intended to provide a system by which school districts should be made coterminous with the boundaries of other municipal entities. To be sure, the board of supervisors is given authority in certain classes of cities to provide otherwise, but this exception only emphasizes the general rule. There is sound reason for such a policy. The further consideration, of procedure for annexation, and for taxation, present themselves, whereby the qualified electors of a municipality, and of the proposed addition, declare by ballot whether or not they shall unite in a common interest and assume common burdens for the maintenance of a larger municipality. After annexation electors residing in the new territory become residents of the city, subject to taxation of their property for street, school, sanitation, and general funds (Laws 1917, p. 1664, c. 796, § 1, subd. 9); *Frankish v. Goodrich*, 157 Cal. 613, 108 P. 685. Should the petitioners be required to attend school in the Jefferson district, they would be debarred from the privilege of educational facilities which they are by statute required to join in financially maintaining, because residing within the Inglewood district and municipality, subject to taxes for such purposes, while the latter district would reject them, and the Jefferson district would be obligated to receive and educate pupils from an outside district who are no longer under obligation to contribute toward its support through taxation.

Respondents set up various contingencies which might arise to confront persons of school age remaining in outlying territory should it be held that the annexation had the effect of transferring to Inglewood school district pupils residing within the area annexed. For instance, it is said, suppose such action had left the Jefferson district without a schoolhouse, or that the supervisors should fail to provide facilities for those whom the annexation did not transfer. But, as was said in *People v. Rinner*, 52 Cal. App. 757, 199 P. 1066, the outlying territory would be subject to the authority of the board of supervisors, and we must assume that they would take the proper action. The consensus of all the authorities in this and other jurisdictions supports the policy of affording to those residing within the limits of a city or a county, and paying for the establishment and maintenance of its public institutions, the benefits of those advantages in preference to persons from outside who are under no civic obligations to such political subdivision.

The case of *Frankish v. Goodrich*, supra, is authoritative as to the issue presented in the instant proceeding. A comparison of the statutory provision in force at the time that case was decided with the law as it is now shows that no change has been made which

(235 P.)

would affect the issue here involved. In the statutes of 1911 (St. 1911, p. 1340) we find the words, "except cities and towns of the sixth class," inserted where they now are, and in 1917 the clause that "in no instance shall the territory within an incorporated city of the sixth class be in more than one district." In that case it appeared that the city of Upland, a municipality of the sixth class, was incorporated in 1906, and its boundaries included certain territory formerly embraced within the school district of the city of Ontario, which was also a city of the sixth class. The Ontario district having previously established a high school and constituted itself a high school district which included all of the territory embraced within the Ontario school district, the school authorities of the two cities, because of the absorption of a portion of this latter district within the boundaries of the new city of Upland, sought to maintain said high school as the Ontario-Upland high school district. A resident taxpayer of Ontario high school district petitioned the superior court of San Bernardino county for an order restraining the trustees of the two school districts from acting as a union high school board, and from exercising authority or control over the property or funds of the Ontario high school district. The Supreme Court there said:

"It is unquestioned that the outside territory formerly belonging to the Ontario school district, upon its inclusion within the boundaries of the city of Upland, became a part of the Upland school district. Pol. Code, § 1576; *Hughes v. Ewing*, 93 Cal. 414, 28 P. 1067; *Bay View School District v. Linscott*, 99 Cal. 26, 33 P. 781; *Kramm v. Bogue*, 127 Cal. 122, 59 P. 394. But while it is admitted that the outside territory formerly belonging to the Ontario school district ceased to be a part of that school district by its inclusion within the boundaries of the Upland school district and became a part of the Upland school district, nevertheless it is insisted that this territory is not severed from the Ontario high school district, as distinguished from the Ontario school district; that it still remains a part of the Ontario high school district, subject to its burdens and entitled to its rights; and that by virtue of this, through some method not defined in appellants' brief, it is declared that 'by operation of law there was thus created the Union high school district composed of Upland school district and Ontario school district.'

"But a reading of section 1670 of the Political Code and of the other sections bearing upon the question make it manifest that a high school district, so far as its territorial limits are concerned, is not a distinct entity from the school district. * * *

"The contention that the portion of the Ontario school district now belonging to the Upland school district is still subject to taxation for the support of the Ontario high school district, and that therefore it must continue to be a part of the Ontario high school district, is without foundation in law. The territory is no longer subject to taxation in the Ontario

high school district, but in the Upland school district alone."

It is thus definitely asserted that, where under the law when existing territory outside of a city of the sixth class is annexed thereto, it becomes a part of the school district comprised by the city to which the territory is annexed. It is true that in the case under consideration a high school district was involved, as distinguished from the school district in the instant proceeding, but as the opinion above quoted holds, so far as territorial limits are concerned, the high school district and the school district are not distinguishable. With the authority of this decision before us, it remains only to be adjudged as to whether or not the clause excepting cities of the sixth class and the additional prohibitory clause have made a change in the law which would have altered the decision in the former case.

At that time the statute read:

"Every city or incorporated town, * * * unless subdivided by the legislative authority thereof, shall constitute a separate school district which shall be governed by the board of education or board of school trustees of such city or incorporated town."

The apparent idea of the Legislature in subsequently inserting the provision, "except cities and towns of the sixth class," was to treat such cities as unincorporated territory for the purposes in question. This is indicated by other provisions of the school law and the absence of legislation relating to such municipalities.

As the law read when thus changed, territory within a city of the sixth class could be annexed to that of another school district, and also it could be divided so that a portion of its area might be placed in one school district and a portion in another. But the undesirability of permitting a city even of the sixth class to be divided is apparent. It may have been emphasized by the cases of *Scott v. San Mateo County*, 27 Cal. App. 708, 151 P. 33, and *Petition of East Fruitvale Sanitary District*, 158 Cal. 453, 111 P. 368. At any rate, in 1917 the Legislature added the provision that in no instance should the territory within an incorporated city of the sixth class be in more than one school district. If under the law as it stood at the time of the decision in *Frankish v. Goodrich* it was held that the provision that every city or incorporated town should constitute a separate school district, etc., resulted in the conclusion that where territory was added to a city it ipso facto became a part of the district comprised by the city, the conclusion is irresistible that a prohibition against territory within an incorporated city of the sixth class, being in more than one school district, must produce the same result. The purport of the former provision was to prevent territory within an incorporated city from being

in more than one school district. It is true that, in addition to this, it carried an inhibition against the territory of an incorporated city being in a school district outside of the city itself, but that is immaterial here.

I am of opinion that the annexation brings petitioners within the Inglewood school district, from which it follows that they are entitled to attend school in the district in which they reside.

Let the peremptory writ of mandate issue as prayed.

FINLAYSON, P. J.; WORKS, J. We concur in the judgment on the ground that the question presented is concluded by the provisions of section 1576 of the Political Code as amended in 1917.

71 Cal. App. 409

In re BACKESTO'S ESTATE.

KENNEDY et al. v. HOUSTON et al.

(Civ. 5100.)

(District Court of Appeal, First District, Division 2, California. Feb. 25, 1925. Hearing Denied by Supreme Court April 23, 1925.)

1. Wills ⚡531(1)—Rule as to determination whether legatees are to take per capita or per stirpes, stated.

In ascertaining whether legatees are to take per capita or per stirpes, the intention of the testator, reached only by an examination of the language used as applied to all the surrounding circumstances and conditions present in testator's mind at time will was written, is the determining factor.

2. Wills ⚡531(3)—Children of named brothers and sisters of testator and testator's wife named in will held to take per capita and not per stirpes.

Under will giving surviving wife life estate, and providing that on wife's death proceeds of property "shall be equally divided, except as otherwise specified, between the children of" named brothers and sisters of testator and of testator's wife, and that children of named person "shall have only one-half the amount of the other children mentioned," the children on distribution of proceeds take per capita and not per stirpes; the word "among" being substituted for the word "between."

3. Wills ⚡634(14)—Remainder held to vest at time of testator's death.

Under will giving surviving wife life estate, and providing that on wife's death proceeds of property "shall be equally divided, except as otherwise specified, between the children of" named brothers and sisters of testator and of testator's wife, and that children of named person "shall have only one-half the amount of the other children mentioned who are benefited by this will," a remainder vested in the children at time of

testator's death; the devise being a "testamentary disposition to a class," within Civ. Code, § 1337, in view of sections 1310, 1341-1343.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

In the matter of the estate of John P. Backesto, deceased. Proceeding by Mary J. Kennedy and others against John P. Houston, etc., and others, to determine succession to estate. From separate portions of decree rendered, Sadie Seaton Wagner and George W. Hazzard separately appeal. Affirmed on Hazzard's appeal, and reversed on Wagner's appeal, with directions.

See, also, 63 Cal. App. 265, 218 P. 597.

Hamilton & Lindley and Haines & Haines, all of San Diego, for appellant Hazzard.

Leonard, Surr & Hellyer, of San Bernardino, for appellant Wagner.

Liggett & Liggett, of San Diego, Fry & Jenkins, and F. R. Estes, all of San Jose, and R. L. Beardslee, of Stockton, for respondents.

NOURSE, J. John P. Backesto died testate on March 17, 1890. In his will he gave to his wife a life interest in all his estate and provided that, after her death, the property should be sold and the proceeds equally divided among the children of certain brothers and sisters of decedent and of decedent's wife, excepting the children of the decedent's brother Henry, who should receive only one-half of the amount of the other children mentioned. The testator's wife died on January 2, 1918. Thereafter this proceeding was instituted under section 1664, Code of Civil Procedure, to determine the succession to the estate. The trial court held that the bequest of the will was made to the beneficiaries as a class composed of all the children of the persons designated living at the time of the death of the testator's wife and that they should all take equally per capita, except that each of the four children of the brother Henry should receive only one-half of the amount taken by each of the other children. It was then found that 22 children were entitled to take under this ruling—18 in equal portions, and each of the 4 children of Henry in one-half of the portion of the others. The estate was then divided into fortieths and each of Henry's children was awarded one-fortieth and each of the remaining 18 children was given two-fortieths.

From this decree, Sadie Seaton Wagner, who was a daughter of Irene Seaton, a daughter of Jacob, brother of testator, appeals on the ground that the trial court erroneously excluded her from participation in the estate when it found that the bequest to her mother, Irene Seaton, lapsed upon her mother's death in 1908, prior to the death of testator's wife. Another appeal is prosecuted by George W. Hazzard, a son of a sis-

ter of testator's wife. He assigns as error the finding that the beneficiaries should take per capita instead of per stirpes. By stipulation both appeals are to be heard on the same record. The appeals are presented on the judgment roll which contains the stipulation of facts upon which the cause was heard.

The pertinent portions of the will, which was an olographic one, are that—

"I, John P. Backesto, of San Jose, California, do hereby bequeath, or will to my beloved wife Anna E. C. Backesto, all my property, real and personal, *during her natural life*, to own the same. * * * *After her death, the property shall be sold, and the proceeds shall be equally divided, except as otherwise specified, between the children of Jacob Backesto. * * * Between the children of (other designated brothers and sisters of testator and of testator's wife). The children of Henry Backesto, of Shiloh, Richland county, Ohio, shall have only one-half the amount of the other children mentioned, who are benefited by this will, by virtue of him (Henry Backesto) having received a legacy, from our uncle. * * * Within one year after the death of my wife, the executors, shall sell the property, and divide the proceeds within three years, between the heirs as above specified.*" (Here follows an explanation of the different forms of spelling the name of testator by other members of the family.) (Emphasis ours.)

[1] Directing our attention first to the Hazzard appeal, which attacks the ruling that the distribution should be per capita and not per stirpes, we find little aid in the cited cases because none of them involve the same state of facts. In a case of this kind, the intention of the testator is the determining factor, and this can be reached only by an examination of the language used as applied to all the surrounding circumstances and the conditions present in the mind of the testator at the time the will was written. In re Pearsons, 99 Cal. 30, 34, 33 P. 751. The general rule of interpretation is stated in 40 Cyc. 1495, as follows:

"A devise or bequest to the children of two or more persons, whether expressed as to the children of A. and B., or to the children of A. and the children of B., or to other relatives of different persons, usually means that such children or relatives shall take per capita and not per stirpes unless it is apparent from the will that the testator intended them to take per stirpes."

Mr. Jarman, in his work on Wills, says:

"Where a gift is to the children of several persons, whether it be to the children of A. and B., or to the children of A. and the children of B., they take per capita, not per stirpes. The same rule applies, where a devise or bequest is made to a person and the children of another person; or to a person described as standing in a certain relation to the testator, and the children of another person standing in the same relation. * * *" 2 Jarman on Wills (6th Ed.) 1051, p. 205.

[2] The significant portions of the Backesto will are that—

"After the death of his wife "the property shall be sold and the proceeds shall be *equally divided*, except as otherwise specified, *between the children of Jacob, * * * between the children of Rebecca, * * * between children of Maria Hazzard, deceased, only one of whom is now known to be living, * * * between the children of David. * * ** The children of Henry * * * shall have only one-half the amount of the *other children mentioned* who are benefited by this will. * * * Within one year after the death of my wife, the executors shall * * * divide the proceeds * * * *between the heirs* above specified."

The confusion in the language of the will arises from the repeated use of the word "between." In its strict grammatical sense, the preposition "between" is used when applied to two things or two groups of things. When more than two are referred to, the word "among" is more properly used. However, the use of the word "between" as applying to more than two is not uncommon; in fact, the failure to make this distinction between the words "between" and "among" is quite common. It is plain that the testator did not use the word with this grammatical distinction because, if he had, he would not have said "between children of Maria Hazzard" when only one was known to be living; nor would he have said "between the children of Jerome B. Conwell" when Jerome had but one child. It seems clear that the word was used in the sense of "among," particularly as the same word is used later in the will with this meaning when the testator directed his executors to divide the proceeds "between the heirs as above specified."

If we substitute "among" for the word "between" in the clauses naming the various beneficiaries under the will, as well as in this later clause, we find a clear direction to divide the proceeds equally "among" the children of the brothers and sisters mentioned except as to the children of Henry, and they would then take per capita. Precedents supporting this interpretation of the will are found in Estate of Morrison, 138 Cal. 401, 404, 71 P. 453; Estate of Fisk, 182 Cal. 238, 240, 187 P. 958; Neil v. Stuart, 102 Kan. 242, 169 P. 1138, 1139; Kean's Lessee v. Hoffecker, 2 Har. (Del.) 103, 29 Am. Dec. 336, 343; Hill v. Bowers, 120 Mass. 135. It seems apparent that the testator intended to divide his property equally among the children of the brothers and sisters named—among his nephews and nieces irrespective of the number in each family—and that he made no provision for and drew no distinction between any of these brothers and sisters, or between any of his nephews and nieces, except the children of Henry and the three others who are expressly omitted from the will. If he had intended to favor the children of one brother or sister over those of another,

it would have been a simple matter to have done so.

The case of *Neil v. Stuart*, *supra*, is closely analogous on the point under consideration. There the testatrix gave her entire estate to her husband during his lifetime "and at his death the property is to be sold, and divided as follows: Among my brothers' and sisters' children, and David R. Neil, and Andrew Neil, also Lulu Keith, equally." In interpreting the will, the court says:

"Does the will compel the construction adopted by the trial court that the sisters' children take per stirpes? * * * David and Andrew she knew and Lulu she knew, but the children of the brothers and sisters the testatrix apparently did not know and certainly did not name. * * * The only proper construction to be given to the language now under consideration is that each nephew and niece of the testatrix was intended to share equally with the three other devisees, all to take per capita. * * * It would not be deemed natural or reasonable from any language found in the instrument or from any circumstance shown to conclude that she wanted one of the nephews or nieces to have a greater or lesser share than any other, all of whom she must have had in mind when she directed that the proceeds of the property were to be divided among them and the other devisees 'equally.' If one sister should have five children at the death of the testatrix, and another one, there is nothing to indicate that Jennet intended the one to have as much as the five. The language and circumstances indicate that she regarded her nephews and nieces, the one step-niece and the two nephews by marriage, as the equal objects of her benefaction."

For the reasons given we are satisfied that that portion of the decree holding that the division should be per capita, and on which the Hazzard appeal is based, should be affirmed.

The Wagner appeal is from that portion of the decree which held that the gifts did not vest until the death of testator's wife and that the gift to appellant's mother, a daughter of Jacob, a brother of the testator, lapsed because of her death prior to the death of testator's wife. In the consideration of this appeal the following dates are of interest: February, 1889, execution of the will; March, 1890, death of testator; November, 1896, death of brother Jacob; January, 1908, death of Irene Seaton, mother of appellant; January, 1918, death of testator's widow.

This appellant contends that as Irene Seaton was living at the time of testator's death and was one of the children of Jacob mentioned in the will, her title to her share of the proceeds of the estate vested in her on the death of the testator and passed to the appellant and her brother as the heirs of her mother who died intestate. This appellant points out that the trial court found that the bequest in the will was a bequest to "a class composed of all the children of the several

persons designated." She disagrees with the conclusion of the trial court that the bequest was available to those children only who were "living at the time the bequest took effect," i. e., "at the time of the death of the testator's widow."

The appellant rests her case on the provisions of section 1337, Civil Code, which reads, "A testamentary disposition to a class includes every person answering the description at the testator's death; but when the possession is postponed to a future period, it includes also all persons coming within the description before the time to which possession is postponed," and on section 1341, Civil Code, which reads, "Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death." Reference may also be made to section 1342, reading, "A testamentary disposition, when vested, cannot be divested unless upon the occurrence of the precise contingency prescribed by the testator for that purpose," and section 1343, reading, "If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place, except as provided in section thirteen hundred and ten." Section 1310, which is referred to in the section last quoted, provides that if the devisee dying during the life of the testator is a child or other relation of the testator his lineal descendants shall take the estate given by the will.

All these sections show the unmistakable intention of the statutory law to declare that a devise or bequest shall vest at the testator's death unless some other intention is expressed in the will. This policy has been recognized and approved by the California decisions. *Williams v. Williams*, 73 Cal. 99, 102, 14 P. 394; *In re De Vries*, 17 Cal. App. 184, 190, 119 P. 109; *Miller v. Oliver*, 54 Cal. App. 495, 498, 202 P. 168; *Estate of Campbell*, 149 Cal. 712, 717, 87 P. 573. The same rule is approved in 23 R. C. L. pp. 530, 535; *Doe, etc., v. Considine*, 6 Wall. (73 U. S.) 458, 475, 18 L. Ed. 869; and *McArthur v. Scott*, 113 U. S. 340, 378, 5 S. Ct. 652, 28 L. Ed. 1015; 24 Am. & Eng. Enc. of Law (2d Ed.) p. 382; and numerous other authorities which we deem it unnecessary to cite. It is accepted as a settled principle by such text-writers as 2 Jarman on Wills, p. 841; 2 Williams on Executors (7th Ed.) p. 1344; Alexander on Wills, § 996; Minor on Real Property, § 749; and Tiedeman on Real Property, § 302. It has thus become a fixed policy in the interpretation of clauses of this nature found in a will that a disposition to a class includes every person answering the description at the testator's death, and that the estate vests in them as they come in esse though the possession is postponed to a future period.

A brief has been filed in behalf of some of

the respondents in opposition to the Wagner appeal. None of the California cases cited therein are opposed to this view. Estate of Rogers, 94 Cal. 526, 29 P. 962, Estate of Winter, 114 Cal. 186, 45 P. 1063, and Estate of Blake, 157 Cal. 448, 108 P. 287, all construed wills which made dispositions contingent upon the survival of the beneficiary at the date possession was to be transferred. The other authorities cited are of similar import or arise in jurisdictions not having statutory law such as we find in our Civil Code.

[3] After all, cited cases are of little help when the point to be determined is the intention of the testator. An examination of the entire will convinces us that the testator intended to group all his nephews and nieces on both his own and his wife's side, except those expressly excluded, into one class to be the equal objects of his benefaction. He gave his wife a life estate but declared that after her death the property should be sold and the proceeds divided between the children "benefited by this will" and repeated that after her death the proceeds should be divided "between the heirs as above specified." This language indicates a present intention to devise the remainder to the nephews and nieces specified in the will, and the will must, therefore, be held to be "a testamentary disposition to a class" within the meaning of section 1337, Civil Code. As such the interest of the devisees would vest at the testator's death, and the appellant herein would be entitled to take by right of representation of the estate of her deceased mother.

There is no dispute as to the facts involved in the proceeding, and the findings of the trial court are sufficient to support a decree as prayed by this appellant.

The portion of the decree embraced in the Hazzard appeal is affirmed; the portion embraced in the Wagner appeal is reversed, with directions to the trial court to enter a decree in accordance with the views expressed herein.

We concur: LANGDON, P. J.; STURTEVANT, J.

71 Cal. App. 479

EHLERS v. BIHN et al. (Civ. 2889.)

(District Court of Appeals, Third District, California. March 2, 1925.)

1. Principal and agent ⇨173(3)—Finding that defendant approved contracts sued on and accepted assignments from agent executing them held warranted by evidence.

Evidence held to warrant finding that company, sued for purchase price of grapes, approved contracts signed by alleged agent and

accepted assignments thereof in accordance with agreement with agent.

2. Sales ⇨176(5)—Buyer, not rejecting nor objecting to grapes not conforming to contract until long after delivery, precluded from objecting after they decayed.

Buyer not rejecting nor objecting to different variety of grapes from those purchased until long after their delivery on railroad platform, where it left them until they decayed, could not object thereafter.

3. Sales ⇨195—Buyer held not relieved from liability by inability to get refrigerator cars because of railroad strike.

Buyer not canceling contract nor extending time for delivery of grapes, as authorized in case of inability to get refrigerator cars because of railroad strike in progress at time of purchase, but allowing seller to deliver grapes on railroad platform, held not relieved from liability for purchase price because of inability to get such cars.

4. Sales ⇨176(5)—Seller of grapes entitled to judgment for purchase price, in absence of proof or objection to receipt of grapes as not conforming to statutory standards.

In absence of proof contradicting evidence that grapes sold were in good condition, suitable for eastern market, or objection to receiving them as not conforming to standards required by Fruit and Vegetable Standardization Act, seller was entitled to judgment for purchase price.

5. Evidence ⇨60—Presumption that law was obeyed.

In absence of evidence to contrary, presumption is that law was obeyed.

6. Evidence ⇨219(1)—Buyer's shipment of part of grapes purchased admission of conformity to statutory standards.

Buyer's shipment of part of grapes purchased is in nature of admission that they conformed to requirements of Fruit and Vegetable Standardization Act.

7. Sales ⇨181(11)—Findings that buyer failed to use due diligence in marketing grapes, and that loss resulted therefrom, held supported by evidence.

Evidence that buyers notified seller on October 5th to pick grapes, which were ripe early in September, and delivered boxes on October 7th, held sufficient to support findings that they did not use due diligence in marketing grapes and that loss thereof resulted from such failure.

8. Evidence ⇨317(4)—Question to seller as to conversation with buyer's agent before execution of contracts held not objectionable as calling for hearsay.

In action for purchase price of grapes, question to plaintiff, as to conversation with defendant's agent before execution of contracts, held not objectionable as calling for hearsay.

9. Appeal and error ☞237(2)—Objection to testimony as attempt to vary terms of written contract not available in absence of motion to strike out answer.

Objection that seller's testimony, as to statement by buyer's agent before execution of contracts, that buyer would sell grapes locally in case of car shortage, was attempt to vary terms of written contract by parol evidence, *held* not available, in absence of motion to strike out answer.

10. Appeal and error ☞1051(1)—Admission of testimony as to statement of buyer's agent that person signing contract was buyer's manager held not prejudicial error.

Admission of seller's testimony as to statement of buyer's agent that person signing contract was buyer's manager *held* not prejudicial, if error, in view of conclusive evidence that contracts were made in buyer's behalf and approved by it and that it accepted assignment thereof by agent.

11. Principal and agent ☞120(1)—Testimony that buyer instructed agent to take contracts for grapes at guaranteed price held properly admitted.

Testimony that buyer instructed agent to take contracts for grapes at guaranteed price *held* properly admitted in seller's action for price, in view of agreement between buyer and agent that latter was to handle business in manner prescribed by buyer.

12. Trial ☞333—Verdict held not contradictory in respect to amount awarded.

Verdict "in the sum of \$762.50 dollars. Seven hundred sixty-two & fifty cents," *held* not defective as contradictory.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by Anna Ehlers against C. L. Bihn and the Associated Fruit Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Glenn West, of Lodi, and D. L. Beard, of Napa, for appellants.

Clarence N. Riggins, of Napa, for respondent.

FINCH, P. J. The defendants filed separate notices of appeal from the judgment herein in favor of plaintiff. The parties have stipulated that the appeals be consolidated and that the same may be heard and determined on a single record.

The defendant Associated Fruit Company is a corporation which maintains offices in several cities. In so far as concerns the transactions involved in this case, its principal office is in the city of Fresno. At the time of those transactions and for several years prior thereto, the defendant Bihn was engaged in the business of buying and shipping fruit at the city of Napa. In the year 1922 the company and Bihn agreed to co-

operate in buying and shipping fruit produced in Napa county and certain adjacent territory. They reduced their agreement to writing in the form of a letter signed by the company, dated July 7, 1922, addressed to Bihn and accepted by him in writing, as follows:

"This confirms our understanding with you whereby you are to work with us exclusively for the balance of the season 1922 in the soliciting, buying and shipping of fruits and vegetables, except as herein otherwise provided. It is agreed that you will not operate in any other territory except Napa county and to and including Cordelia, Solano county. You are to solicit in our name, but you are to buy in your name subject to our approval and immediately assign such contracts to us. You are to demand and receive written acknowledgment of every contract assigned to us immediately after you have closed such contract with growers or others with our approval. * * * We are to have the sale of any fruit that you may secure or buy as stipulated herein. The profits or losses are to be divided 30% credited or charged to your account—70% credited or charged to our account. You are to pay all of your own expenses including the expense of any agents that you may employ, * * * we are to pay all of our over-head expense, including the expense of Mr. Lacey and any office assistance that he may require. * * * It is agreed that we furnish shook and loading material at cost, your account to be charged with 30% of the cost of any carry-over. * * * It is distinctly understood that you are not to act as our agent in the purchase of fruits and vegetables under this agreement and that we shall not be held responsible for any of your acts unless approved by us in writing. It is understood that you agree to handle business covered by this agreement in a manner as may be prescribed by us from time to time, excepting as herein otherwise stipulated. * * *

Mr. Lacey, whose name is mentioned in the contract, appears to have had at least general supervision over the company's office at Napa, and he signed checks in behalf of the company in payment for fruit purchased by Bihn under the latter's contract with the company. The company and Bihn "jointly" established an office in the city of Napa with an office sign containing the names of both the company and Bihn. In carrying out his part of the agreement Bihn employed several men to go out among the grape growers and solicit contracts for the purchase of their grapes, among them being G. E. Tobin and Walter Rossman. Under his direction they distributed among the growers attractive blotters, on which the company's name was printed in large letters between beautifully colored clusters of grapes, and proceeded, in accordance with the terms of the agreement, to "solicit" in the company's name, and, after leading the grower up to the selling point, to "buy" in Bihn's name. In this manner Bihn

entered into contracts with approximately 100 growers. Standard forms of contracts were used and they were executed in triplicate, the name of the company not appearing therein. One copy was left with the grower, one with Bihn, and the third was sent to the company for approval. The company mailed its copy back to Bihn with a "characteristic" hieroglyphic crayon mark in the lower left-hand corner, which was probably intended to be the initial of some person's name, carelessly written. Bihn treated these marks as approvals of the contracts on which they appeared. He testified:

"The papers would come back from the Associated Fruit Company. They would have that on them. * * * I would go right ahead shipping grapes. * * * I received likely every contract approved and a list of them in a letter, which was also received, something like that."

He did not preserve the letters. The growers were given company checks in payment for their grapes. The company furnished the growers boxes in which to pick their grapes. Some of the boxes were stamped with the company's name, others were not.

Rossman called on plaintiff at her residence and said, according to plaintiff's testimony, "that he was soliciting or buying, as you would say, grapes for the Associated Fruit Company," and gave her and her son some of the company's blotters. He said that the Associated Fruit Company would buy the black grapes and ship the white grapes on consignment. Thereafter, about the first of September, Tobin called on plaintiff, gave her a company blotter, and said that he was representing the company. He made three or four calls before plaintiff agreed to sell her grapes. Finally on the 8th day of September, Tobin presented two contracts for plaintiff's signature in which Bihn's name appeared as buyer. To plaintiff's inquiry as to the use of Bihn's name in the contracts instead of that of the company, Tobin replied, "That is all right, that is just the manager." Plaintiff then signed the contracts which follow. Printed forms were used, the italicized parts being written in pencil. The black-grape contract reads as follows:

"This certifies that *Ana Ehlers* * * * has sold all *wine grapes* all the fruit crops hereinafter specified that buyer shall find suitable for eastern markets during the year 192— on the following described premises: *15 acres* Delivered at *St. Helena Variety Petit Syra* Price per ton *85.00* Quantity—Tons *25* The seller agrees to pick and deliver all of said fruit at his own expense, in good condition, entirely free from mildew, or smut, or rain, or sand damage, and free from any damage whatsoever, and at the times directed by the buyer. The buyer agrees to pay for said fruit upon completion of delivery thereof and presentation of weigh-tags therefor, at the office of the buyer at *Napa, California*. In the event of a strike, quarantine,

boycott, embargo, fire, or failure of transportation companies to provide refrigerator cars, directly or indirectly affecting buyer's ability to perform this contract, buyer may cancel this contract, or extend time of delivery for a period equal to that so lost. * * * This said contract shall be subject to any state or federal law or laws, rule or rules, regulating food products and the distribution thereof, and the crops herein purchased shall comply with any and all such laws, rules and regulations. This contract is understood by the parties hereto to constitute an immediate sale, transferring title to buyer, but until delivery has been completed, seller agrees to, and does, assume all risks of loss, depreciation or damage, of whatever kind or nature, to any undelivered part of said crops. * * * Time is of the essence of this agreement, and no understanding other than herein expressed shall vary or modify this transaction."

The white-grape contract contained the following covenants:

"*Anna Ehlers*, hereinafter called the grower, hereby places the entire crop of *white grapes* grown on the property known as the *Mount View* being the property of *Anna Ehlers* grower has privilege of disposing of *white grapes* if she can get higher price for the season of 1922, good quality, suitable for eastern market, in the hands of *C. L. Bihn* to pack and market for the grower's account on the following terms and conditions: *buyer to guarantee shook and freight charges and \$30.00 per ton*. Said fruit to be picked and delivered at grower's expense to the packing house provided by shipper at *St. Helena, California*. *C. L. Bihn* to receive for furnishing all material and labor in packing and loading said crop of fruit the general rates in force during the current season. *C. L. Bihn* shall have the right to sell said fruit to the best possible advantage, and shall receive for its services in marketing said crop 10 cents per package, plus selling expense at destination, together with all transportation, refrigeration, revenue tax, collection and other charges advanced by it. *C. L. Bihn* agrees to use due diligence in marketing said fruit for all the parties hereto. * * * This contract shall not be revocable during its term."

[1] It was admitted at the trial that the company received one of the triplicates of each contract "about the time they bear date." They were returned to Bihn with the characteristic crayon mark in the lower left-hand corner. The original exhibits have been transmitted to this court. Nothing appears upon the grape contracts to show that Bihn assigned them to the company. Relative to the assignment of the black-grape contract, he testified as follows:

"Q. Did you make any written form of assignment of that contract to the Associated Fruit Company? A. Yes, it is indorsed, signed on the back in my name. * * * It was on the original."

There was properly admitted in evidence, over the company's objection, a paper, marked "copy" on the face thereof, in which the

plaintiff is "called the seller" and the "Associated Fruit Company" the buyer, bearing the same date and containing substantially all the terms and descriptions of the black-grape contract, and signed "Anna Ehler" and "Associated Fruit Co., by C. L. Bihn." In the lower left-hand corner are the words, "Approved by —, Officer of A. F. Co." In the blank space appears the aforesaid crayon mark. Bihn testified that he received this paper from the company. Neither he nor plaintiff affixed their respective names thereto. He testified that he mailed copies of all grape contracts to the company and received in reply documents in approximately the form of the foregoing paper. The company made no effort to explain the significance of such documents or of the crayon marks thereon and on the copies of the grape contracts which were signed by plaintiff and Bihn. Neither was there any denial of Bihn's testimony to the effect that he assigned the grape contracts to the company. These were all matters peculiarly within the power of the company to prove or disprove, and, in view thereof, a fair inference from all of the foregoing evidence is that the company approved the contracts and accepted the assignments thereof in accordance with the terms of its original agreement with Bihn. Under the circumstances shown by the evidence, it is immaterial in whose name the grape contracts were executed. Both defendants were interested therein and entitled to the benefits thereof and they both assumed and must bear its burdens. *Cutting Packing Co. v. Packers' Exchange*, 86 Cal. 574, 25 P. 52, 10 L. R. A. 369, 21 Am. St. Rep. 63; *Robinson v. Rispin*, 33 Cal. App. 536, 165 P. 979.

[2] Plaintiff delivered four truckloads of black grapes, which were shipped by defendants and for which the company paid her. It appears that the defendants did not have a packing house at St. Helena but received the grapes purchased by them on the north end of the Southern Pacific platform. Thereafter she delivered two more truckloads of black grapes, of which the defendants shipped 45 boxes and made no objections to the remainder on any ground, but left them on the platform until they were unfit for shipment. While on the platform these grapes were kept covered, presumably by defendants, to protect them from the weather. In this lot, packed in separate boxes, there were about 600 pounds of a different variety of black wine grapes from those purchased but of a higher market value. They were not rejected and no objection was made to them until long after their delivery. Some of the same variety were included in the first shipment. After they had decayed while in defendants' possession, it was too late to object.

[3] Appellants contend that, on account of a railroad strike, they were unable to get refrigerator cars in which to ship this lot of grapes, and that therefore they are not liable. Under their contract with plaintiff they were given the right in such a case to "cancel this contract, or extend time of delivery for a period equal to that so lost." They did neither, but allowed plaintiff to deliver the grapes to them, and, of course, it was then too late either to cancel the contract or extend the time of delivery. The strike was in progress at the time the grapes were purchased and continued through the grape-picking season. The defendants therefore had ample opportunity to cancel the contract or postpone delivery until they could secure cars.

[4-6] It is contended that plaintiff was not entitled to judgment because there was no proof that the grapes were of the quality required by the California Fruit and Vegetable Standardization Act (Stats. 1921, p. 1234). The testimony shows that the grapes were in "good condition," "excellent condition," and "suitable for eastern market." There was no proof to the contrary, nor was any objection made by defendants to receiving them on the ground that they did not conform to such standards. The facts are unlike those in *MacRae v. Heath*, 60 Cal. App. 64, 212 P. 228, where the evidence showed positively that the fruit there in question did not conform to the required standards. In the absence of evidence to the contrary, the presumption is that the law has been obeyed. The fact that defendants shipped a part of the grapes is in the nature of an admission that they conformed to the requirements of the act.

[7] Plaintiff testified that the white grapes were ripe early in September, and that during that month she frequently asked Tobin for boxes in which to pick them and requested that they be shipped immediately. Bihn testified that the company finally sold the white grapes, and that on the 1st day of October he gave Tobin orders to deliver boxes to plaintiff in which to pick the grapes and to instruct her to pick them. Arrangements had then been made for a car in which to ship them. Tobin did not communicate this information to the plaintiff until October 5th. A load of boxes was delivered to her October 1st and another October 7th. On the 2d of October .20 of an inch of rain fell; .81 on the 3d; and .03 on the 4th. The 5th, 6th, and 7th were clear. On the 8th .04 of an inch of rain fell; .04 on the 9th; .62 on the 10th; and .06 on the 11th. Plaintiff testified that she picked eight or nine tons of the white grapes before the rain which commenced on the 8th of October, and that the white grapes were not damaged by the rains which had theretofore fallen. She picked the remainder after the later rains and deliv-

ered all of them on the Southern Pacific platform, the last load being delivered October 14th. The defendants refused to accept them and they became a total loss. The testimony shows that the white grapes were in good condition prior to the rain commencing on the 8th. Bihn testified that normally the season for shipment of grapes of the variety described in the white-grape contract ended about October 20th. The white-grape contract contains no clause excusing performance by the buyer in the event of a strike or inability to obtain cars, but the buyer therein "agrees to use due diligence in marketing said fruit." If it be conceded that the defendants used due diligence up to the 1st of October, when they had succeeded in getting a car, their notice to plaintiff on the 4th to pick her grapes and the delivery of the boxes on the 7th did not constitute due diligence, in view of the lateness of the season and the length of time which had elapsed after the grapes were ripe and ready for shipment. It cannot be said that the evidence is insufficient to support the implied finding of the jury that the defendants did not use due diligence in marketing the grapes and that the loss thereof resulted from such failure on their part.

[8-10] Plaintiff was asked, in direct examination, to relate a conversation she had with Rossman before she signed the contracts. Counsel for the company objected on the ground that such conversation was hearsay and not binding upon the company. The objection was overruled and the witness testified that Rossman said that in the event of a shortage of cars the buyer would sell them locally. Counsel for the company then objected on the further ground "that it is an attempt to vary the terms of a written contract by parol evidence." Counsel for plaintiff thereupon withdrew the question. The question was not subject to the first objection and no motion was made to strike out the answer. Plaintiff was asked if Tobin made any statement "about the name of Bihn" when the contracts were presented to her for signature. Counsel for the company objected "on the ground that it is an attempt to vary the terms of a written contract." The objection was overruled and the witness answered that she asked Tobin concerning the use of Bihn's name in the contract and that Tobin replied: "Oh, that is all right; that is just the manager." The pleadings raised no issue of fraud or mistake, but if it be conceded that the objection should have been sustained, the evidence shows so conclusively that the contracts were made in behalf of the company and that it approved them and accepted an assignment thereof that no prejudice could have resulted from the admission of the testimony.

[11] It is urged that the court erred in admitting testimony to the effect that the company instructed Bihn to take contracts for white grapes at a guaranteed price. The agreement between the company and Bihn provided that he was "to handle business covered by this agreement in a manner as may be prescribed" by the company. The evidence therefore was properly admitted.

[12] The verdict of the jury reads as follows:

"We, the jury in the above-entitled cause, find for the plaintiff and against both defendants above named, in the sum of \$762.50 dollars. Seven hundred sixty-two & fifty cents."

Appellants contend that—

"The verdict is contradictory. In one place it says it is for over seven hundred dollars and, in another place, that it is for like number of cents."

The criticism is hypercritical.

The contention that the court erred in giving and refusing instructions is sufficiently disposed of by what has already been said in considering the defendants' liability under the facts stated. Other contentions made are without merit, and it is unnecessary to further extend this opinion by a discussion of them.

The judgment is affirmed as against both defendants.

We concur: HART, J.; PLUMMER, J.

196 Cal. 19

PEOPLE v. CRAIG. (Cr. 2742.)

(Supreme Court of California. April 13, 1925.
Rehearing Denied May 11, 1925.)

1. Jury ⚡85—Court is vested with discretion in determining competency of juror.

A court is vested with a wide discretion, in determining whether juror has shown himself competent or disqualified to serve in trial of case.

2. Jury ⚡103(11)—Where juror could disregard opinion formed, it is not abuse of discretion to disallow challenges for bias.

It is not an abuse of discretion to disallow challenges on ground of bias, where juror, who entertained strong opinion wholly founded on rumors and newspaper statements, stated that he could set aside opinions formed.

3. Criminal law ⚡1158(3)—Court's decision as to competency of jurors is conclusive, where jurors' answers are contradictory.

Trial court's decision as to competency of juror is conclusive, where juror makes inconsistent statements on voir dire.

4. Criminal law ⚡1166½(8)—Erroneous disallowance of challenges for cause is not prejudicial, unless defendant desired to use additional peremptory challenges.

An erroneous disallowance of a challenge for cause is not prejudicial, even though defendant finally exhausted his peremptory challenges, if it does not appear that he had occasion to, or desired to, use an additional peremptory challenge, or that the jurors finally accepted were not entirely satisfactory to him.

5. Criminal law ⚡730(8)—District attorney's argument held cured by instructions.

Where district attorney in argument challenged the genuineness of a birth certificate introduced to show accused to be under 22 years, and called upon jury to observe defendant's appearance in determining whether he was not over 22, held that instructions given immediately, and again in main charge, that statements made by counsel were not evidence and, unless sustained by evidence, should be disregarded, cured any possible prejudice.

6. Witnesses ⚡359—Manner of proving prior conviction stated.

The usual manner of proving a prior conviction is to ask witness if he has not been convicted of a felony, and, if he denies that he has been so convicted, to produce a copy of the judgment of conviction, and, if he answers in the affirmative, he may then be asked of what specific crime he was convicted.

7. Witnesses ⚡359—Certified copy of judgment of former conviction of felony is admissible to show specific felony of which conviction was had.

Where witness admitted on cross-examination that he had been convicted of a felony, it was proper, at the close of cross-examination, to admit a certified copy of judgment of conviction rather than to elicit from witness specific felony of which he had been convicted.

8. Homicide ⚡311—Instruction that jury's discretion in fixing punishment for first degree murder is not arbitrary is proper.

Instruction that jury's discretion in fixing punishment for first degree murder, under Pen. Code, § 190, is not an arbitrary discretion, but is limited to a determination of which of two punishments shall be inflicted, and is to be employed only when the jury is satisfied that the lighter punishment should be imposed, is proper.

In Bank.

Appeal from Superior Court, Tehama County; Walter E. Herzinger, Judge.

Charles Craig was convicted of murder in the first degree and sentenced to death, and he appeals. Affirmed.

W. P. Johnson, of Red Bluff, for appellant.

U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., Fred C. Pugh, Dist. Atty., of Red Bluff, and Curtiss E. Wetter, Deputy Dist. Atty., of Corning, for the People.

SEAWELL, J. The defendant and one Baker were jointly charged by an information filed against them with the crime of murder, which consisted of having killed and murdered with malice aforethought, on July 10, 1924, in the county of Tehama, this state, one Samuel Hermanson. On the morning of the trial, and before the jury was impaneled, defendant Baker withdrew his former plea of not guilty and entered a plea of guilty of murder of the first degree, and was subsequently sentenced upon said plea to life imprisonment in the state penitentiary. Upon the trial of this defendant, Charles Craig, the jury returned a verdict of murder of the first degree against him without recommendation, which verdict carried with it, under the law of the state, the imposition of the death penalty. From an order denying a motion for a new trial, and the judgment of the court imposing the death penalty, this appeal is taken. The sufficiency of the evidence to sustain the judgment is not questioned, and it will not be necessary to state with minute detail the facts and circumstances which conclusively establish the guilt of this defendant, and the guilt of his associates in crime as well.

On the morning of July 10, 1924, shortly after the Bank of Tehama, located at Red Bluff, Tehama county, had opened its doors for business, the defendants Charles Craig and Jack Baker entered said bank and by the use of fear compelled its teller, Frank C. Joy, to place within a satchel, which Craig carried, currency and coin, the property of said bank, aggregating the sum of \$1,906.31. Baker exhibited no deadly weapon, and it is claimed that he had none at this time, but Craig displayed a pistol to the teller, which he held in such a way as to be partially concealed from the view of the few persons who chanced to be in the bank at the time, and,

in whispering tones, and in a threatening manner, gave the teller to understand what his mission was at the bank. Craig took the satchel and its contents and with his associate left the bank, and both leaped into a blue painted Hudson automobile, badly weather-stained, which they had parked near the bank building, and began their flight from the scene of the crime.

The news of the robbery was immediately broadcasted by telephone service, messengers, and word of mouth, to farm and ranch houses and public places such as could be reached along the highways leading out of the county, describing the defendants and the automobile in which they were traveling with instructions to apprehend all such persons as might be reasonably suspected of the commission of the crime. The route taken by the bandits, a short way out of Red Bluff, became very rough in spots, and, after they had traveled about 26 miles easterly from Red Bluff, the rear right wheel of their automobile was entirely wrecked, and they were forced to abandon it by the roadside. They then continued their flight easterly on foot, and, after traveling about 2 miles further, they met the deceased, Samuel Hermanson, who was driving his Ford runabout, and was traveling westerly towards Red Bluff, in response to a message descriptive of the persons and the automobile, which he had received from the sheriff's office informing him of the bank robbery, and requesting him to apprehend such strangers as might answer to the description sent out. Hermanson resided at the Lyman ranch, which was situate a few miles east of the point on the road at which he accosted the defendant and Baker. Before leaving the Lyman ranch to join in the search, Hermanson placed a loaded automatic rifle in his Ford runabout, and buckled a holster containing his revolver and also an ammunition belt containing cartridges about his person.

Defendant Craig had changed his clothing from dark to light colored apparel near the place where the Hudson machine had been abandoned. The Hudson machine was not within sight of the locality where Hermanson met Craig and Baker. Craig observed Hermanson slowing down his car as he approached them, and anticipated that he would interrogate them in connection with the crime. They halted; Craig taking a position on the north side of the road, and Baker stepped to the south side of the road. Craig was the first to speak, and he asked Hermanson where they could obtain water and what the distance was to the nearest garage. Hermanson then told them of the bank robbery and expressed doubt as to Craig and Baker being the persons wanted, as they did not seem to fit the description sent out, but he decided, nevertheless, to take them into Red Bluff. Both expressed a willingness to go. He made an incomplete

search of both, holding his revolver in his hand while doing so. Craig carried his coat on his arm and his revolver, which was in the inner pocket of his coat, was overlooked by Hermanson. His engine had stopped, and as he got into the car he asked them to crank it, but each responded that he did not know how to crank a car. Hermanson then got out and cranked the car, got back into it, placed the rifle at his right side and the revolver between his limbs, handle up, with the barrel resting on the cushion of the seat. He directed Craig and Baker to take positions on the running board. Craig stepped on the right running board and Baker on the left. As Hermanson threw the car into gear, Baker, so he claims, upon signal from Craig, grabbed the revolver, and Hermanson attempted to grab the rifle at his right, but Craig had also grabbed it, and a struggle ensued for the possession of the arm. Hermanson was shot five times in a brief space of time, any one of the wounds, except possibly one, would probably have proved fatal. His lungs, liver, and the abdominal cavity were pierced by bullets as the struggle for the rifle ensued, and as a finale of the assault he was deliberately shot 2 inches above the right eye by Craig; the weapon having been held near to his head, the bullet entering the brain and lodging against the rear wall of the skull. The physicians testified that in their opinion death instantly followed. Some of the wounds upon his body were inflicted by shots aimed by Baker. During the struggle the automobile, which had been set in motion and which was unguided, left the road and traveled over rough, rocky ground, and plowed its way through chaparral, and landed against a barbed-wire fence, after breaking down a fence post, and then stopped. The engine had ceased running. Hermanson's body, stripped of the pistol, holster, ammunition belt, and cartridges, was ruthlessly thrown from the car and the machine was appropriated by the bandits. They again set out on their way, but the car was without water, and the gasoline was low. The personal effects of Hermanson of a tell-tale character were disposed of along the roadside as they traveled. All were afterwards recovered. Two neighbors of Hermanson had been informed by him but a short time before his death of the robbery, and they also went in the direction that Hermanson had gone in pursuit of the robbers, and to give assistance to Hermanson if need be. The neighbors, who were driving a Ford automobile, were overtaken by Craig and Baker on their return trip home. Upon being questioned, the bandits said to them that they were on their way to Reno. The robbery was casually referred to by them. Their car was steaming badly, and they inquired as to where they could get water. They were directed to the Lyman ranch, which was a few miles ahead of them, and,

following directions, drew up at the Lyman ranch, the domicile of Hermanson. The two neighbors referred to became suspicious that these men were the bandits, and they followed closely behind them. They also drew up at the Lyman ranch house. Hermanson's automobile had been damaged and was not at once recognized by the workmen who were at the ranch when it was driven into the house yard. Craig asked for water, and was directed to a place where it was obtainable. His hands appeared to be unusually dark, and he washed them. The automobile seat was bloodstained and the cushion and top were bullet pierced. It bore other unmistakable evidence of the deadly struggle. It was soon discovered that Hermanson's name was upon the license plate inside the car. Craig and Baker were placed under guard and held until the arrival of the sheriff, which was shortly thereafter, and he took appellant and his associate into custody. The evidence against the bandits unfolded at once. They made several confessions of guilt and gave detailed statements of the manner in which the murder was executed. Further details of the deadly assault would serve no purpose except, possibly, to show that both Craig and Baker were guilty of a deliberate murder, committed in a vicious and merciless manner. The circumstances of its execution further shows that its perpetrators possessed wicked and malignant hearts.

[1-4] Appellant insists that the court committed reversible error by the denial of challenges made for actual bias at the trial of the cause to four certain jurors, which ruling compelled the defendant to exercise peremptory challenges upon said jurors, thereby reducing his peremptory challenges to that extent. Four other jurors were accepted after appellant's peremptory challenges had been exhausted, all of whom, it is now contended, would have been peremptorily challenged had appellant not been required to exhaust his challenges upon said jurors whom he claimed should have been dismissed from the jury upon his challenges for actual bias. There are two answers to this claim of error: First, the court is vested with a wide discretion in the exercise of its judgment as to whether a juror has shown himself or herself to be competent or disqualified to serve in the trial of a cause. We have examined the record as to the grounds upon which bias was predicated as to the four jurors upon whom peremptory challenges were used. While it is true that one of the jurors, at least, seemed to entertain a strong opinion, wholly founded, however, upon public rumor or statements in public journals or common notoriety, nevertheless said juror and the other three, upon crucial tests being applied by the court as to whether or not they could and would entirely set aside and disregard the opinions thus

formed, answered in the affirmative. Even if we concede, upon an inspection of the record merely, that, had we been in the trial court's place, we would have allowed the challenges, yet we cannot say, under the decisions of this state, that it was an abuse of discretion for the trial court to have disallowed the challenges. The answers of these jurors to questions propounded both tended to show disqualifications—provided they fully understood the questions propounded—and also indicated competency to sit as jurors. The trial judge whose position for a proper determination of the question was superior to our own, which must be limited to a mere examination of the record, ruled that said persons were competent to act as jurors, and we are not convinced that his ruling constituted an abuse of discretion. Where there are inconsistent statements made by prospective jurors on voir dire, the decision of the trial court is conclusive. *People v. Edwards*, 163 Cal. 752, 127 P. 58; *People v. Loper*, 159 Cal. 6, 112 P. 720, Ann. Cas. 1912B, 1193; *People v. Riggins*, 159 Cal. 113, 112 P. 862; *People v. Ryan*, 152 Cal. 371, 92 P. 853. Second, we have carefully examined the testimony given by the four jurors on voir dire who were accepted, and find that no objection was made or could have been made to their qualifications to serve as jurors in the case. The only information they had was clearly such as was founded upon public rumor, or statements made in public journals or common notoriety. Each of them was so clearly within the rule of qualification that no objection was made by counsel for the defendant to their competency to serve as jurors. By all of the authorities of this state touching like situations the rule is that an erroneous disallowance of a challenge for cause is not prejudicial, even though the defendant finally exhaust his peremptory challenges, if it does not appear that he had occasion to or desired to use an additional peremptory challenge, or that the jurors finally accepted were not entirely satisfactory to him. *People v. Kromphold*, 172 Cal. 512, 157 P. 599; *People v. Schafer*, 161 Cal. 573, 119 P. 920; *People v. Harrison*, 18 Cal. App. 288, 123 P. 200, 8 Cal. Jur. 610. The above cases state the precise situation of the defendant in the instant case. In the case of *People v. Kromphold*, quoting approvingly from *People v. Schafer*, it is said:

"It is entirely consistent with the record that the twelve jurors who actually tried the case were absolutely satisfactory to defendant, and that he desired all of them to serve and would not have excused any one of them if he had been given the opportunity. After judgment, the contrary should not be presumed."

[5] The second point that appellant urges rises out of the alleged misconduct of the district attorney concerning his treatment, during his argument to the jury, of a birth

certificate offered in evidence, by which it was claimed that defendant Craig was proved to be of an age not beyond 22 years. The certified copy of the birth record of defendant Craig, attested by the county clerk's record of the county of Calhoun, state of Illinois, was received in evidence as being the birth certificate of the defendant. It contained no certificate, however, by any presiding judge or justice of that county or state, that the attestation was in due form. The district attorney objected to it upon the ground that it was not properly certified to, but his objection was overruled. In his argument to the jury the genuineness of the certificate was challenged, and some caustic remarks were indulged in as to how it must have been obtained. In support of his position that it did not correctly state the age of the defendant, he called upon the jury to make their own observations of the defendant, and apply their human experiences in determining whether or not the defendant's age was not greatly in excess of 22 years. No objection was made at the time the alleged misconduct of the district attorney was committed. At the close of the district attorney's argument, the attorney for the defendant assigned, as misconduct on the part of the district attorney, the statements impugning the faith and credit that should be given to the certificate of birth. The court immediately instructed the jury that any statements made by either the district attorney or counsel for the defendant was not evidence in the case, and, unless such statements were sustained by evidence admitted by the court, it was the duty of the jury to disregard any such statements. This admonition was repeated again in the general instructions. We think the court's admonition cured any possible prejudice that may have accrued to the defendant. Whether or not the defendant was precisely 22, or had passed that age, was not a question of any great moment. The evidence shows him to have been the directing mind in the commission of both crimes. Admittedly he was 4 years beyond the age of 18, an age which subjected him to the full consequences of a willful murder. Again, the defendant was in the presence of the jury, and, if he had the appearance of having attained an age beyond that which the birth certificate indicated, the jury had a right to consider such a circumstance. If the challenge of the district attorney was without reasonable foundation the statements would have reacted upon the prosecution. We are of the opinion that the statement of the district attorney in this respect could not have influenced the jury to return a verdict different from the one which it found.

[6, 7] It is next urged that the court committed error in the admission of a certified copy of a judgment showing the conviction of the defendant of murder committed in the

state of Iowa on March 30, 1917. The district attorney asked the defendant if it were not true that he was convicted at Spencer, Iowa, of murder in the first degree, in 1917 or 1918. The attorney for the defendant objected to the question and assigned it as misconduct. The court then informed the district attorney that he would permit him to ask if he had been convicted of a felony. The district attorney reframed his question, and asked the defendant if it was not a fact that on or about the 30th day of March, 1917, in Clay county, Iowa, he was convicted of a felony, and the defendant replied in the affirmative. The district attorney, at the close of the examination of the witness, offered a judgment of conviction, had against the defendant in the district court of Clay county, Iowa, on March 30, 1917, of murder of the first degree. This was objected to, but the objection was overruled. The usual manner of making proof of a prior conviction is to ask the witness who has suffered such a conviction if he had been theretofore convicted of a felony, and, if he denies that he has been so convicted, to produce a copy of the judgment of conviction, or, if he answers in the affirmative, he may then be asked of what specific crime he was convicted. *People v. Chin Hane*, 108 Cal. 597, 41 P. 697; *People v. Eldridge*, 147 Cal. 782, 786, 82 P. 442; *People v. Fouts*, 61 Cal. App. 242, 245, 214 P. 657. In this case the judgment of conviction was offered, rather than eliciting the same information from the defendant who had suffered a former conviction. We are not able to see that defendant could have possibly suffered injury by this ruling.

[8] Lastly, it is claimed that the court erred in giving an instruction which has been held by a long line of authorities not to be error. The instruction complained of is an amplification of section 190, Penal Code, which provides that the jury may, within their discretion, in case they find a defendant guilty of murder of the first degree, pronounce a sentence that will relieve him of the extreme penalty of the law—to which has been added with judicial sanction—that such discretion is not an arbitrary discretion, but is limited to a determination of which of two punishments shall be inflicted, and is to be employed only when the jury is satisfied that the lighter penalty should be imposed. The precise instruction, without repeating it, has been so often passed upon by this court within the past 2 years that it is only necessary to cite the authorities which hold that the giving of the instruction does not necessitate a reversal of the judgment. *People v. Casade* (Cal. Sup.) 230 P. 9; *People v. Wolfgang*, 192 Cal. 754, 221 P. 907; *People v. Connelly* (Cal. Sup.) 234 P. 374; *People v. Perry* (Cal. Sup.) 234 P. 890.

The order and judgment appealed from are affirmed.

We concur: MYERS, C. J.; RICHARDS, J.; SHENK, J.; LAWLOR, J.; WASTE, J.; LENNON, J.

196 Cal. 29

In re DARE'S ESTATE.

SPONABLE v. DARE

(L. A. 7892.)

(Supreme Court of California. April 13, 1925.
Rehearing Denied May 11, 1925.)

1. Executors and administrators §296—**Executor not required by will to pay over to beneficiary of trust any portion of estate prior to decree of distribution.**

Under will providing for certain bequests which executor was bound to pay under Civ. Code, §§ 1363-1368, and devising residue of estate in trust for named beneficiary, executor, who was also trustee, *held* not required to pay over to such beneficiary any portion of estate or income thereof prior to decree of distribution.

2. Executors and administrators §296—**Immaterial that trustee named in will was also executor, in determining whether he was required to pay over to beneficiary any portion of estate or income prior to decree of distribution.**

That trustee named in will was also executor was immaterial in determining whether, as executor, he was required to pay over to beneficiary any portion of estate or income thereof prior to decree of distribution, where in his capacity as executor he was not invested with title to property nor powers and duties devolving on him as trustee.

3. Executors and administrators §315(6)—**Decree of distribution held not conclusive as between trustee and beneficiary.**

Under will devising residue of testatrix's property on payment of certain bequests in trust for adopted daughter, decree of distribution *held* not conclusive on question whether any part of amount distributed to trustee belonged to beneficiary as income.

4. Wills §435—**Will interpreted as though adopted daughter of testatrix was her natural offspring.**

Will devising testatrix's property in trust for her adopted daughter, who appeared to stand in such relation to testatrix, would be interpreted as though such daughter was natural offspring of testatrix.

5. Wills §620—**Will devising property in trust for testatrix's adopted daughter held a bequest for maintenance.**

Will devising property in trust for testatrix's adopted daughter until she reached specified age constituted a bequest for maintenance of such daughter until such time as she should come into ownership and possession of entire residue of estate, where she had been supported by testatrix and her husband and had no means for her own support.

6. Wills §684(7) — **Devise of property in trust for testatrix's adopted daughter held to take effect at testatrix's death.**

Under devise of property in trust for testatrix's adopted daughter, constituting a bequest for maintenance beneficiary, *held* entitled to income from testatrix's death, in view of Civ. Code, §§ 1368, 1369.

7. Trusts §274(3)—**Commissions of executor and fees of his counsel held not chargeable against beneficiary's income from trust estate.**

Under will devising property in trust for testatrix's adopted daughter, income therefrom was not chargeable with commissions of executor and fees of his counsel during administration of estate, in absence of a showing that substance of estate in hands of administrator was not ample for payment of such expenditures.

8. Trusts §274(3) — **Unusual expense, enhancing value of capital of trust created by will, payable out of capital rather than income.**

While regular annual and ordinarily recurring expenses incidental to administration of a trust created by will are payable out of income derived from its properties, unusual and extraordinary expenses, going to enhancement of value of capital itself, should be payable out of capital.

9. Trusts §274(3)—**Unusual expenditures of trustee under will, in caring for corpus of estate, not chargeable against "income" payable to beneficiary.**

Unusual expenditures by testamentary trustee, in caring for and preserving corpus of trust estate, and which benefited corpus of estate, *held* chargeable against corpus of estate and not income paid beneficiary, in view of Civ. Code, § 840, where her position was analogous to that of a life tenant; "income" being something produced by capital without impairing it, and which leaves property intact.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income.]

In Bank.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

In the matter of the estate of Emma E. Dare, deceased, in which report and account of Frank W. Sponable, as trustee, was opposed by Doreene Dare. From an order disapproving report and account, trustee appeals. Affirmed, with directions.

Harry W. T. Ross, of Santa Barbara, for appellant.

E. W. Squier and Schauer & Ryon, all of Santa Barbara, for respondent.

RICHARDS, J. This appeal is from an order of the superior court in and for the county of Santa Barbara, disapproving in certain respects the report and account of one Frank W. Sponable as trustee under and by

virtue of the will of Emma E. Dare, deceased, which said order was made and entered on July 18, 1923, pursuant to certain findings of fact and conclusions of law on that date made and filed in said court. The appeal is by said trustee, and presents to this court for its determination certain questions respecting the correctness of the conclusions of law of said court, which formed the basis of said order, and of the order itself. The facts are undisputed and are briefly these: Emma E. Dare died in the city of Santa Barbara on or about the 21st day of July, 1920, leaving estate therein and also in the state of Kansas, of which latter state she had been a resident prior to her becoming a resident of California shortly before her death. On June 3, 1920, she had made her last will, which was offered and admitted to probate in the county of Santa Barbara upon her decease therein. By the terms of her said will, after making certain specific bequests, she devised all the rest and residue of her estate to Frank W. Sponable of Paola, Kan., as trustee; or, in the event of his death prior to the death of the testatrix or of his failure or refusal to accept the trust, then to John L. Hunt of Topeka, Kan., upon certain trusts as set forth in said will, among which were the following:

"(a) To pay to my adopted daughter Doreene Dare, formerly Doreene Steer, all of the income thereof in equal monthly payments as nearly as may be until she, the said Doreene Dare shall reach the age of thirty-five years, and then on her thirty-fifth birthday to pay, assign, convey and turn over to her one-half of all of the property so held in trust, together with all of the income thereof, if any, which shall not theretofore have been paid to her as hereinbefore provided; and thereafter and after the thirty-fifth birthday of her, the said Doreene Dare, to pay to her in like equal monthly payments all of the income of the remainder of said trust property until she, the said Doreene Dare, shall reach the age of forty-five years, and on her forty-fifth birthday to pay, assign, convey and turn over to her, the said Doreene Dare, all of the remainder of said trust property, together with all of the income thereof which shall then have accumulated and which shall not have been theretofore paid over to her."

The will then proceeds to attempt to provide against any assignment of the income or principal of the devised property by Doreene Dare and against any attachment or garnishment being recognized or satisfied out of said property. The will then provides as follows:

"(c) In case the said Doreene Dare shall not survive the age of forty-five years, then I direct that the income from one-half of the property which shall have come into the hands of said trustee and shall still remain in his hands shall be paid to my great nephew Thomas Dare Ball of Darlow, Kansas, in equal quarterly payments until the said Thomas Dare Ball shall reach the age of twenty-five years."

The will then provides for the payment over to said Thomas Dare Ball of one-half of the substance of said property under certain contingencies, and further provides that, in the event said Thomas Dare Ball should not survive said Doreene Dare, and that the latter died before attaining the age of 45 years, the one-half of the property should go to two other relatives named, or the survivor of them. As to the remaining one-half of said property, it was, in the event of Doreene Dare not surviving the testatrix or not attaining the age of 45 years, to be turned over to a certain cemetery association for certain specified purposes; and in the event such association was not in existence, to her relatives to whom the other half of the property was to come, for like purposes. The will of the decedent was duly presented for and admitted to probate in said court by Frank W. Sponable, the executor named therein, and administration was thereafter had thereon and upon said estate; and thereafter in due course the said executor presented and filed his first and final account, together with a petition for the distribution of the residue of the estate to himself as the trustee named in said will and upon the trusts set forth therein. This account of the executor contained a detailed statement of the money and property of the estate which had come into his hands as such executor and of the expenditures made by him therefrom, of the claims which had been presented, filed, and paid, and of the balance of cash on hand and subject to distribution. A hearing was had upon said account and petition for distribution after due and legal notice thereof, and, there being no objection offered at said hearing to said account or to the decree of distribution of said estate as prayed for, the court proceeded to settle said executor's account and to make distribution of the residue of said estate. In so doing the court found that the said executor was entitled to an allowance of the sum of \$1,058.56 for his commissions as such executor, and that his attorney of record in the probate of said estate was also entitled to an allowance of the sum of \$1,058.56 for his fees as such attorney. The court directed the payment of these respective sums out of the estate in the hands of the executor, and further ordered and decreed that the whole of the residue of said estate subject to the payment of the above allowances be distributed to Frank W. Sponable as trustee and upon the trusts set forth in said will, and which were also set forth in *hæc verba* in said decree. The decree contained a specific description of the residue of said estate thus distributed, which showed as cash on hand and subject to such distribution the sum of \$6,218.55, and which sum embraced and included whatever amounts of money had been received by the executor during his administration of said estate as the income thereof accruing be-

tween the date of the death of said testatrix and the date of such decree of distribution. This decree of distribution was filed and entered on January 30, 1922, and thereupon the said Frank W. Sponable received the whole of the residue of said estate as trustee in conformity with the terms of said decree of distribution. Thereafter, and on April 19, 1923, in response to a citation issued out of said court and in the matter of said estate, the said trustee appeared and filed his first account and report as such trustee. Notice was duly given of a hearing upon said account and report, and upon the date fixed for such hearing said Doreene Dare appeared and filed her exceptions and objections to the account and report of said trustee, wherein she set forth some sixteen separate and specific objections thereto and to the settlement and approval thereof. Thereupon, and on May 26, 1923, the said trustee filed a supplemental and more detailed statement of his receipts as such trustee. Thereupon the said Doreene Dare, on May 28, 1923, presented and filed her amended exceptions and objections to the account and report of said trustee. A hearing was had upon the issues as thus presented before the court, and, the matter being submitted the court, on July 18, 1923, filed its findings of fact and conclusions of law upon the said issues, and thereupon, and as a part thereof, entered its order and decree in the following terms, viz.:

"It is therefore ordered, adjudged, and decreed, that said account and report as amended be and is hereby disapproved and disallowed by the court, and that said trustee be and he is required and directed to file forthwith a full and true account in accordance with the findings of fact and conclusions of law herein, showing the corpus of said estate and the income therefrom separately from the date of death of testatrix until the receipt of said trust fund by the said trustee, and that such further account show a full and true account in accordance with the findings of fact and conclusions of law herein from the time of said trustee's receipt of said trust fund to the date of the filing of said account and report as amended; and that said trustee pay over to the beneficiary and contestant, Doreene Dare, just as soon as it can be done without loss to the investments of the trust, the income received from said trust property from the date of testatrix's death to the date of distribution to Frank W. Sponable as trustee herein, without deduction therefrom of either the attorneys' or the executor's fees therein allowed for handling said estate or other expenses of administration of said estate; that said trustee pay over to the beneficiary and contestant, Doreene Dare, just as soon as it can be done without loss to the investments of the trust, the income received on said trust funds from date of distribution to Frank W. Sponable, as trustee, without deduction of the expenses found to be extraordinary and unusual expenses under paragraph 15 above, and including therein the part of said income which has been reinvested by said trustee; that said

trustee pay over to the beneficiary and contestant, Doreene Dare, any other amounts found to be due her under his account, submitted in accordance with this decree, and in conclusions herein."

[1-3] From the foregoing terms of said order and decree, and from the whole thereof, the said trustee has taken and prosecutes this appeal. The appellant presents three points for our consideration upon this appeal: First, whether, after the decree settling the final account and distribution in the estate of Emma E. Dare has become final it can be modified by an order of the court making it in a collateral proceeding; second, whether the income to be paid to the said Doreene Dare commenced at the death of the testatrix or upon and after the date when the property passed into the hands of the trustee upon the distribution of said estate; third, an interpretation as to what is meant by "income" to be paid by the trustee to the said beneficiary—whether it is "net income" and subject to deductions for the expenses necessary to preserve and care for the substance of the trust estate, or whether the gross income shall be paid the present beneficiary without such deductions being first made by the trustee. The answer to the first of these questions leads to the primary inquiry as to whether the executor of said decedent's estate was bound by the terms of her said will to pay over to said Doreene Dare any portion of said estate or of the income thereof prior to or at the time of the decree of distribution of the residue of said estate. We look in vain for any provision of the will or of law which imposes such a duty upon him in his capacity as such executor. The will directs the executor thereof to pay the expenses of the decedent's last illness and funeral and to erect a suitable marker over her resting place. It then proceeds to make certain bequests of specific sums of money to be paid to the persons named as the recipients thereof. The executor was bound as a matter of law to provide for the proper administration of said estate and the payment of these bequests during the course thereof. Civ. Code, §§ 1363-1368. All the rest and residue of said estate was by the decedent devised to Frank W. Sponable as trustee under the trusts created by the terms of the decedent's said will. That said Frank W. Sponable was also the executor of the decedent's said will and of her estate is an immaterial incident, since in his capacity as executor he was invested with the title to none of the property nor with none of the powers and duties which were to devolve upon him upon the distribution to him of the entire residue of said estate in the capacity of such trustee. This being so, no issue was presented or presentable as to what portion of the income derived from the property of said estate the primary beneficiary of said trust would be entitled to receive from the trustee thereof,

nor as to what date the right to such income or any portion thereof was to take its beginning, for the reason that no such trust had been cast upon Frank W. Sponable until the making and the entry of the decree of distribution of said estate to him in the capacity of such trustee. Had the executor failed or neglected to make a proper accounting of the property of said estate, or of the income thereof, or of the conservation of such income, he could doubtless have been compelled to do so at the instance of the beneficiary of the trust provided for in the decedent's said will, but beyond that she would not have been entitled to go in demanding the payment over to her of any portion of such income prior to the distribution of said estate, for the twofold reason that the entire residue of said estate, after the payment of the expenses of administration and of the specific legacies, was devised and hence to be distributed to said trustee, and that her right to be paid over any portion of such income could not arise until the legal relation of trustee and beneficiary had been established by the decree of distribution. It follows necessarily that nothing material to the questions here under consideration was concluded by the terms of the decree of distribution except the correctness of the executor's approved account and the amount of the residue of the estate to be distributed to said trustee. The correctness of the said decree of distribution is not challenged by this proceeding in either of the above respects, nor did the trial court, in making the order complained of upon this appeal, attempt in any particular to alter or vary the terms of said decree. No authority would seem to be required to reinforce these irresistible conclusions, but if any were needed it might be found in the very cogent language of the Supreme Court of Connecticut in passing upon a precisely similar question. *Bancroft v. Security Co.*, 74 Conn. 218, 50 A. 735, 737. It follows that there is no merit in the appellant's first contention.

[4, 5] The second question presented by the appellant is as to whether the income, to be paid to said Doorene Dare as the primary beneficiary under the terms of the trust provided for in the decedent's said will, commenced as to the time of its allocation from the date of the decedent's death, or from the time of the coming of the property of said estate into the hands of the trustee, upon its distribution to him as such. This question involves an interpretation of the terms of the decedent's said will with respect to such income. It is to be noted that the said testatrix in her said will refers to Doreene Dare as her "adopted daughter," and the record otherwise shows that the latter stood in this relation to the testatrix. This being so, she is to be regarded, in attempting to interpret the terms of this will, precisely as though she was the natural offspring of the testatrix.

So regarding her, and looking to the other provisions of said will by the terms of which she is made the sole beneficiary and recipient of the income of the residue of the property of said estate coming into the hands of said trustee, we are constrained to the conclusion that the testatrix intended that the said provision in her will should constitute in effect a bequest for the maintenance of her adopted daughter until such time as she should come into the ownership and possession of the entire residue of her said estate under the other terms of her said will. In *Estate of Mackay*, 107 Cal. 303, 40 P. 558, wherein the testator bequeathed to his executors in trust the sum of \$15,000, directing them to invest the same in such securities as they should deem advisable, and pay over the income thereof to one Hattie Schenck, housekeeper, during her life, the court held that the said provision in the testator's will amounted, in substance, to a bequest for maintenance. It was aided to this conclusion by proof that for several years prior to such provision the beneficiary thereof had been dependent for support and maintenance and had been supported and maintained by him. A similar showing was made in the instant case, the proof and the findings of the court being that the respondent herein was the adopted daughter of the decedent and of her deceased husband, and had been supported and maintained by her adopting parents prior to their death, and that she had no means of her own nor any other source of support or income than that provided by her said parents aside from her own earnings. The trial court expressly found that the trust provisions of the decedent's will were intended for the maintenance of respondent. We are of the opinion that this finding is fully justified by the terms of the decedent's said will and by the proofs before the court. The appellant herein strongly relies upon *Estate of Brown*, 143 Cal. 450, 77 P. 160, as in point in opposition to this conclusion. There are some points of similarity between the two cases, but the dissimilarity between that case and the case of *Estate of Mackay*, supra, and also of this case, furnish the essential points of differentiation between them. In the *Brown Case* the element of past dependence and support was lacking, but was present in both the *Mackay Case* and the case at bar. In the *Brown Case* also the element of relationship was wanting which is present in the instant case. In the *Brown Case* also the trial court found upon the evidence before it that the bequest was not one for maintenance, and this court on appeal sustained said finding upon the express ground that the evidence in the case was not before it on appeal. We therefore hold that the *Estate of Brown* is not in point upon this appeal.

[6] This brings us to the next inquiry, which is, conceding these provisions in the decedent's will to amount to a bequest for

maintenance, to what date did its intended inception relate—that of the testatrix's death, or that of the investment of the trust in the hands of the trustee? By both reason and authority we are compelled to the conclusion that the respondent's right to the income to be derived from the trust properties must be held to have relation to the death of the testatrix. As to the reason of the situation, it would seem to follow that if, as we hold, the provision in said will and in the trust clauses thereof were intended by the testatrix to be in the nature of a bequest for the maintenance of her adopted daughter who, as has been shown, had no other means of support except that of her own exertions, and, also, as has been shown, such adopted daughter had heretofore been supported and maintained by her adopting parents during their lifetime, such intention ought to have relation to a time from and after the death of the testatrix, since by that means only could continuity of such maintenance be assured. This conclusion would derive additional and very cogent support from the fact that the adopted daughter of the testatrix is made primarily the sole beneficiary of the entire substance of the residue of the said estate under the terms of said trust. The foregoing reasoning and conclusion are fully supported by the authorities dealing with similar or analogous situations. In 40 Cyc., under the caption of "Income from Residuary Fund," it is stated as—

"settled by the great weight of authority that in the case of a life estate in a residuary fund or in some aliquot portion thereof, if no time is prescribed in the will for the commencement of the interest or the enjoyment of the use or income of such residue, the legatee for life is entitled to the interest or income of the clear residue as afterwards ascertained, to be computed from the death of the testator."

The cases cited in support of this statement fully sustain it. *Bancroft v. Hartford Security Co.*, 74 Conn. 218, 50 A. 735; *Lawrence v. Security Co.*, 56 Conn. 423, 15 A. 406, 1 L. R. A. 342; *In re Stanfield's Estate*, 135 N. Y. 292, 31 N. E. 1013; *Cooke v. Meeker*, 36 N. Y. 15; *Davison v. Rake*, 44 N. J. Eq. 506, 16 A. 227; *Jesseph v. Westenberg*, 92 Wash. 602, 162 P. 1004; *Davis v. Brown*, 112 Wash. 121, 191 P. 1098. The rule is similarly stated and supported in *Ruling Case Law*, vol. 28, p. 355. The Civil Code, in sections 1368 and 1369, provides:

Sec. 1368. "Legacies are due and deliverable at the expiration of one year after the testator's decease. Annuities commence at the testator's decease."

Sec. 1369. "Legacies bear interest from the time they are due and payable, except that legacies for maintenance, or to the testator's widow, bear interest from the testator's decease."

In the case of *Crew v. Pratt*, 119 Cal. 131, 51 P. 44, this court said, with reference to

an annuity to be paid by his trustees to the widow of a testator "for her maintenance," and "as soon after my decease sufficient funds shall come into their possession," that, in the absence of an expressed intention to the contrary in the will, the annuities should commence at the date of the death of the testator, and that the clause in the will relating "to the time of payment (viz. as soon as they have sufficient funds, etc.) does not relate to the date when the annuity should begin," citing section 1368 of the Civil Code. We are therefore satisfied that the trial court, upon its finding that the bequest of the income of said estate was "a bequest for maintenance," was not in error in holding that the beneficiary thereof was entitled to receive such income accruing from and after the date of the testatrix's death.

[7-9] The final question presented for our consideration is as to whether the "income" thus to be paid the beneficiary is to be the net income and subject to deductions for the expenses necessary for the care and preservation of the trust estate, or whether the gross income is to be paid over to the beneficiary, leaving said expenses to be provided for out of the substance of the trust estate. Incidental to this inquiry, the first question discussed is as to the property or fund out of which the commissions of the executor and the fees of his counsel during the administration of the estate, as allowed by the court in the settlement of the executor's final account and in the decree of distribution, are to be paid. Upon the allowance of these items of necessary expense, they become a part of the expenses of administration, and, as such, were payable by the administrator prior to the distribution of the estate to the trustee under the terms of the will. They were not, therefore, any part of "the residue" of the estate which was distributable to such trustee. Like the other expenses of administration, they were chargeable against and payable from the corpus of the estate as distinguished from the income thereof; and, if we are correct in holding that the income of the estate from the death of the testatrix was to be paid to the beneficiary, it follows that the income was not to be chargeable with these expenditures, at least in the absence of a showing that the substance of the estate in the hands of the administrator was not ample for the payment of these expenditures. A different question is, however, presented with reference to the expenditures of the trustee in caring for and preserving the corpus of the trust estate after the same has come into his hands as such trustee. If the primary beneficiary of this trust, Doreene Dare, was to be the ultimate and only recipient of the corpus of this estate, as well as of the income thereof, the question would be somewhat simplified. But she is not. Under the terms of the will she is given one-half of the trust estate when and if she shall

reach the age of 35 years, and she is to receive the other half thereof only when and if she shall reach the age of 45 years. Until she attains these respective ages she has nothing other than a life interest in the properties of the estate and in the income thereof, and is thus in a position analogous to that of a life tenant in the whole corpus of said estate until she attains the age of 35 years and in the remaining one-half thereof until she attains the age of 45 years. In case of her death before she is 35 the entire estate goes to others, subject to the trust; and, if she lives so long, but dies between that age and 45, the one-half thereof goes elsewhere. Being thus in a position analogous to that of a life tenant, the principles of law applicable to the duty of a life tenant to pay out of her income from the body of the estate the taxes and other annual charges which are necessary to be paid in order to the preservation of the property thereof would be applicable to her. Section 840 of the Civil Code provides that—

"The owner of a life estate must keep the buildings and fences in repair from ordinary waste, and must pay the taxes and other annual charges, and a just proportion of extraordinary assessments benefiting the whole inheritance."

In the case of *Huddleston v. Washington*, 136 Cal. 514, 69 P. 146, it was held that a remainderman might invoke the aid of equity to compel a life tenant to apply the rents of the property to the payment of delinquent taxes which, being unpaid, were endangering the remainderman's estate. In *Estate of Gartenlaub*, 185 Cal. 648, 197 P. 90, 24 A. L. R. 1, which was the case of an estate devised in trust, wherein the trustee was to convert the estate into money and invest the same in certain described bonds, and was by the terms of the will directed to pay to the testator's widow monthly during her lifetime three-fourths of the entire net income, revenue and profit of every kind arising from said estate, this court held that a premium which the trustee was to pay upon the purchase of certain bonds was to be paid out of the income and not out of the corpus of the estate, and in so holding this court pertinently said:

"A testator who creates a trust such as that in the instant case has two objects in view: First, the payment of the income arising from a fund to certain persons during lifetime; second, the transfer of that fund to certain individuals upon the death of the life tenants. The existence of a corpus, principal, or fund is an essential element of the trust and the preservation of this principal until the termination of the life estates is indispensable to the fulfillment of the testator's plans. Therefore, any depletion of the principal tends to frustrate the fundamental purpose of the trust and should be avoided, and, where the price paid for a bond consists of more than the par value thereof, that method of accounting should be adopted

which will prevent the impairment of the principal unless the testator has clearly directed to the contrary. Otherwise the life tenant, who is entitled to receive only income, will, in effect, have received a part of the principal."

In the case of *Berry v. Stigall*, 125 Mo. App. 264, 102 S. W. 585, it was decided that, where a will directed that the testator's minor children should be maintained out of the rents of the real estate until the youngest child should become of legal age and a trust was created to take full charge and control of such real estate during such period, it was proper for the trustee to use so much of such rents as should be necessary for the making of repairs, for taxes, for legal expenses, and for the reasonable compensation of the trustee, and to the same effect is the decision in the cases of *N. Y. Life Ins. Co. v. Sands*, 24 Misc. Rep. 102, 53 N. Y. S. 320; *Denver v. Park*, 169 Mo. App. 335, 152 S. W. 604; *Cogswell v. Weston*, 228 Mass. 219, 117 N. E. 37. The principle underlying these applications of the rule is that it is essential, in order to carry out the ultimate purposes of the testator that the corpus of the trust estate should as far as possible remain intact. In 22 Cyc. p. 67, it is stated that:

"The usual and ordinary meaning of the word 'income' when used alone is 'net income.'"

And in the case of *Sargent Land Co. v. Von Baumbach*, 207 F. 423, 430, it was held that the ordinary meaning attached to "income" is that it is something produced by capital without impairing that capital and which leaves the property intact, and the same thing is held, in substance, in the cases of *Stanton v. Zercher*, 101 Wash. 383, 172 P. 559, and *Niland v. Niland*, 154 Wis. 514, 143 N. W. 170, Ann. Cas. 1915B, 1127. While it is thus well settled that the regular annual and ordinarily recurring expenses incident to the administration of a trust of this character are payable out of the income derived from its properties, it is an equally well-settled rule that unusual and extraordinary expenses, particularly where these go to the enhancement of the value of the capital itself, should be payable out of that capital rather than out of the income thereof. *Estate of Gartenlaub*, supra, and cases cited. When we look to the specific expenditures of said trustee, which the trial court in this case directed to be chargeable to the corpus of said estate, we find that they were of such an unusual and extraordinary character as to be properly so charged. When the said trustee took over the residue of said estate, a portion of its assets consisted of a second mortgage upon a tract of land in Kansas then owned by one Myers, which was subject to a first mortgage upon which certain overdue interest and taxes were unpaid. The trustee entered into an arrangement with Myers by which the latter deeded

the premises to said trustee, subject to said prior mortgage and to said overdue charges. The trustee paid the war stamps on said Myers' deed for the reason, as stated in the evidence, that the latter was "broke" and unable to supply the same. He also paid the cost of the recordation of said deeds, the overdue interest on the first mortgage, and the delinquent taxes on the land. The evidence shows that this transaction was for the benefit of the corpus of the estate, and that its result was probably that of an enhancement of the value of the second mortgage upon the land thus acquired, and to that extent at least an increase in the amount and value of the corpus of the estate itself. The incidental expenditures thus made were unusual, and for that reason, as well as for the reason that the corpus of the estate received the main benefit of the transaction, it should in our opinion bear the burden of these expenditures.

The order of the trial court is hereby affirmed, with directions to the trial court to require said trustee to present a trustee's account in such form as will permit a settlement thereof in conformity with the views expressed in this opinion.

We concur: MYERS, C. J.; SHENK, J.; WASTE, J.; LAWLOR, J.; SEAWELL, J.; LENNON, J.

196 Cal. 1

W. P. FULLER & CO. et al. v. McCLURE
et al. (L. A. 7365.)

(Supreme Court of California. April 11,
1925.)

1. Mortgages ⚡151(3)—Payments applied upon sum fixed as amount which had priority to deed of trust reduced amount of priorities.

Where mortgagee's claim and mechanics' liens were by decree to be taken care of out of a fund fixed by trial court as gross sum which had priority to a deed of trust, whatever payments were to be applied upon such gross preference, whether derived from sale of the premises or from moneys collected by receiver, reduced the priorities to the lien of the deed of trust.

2. Mortgages ⚡567(1)—Where mortgagee's preferred claim paid, beneficiary of trust deed entitled to sums thereafter received by receiver.

In a suit to foreclose mechanics' liens against property subject to a mortgage and a deed of trust, where a payment of funds collected by receiver to holder of mortgage reduced the mortgagee's preferred claim, to an amount which was fully taken care of by proceeds of foreclosure sale, the beneficiary of the trust deed, as against the mortgagee, held entitled to whatever further sums were thereafter collected by the receiver.

3. Appeal and error ⚡837(2)—Judgment not before trial court held not before Supreme Court in its determination of correctness of order appealed from.

Judgment entered in independent suit which was not before trial court held not before Supreme Court in its determination of correctness of order appealed from.

In Bank.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Consolidated actions by W. P. Fuller & Co. and others against John Q. McClure, A. T. Storch, and others. From an order requiring receiver to pay over money to defendant Mary C. Young, McClure appeals. Affirmed. See, also, 48 Cal. App. 185, 191 P. 1027.

Charles Robert McCarty, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and Culver & Nourse, all of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from an order after final judgment, whereby the trial court directed the treasurer of the county of Los Angeles to pay over to the respondent Mary C. Young the sum of \$598.30, being the balance of a fund in the hands of said official and derived from the transactions attending the pending litigation. The facts of this somewhat complicated case leading up to the making of said order are undisputed and are these: One Lillian Young was the owner of certain unimproved property in the city of Los Angeles, and she sold the same to one A. T. Storch, a contractor, who contemplated the erection of a building upon the property, taking as a portion of the purchase price the promissory note of said Storch for the sum of \$2,500, secured by a trust deed upon the property to the Title Guarantee & Trust Company, of which she was the beneficiary, which recited that it was subsequent and subject to a first mortgage securing the sum of \$6,500, and which was executed by said Storch to one Richman, a money lender, for the purpose of procuring funds for the erection of the building upon the property. Both the mortgage and the trust deed were recorded on May 9, 1916, and the work of construction was immediately begun. By the terms of Richman's mortgage he was to advance, and did advance, the sum of \$1,600, and was to pay further sums at the mortgagee's option to the amount of said loan as the work proceeded. Certain mechanics and materialmen from time to time performed labor and furnished materials for which they became and continued to be lien claimants. The oral understanding between Storch and Richman at the time of the giving of said first mortgage was that Storch was to endeavor to find a purchaser of said note and mortgage, and that Richman was

to transfer the same to such purchaser thereupon repayment to him of such sums as he had advanced in the meantime. About June 20, 1916, Storch found a purchaser for said note and mortgage, in the person of one J. Q. McClure, who was willing to pay and did then pay the sum of \$5,000 therefor, out of which the sum of \$2,900 was paid to reimburse Richman for the sums to that extent he had theretofore advanced to Storch. The agreement between Storch and McClure was that, though the latter had paid and was to pay no more than \$5,000 for said note and mortgage, it should stand as an obligation of Storch to the extent of \$6,000 and interest, the result of which understanding being that McClure would thus make a profit of \$1,000 on the transaction. When McClure thus took the note and mortgage, he did so with knowledge of the agreement between Storch and Richman as to the optional nature of all the advances to be made by Richman other than that of the first \$1,600, and also of those advances which had thus been made. He had also actual notice that the work of construction had begun and was going on at the time of his purchase of said note and mortgage, and that mechanics and materialmen were performing labor and furnishing materials at various times between the date of the first payment of \$1,600, made by the original mortgagee, and the date when he had made his last advancement upon the mortgage loan. In the course of time W. P. Fuller Company, one of said lien claimants, commenced an action for the foreclosure of its mechanic's lien. Other lien claimants brought like actions, in which Storch, McClure, and Title Guarantee & Trust Company were made defendants, and each of these, with the exception of Storch, appeared, setting up their respective claims and alleged priorities with respect to the premises subjected to such liens. The several causes were consolidated and tried as one action, and as such were decided by the trial court and a general decree of foreclosure entered, wherein the trial court undertook to set forth and determine the respective rights and priorities of all of the parties.

The defendant and cross-complainant, McClure, appealed from such decree of foreclosure, and by his said appeal presented as the sole question for determination by the appellate tribunal that of priority and the extent of such priority as between himself as the transferee and holder of the Richman mortgage, Mary C. Young, as the successor of Lillian Young, the beneficiary of the trust deed, and the several mechanics' lien claimants. That appeal was decided by the District Court of Appeal on June 15, 1920. The appellate court, after reviewing quite exhaustively the facts of the case, concluded that the foreclosure decree of the trial court should be modified so as to adjudge that the

trust deed is subordinate to the mortgage to an amount equal in the aggregate to the sum of \$6,000, together with unpaid and accrued interest thereon at the rate provided for in the mortgage, and a reasonable attorney's fee, to be fixed by the trial court. In all other respects the judgment of the trial court was upheld. The trial court was accordingly ordered to modify the judgment in the above particular, and that as so modified the judgment should stand affirmed. This decision becoming final, the trial court proceeded to recast its former decree in accordance therewith, and, having done so, entered its thus modified decree of foreclosure. Shortly after the inception of the action a receiver had been appointed to collect the rents and profits of the property, and such receiver having rendered a current account, the trial court after the entry of its modified decree of foreclosure, but before the foreclosure sale thereunder, settled such account of the receiver; and finding in his hands the sum of \$1,941.28, made an order directing the receiver to pay that amount to the transferee of the mortgage, McClure, to be applied pro tanto on the first amount coming to him under the decree, the sum of \$2,275.64. This credit was received by McClure, who thereafter procured a sale of the property by the sheriff without notifying him of the receipt of such credit, but giving him instructions to apply the proceeds of the sale in accordance with the terms of the decree. The property sold for \$7,951.70 net, and in distributing this fund in accordance with the decree the sheriff, after paying the mechanic's lien claimants in the order and to the extent of their respective preferences as fully set forth in the modified decree, paid to McClure the balance thereof which, taken with the sum already paid him by the receiver, considerably overpaid the amount he was entitled preferentially to receive under the terms of the modified decree. By this distribution the lien claimants were paid in full all that they were respectively entitled to under said decree to be paid prior to any payment to be made upon the indebtedness due Young as secured by said deed of trust. Pending the foreclosure sale the receiver collected other sums on account of the rents, issues, and profits of the property, and upon an accounting for the same the trial court found that he had in his hands the sum of \$6,598.30 net, which the court ordered paid over to the clerk of the court pending the further order of the court as to the disposition of the additional fund. The clerk deposited the same with the treasurer. Thereafter Mary C. Young moved the court on notice to have this sum paid over to her to be applied upon the amount found to be due on account of the indebtedness secured by her said trust deed, upon the ground that the amounts which were found to be due upon the mortgage and

the mechanics' and materialmen's liens, and which had been given priority over her deed of trust, had been fully paid. The court granted this motion, and from its order in so doing this appeal was taken by McClure.

The appellant herein contends that, whereas by the original decree of foreclosure he and the lien claimants were given priority over the beneficiary of the trust deed to the extent of \$5,000, the amount which McClure had paid for the said mortgage; and whereas the appellate court had modified said decree to the extent only of holding that McClure and the said lien claimants were entitled to precedence over the lien of said trust deed to the extent of \$6,000; and whereas the trial court upon the going down of that decision had modified its said original decree accordingly, and in recasting its said decree so to do had determined that said amounts by the accretion of interest and costs had been increased to the aggregate sum of \$8,617.37, which said McClure and said lien claimants were entitled by said modified decree to receive and be paid out of the amount received from said property upon the foreclosure sale thereof before the beneficiary of the trust deed was to become entitled to receive anything on account thereof or of the lien secured thereby; and whereas the said property had only sold for the sum of \$7,951.70 net, which, when applied to the payment in their specified order as declared in said foreclosure decree, would pay said lien claimants to the extent of the amount of their claims for which they were entitled to preference over both McClure and the beneficiary under the trust deed, but would, after doing so, leave a sum in excess of \$600 still due to McClure under the terms of said decree, he was entitled to have the further sum collected by the receiver and deposited with the treasurer applied to the said balance of his mortgage debt then remaining unpaid. The respondent made in the trial court, and here makes, the contention that the modified decree of the trial court exactly conformed with the direction of the appellate court upon the former appeal as to the amount, calculated up to the date of said decree, which should be paid to McClure and the lien claimants before the beneficiary under the trust deed would be entitled to be paid anything, whether derived from the sale of the property under said decree or collected by the receiver from the rents and issues of the property pending or succeeding such foreclosure sale; that when the trial court, after making its said modified decree and ordering said sale thereunder, received and settled the first account of said receiver, and finding the sum of \$1,941.28 net in his hands ordered said sum paid over to McClure, such order and the compliance therewith by the receiver automatically reduced the amount which he and the lienholders were entitled to

be paid upon their preferred claims as fixed by said modified decree from the sum of \$8,617.37 to \$6,676.09, or at least to the latter sum augmented by the accruing interest thereon amounting approximately to \$275, thus leaving the total amount which these preferred creditors were entitled to have distributed among them from the proceeds of the foreclosure sale, approximately \$7,000; and that since the total sum received as the result of such sale amounted to the net sum of \$7,951.70, which sum was wholly paid over to said McClure and the lien claimants to the exclusion of the trust deed creditor, the former were thus fully paid all that they were preferentially entitled to according to the provisions of the said modified decree, and that in consequence thereof, when the additional sum of \$598.30 came into the hands of the court through the subsequent receipts and accounts of the receiver the respondent was entitled to have such sum and the whole thereof paid over to her.

[1] We are satisfied that the respondent is correct in her foregoing contention, and that the trial court was not in error in adopting the same and in making the order appealed from accordingly. By its original decision the trial court established a certain fund out of which the advances made upon the appellant's mortgage and the preferred amounts of certain mechanics' lien claims were to be paid before the beneficiary under the trust deed was entitled to receive any sum accruing from the sale of said property or from its usufruct pending proceedings under the receivership. The appellate court upon the first appeal directed the amount thus established as such fund to be increased to the extent of \$1,000, but otherwise confirmed the findings and decree of the trial court. The lien claimants were entitled to the preferences which they were given by these two decrees over the lien of the trust deed, only because of the fact and finding that the first mortgage was to be preferred over the beneficiary of the trust deed to the extent directed by the first decision of the appellate court and provided for in the modified decree, and that as such mechanics' lien claimants, they were entitled to certain preferences over the first mortgagee, which were to be taken care of out of the fund which the trial court had fixed as the gross sum which had priority to the deed of trust. Whatever payments were to be applied upon this gross preference as thus established, whether derived from the sale of the premises or from the usufruct thereof under the receivership must be held to have reduced that gross sum accordingly, and have brought the beneficiary of the trust deed to the extent thereof nearer to the point where there would be no priorities to the lien of her deed of trust.

[2, 3] In ordering the receiver to turn over the sum of \$1,941.28 accounted for by him to

McClure, the court expressly directed that said payment be applied upon the first advances made by the original mortgagee, viz., the sum of \$2,275.64, which formed a part of the preferred fund established by the modified decree. When that sum was thus diminished by the making of such payment, the gross amount of the mortgagee's preferred claim was ipso facto reduced to an amount which was fully taken care of by the sum received upon the foreclosure sale. This being so, the respondent became entitled to whatever further sums were thereafter collected by the receiver and paid into court. A suggestion is made in the briefs of counsel that in a suit brought by Mary C. Young against McClure to recover the amount of the overpayment received by him as a result of the payment from the receiver and of his receipts from the proceeds of the foreclosure sale, the respondent had recovered a judgment for \$774.90, which judgment had become final. It is sufficient to say that no such matter was before the trial court at the time it made the order herein appealed from, and hence that no such matter is before this court in its determination as to the correctness of said order.

The order is affirmed.

We concur: MYERS, C. J.; WASTE, J.; SEAWELL, J.; LAWLOR, J.; LENNON, J. SHENK, J., deeming himself disqualified, does not participate in the foregoing decision.

196 Cal. 73

STARKWEATHER v. EDDY. (L. A. 8201.)

(Supreme Court of California. April 20, 1925.)

1. Appeal and error 429—New trial 139 —Adverse party may waive signing of notice of appeal or intention to move for new trial by attorney of record.

Rule requiring notice of appeal, or of intention to move for new trial, to be signed by the attorney of record for the moving party is subject to the qualification that the failure to so do is a defect which may be waived by the adverse party by failure seasonably to object, and slight circumstances of acquiescence are sufficient to show such waiver.

2. Appeal and error 429—Respondent held to have waived signing of notice of appeal by attorney of record.

Respondent held to have waived signing of notice of appeal by attorney of record, where the trial was conducted by other counsel, findings of fact prepared by respondent's counsel named counsel not of record, and recited a stipulation between such counsel and respondent's attorney, and respondent's counsel admitted service of a brief signed by attorneys not of record, and procured stipulation extending time for filing reply brief from such attorneys.

In Bank.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by J. W. Starkweather against F. J. Eddy. From a judgment for plaintiff, defendant appeals. Motion to dismiss appeal denied.

L. E. Dadmun, F. E. Davis, and Davis & Dadmun, all of Los Angeles, for appellant.

Gertrude M. Caldwell, of Los Angeles, for respondent.

PER CURIAM. Motion to dismiss the appeal herein "on the grounds and for the reasons that the attorneys making such appeal and signing the notice of appeal and the appellant's brief on appeal, are not the attorneys of record of said defendant and appellant herein."

[1] The motion is supported by an affidavit of counsel for respondent and a certificate of the clerk of the trial court, from which it appears that George P. Cook is the attorney of record in said case for the defendant and appellant; that there has been no substitution of any other attorney or attorneys in his place made or filed as provided by law, and that the notice of appeal and appellant's brief herein are signed by F. E. Davis, L. E. Dadmun, and Davis & Dadmun, and are not signed by said George P. Cook. Respondent cites *Abrahms v. Stokes*, 39 Cal. 150; *Prescott v. Salthouse*, 53 Cal. 221; *Whittle v. Renner*, 55 Cal. 395; *Harrigan v. Bolte*, 67 Cal. xix, 8 P. 184,¹ and *Anglo-California Trust, etc., Co. v. Oakland Rys.*, 191 Cal. 387, 216 P. 578, holding that a notice of appeal or a notice of intention to move for a new trial, to be effective, must be signed by the attorney of record for the moving party, and that in default thereof such appeal or such proceeding for new trial may be dismissed upon motion. Respondent insists that we must follow the rule of the cited cases and dismiss the appeal. Appellant urges with much earnestness that we should overrule those cases. The circumstances of the present case do not call upon us to do either. The rule which requires a notice of appeal or of intention to move for a new trial to be signed by the attorney of record for the moving party has always been subject to the qualification that the failure so to do is a defect which may be waived by the adverse party by failure seasonably to object thereto, and that slight circumstances of acquiescence are sufficient to show such waiver. This qualification is indicated by the statement in *Prescott v. Salthouse*, supra, that:

"The regularity of the service of the notice and presentation of the bill of exceptions were duly objected to by the attorney of the defendant, on the ground that Mr. Lee was not the attorney of record of the plaintiff, and was

¹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

²Reported in full in the Pacific Reporter; not reported in full in California Reports.

therefore not competent to give a notice or present a bill of exceptions in the cause."

In *Whittle v. Renner*, supra, the court took pains to point out that, "We find nothing in the record which shows a waiver of the service on the attorney of record." In *Anglo-California Trust Co. v. Oakland Rys.*, supra, while the fact does not appear in the memorandum opinion filed, it does appear of record in that case that counsel for respondent therein scrupulously refrained from doing anything which might be construed as a waiver of their objection that the notice of appeal was signed by a stranger to the record. They not only reserved that objection but they urged it upon this court at the earliest possible moment by a motion to dismiss the appeal, which was heard and determined before the time for appeal had elapsed, so that the appellant was enabled to and did thereafter procure a proper substitution of attorneys and effectively prosecute its appeal. *Anglo-California Trust Co. v. Oakland Rys.*, 193 Cal. 451, 225 P. 452. As noted above, slight circumstances of acquiescence are sufficient to show such waiver. In *McDonald v. McConkey*, 54 Cal. 143, where the appeal was taken by an attorney not the attorney of record in the court below, the circumstance that respondent's attorney joined with him in certifying to the transcript was held sufficient to show such waiver. In *Withers v. Little*, 56 Cal. 370, and in *Livermore v. Webb*, 56 Cal. 489, respondent's acceptance of service of notice of appeal without objection was held sufficient to show such waiver. See, also, *Woodmen of the World v. Rutledge*, 133 Cal. 640, 65 P. 1105; *Smith v. Smith*, 145 Cal. 615, 622, 79 P. 275, and *Bashore v. Lambersen*, 36 Cal. App. 233, 171 P. 968.

[2] There is ample evidence of such waiver in the records of the present case. The original answer filed in behalf of the defendant in the court below, the appellant herein, was signed by George P. Cook as attorney for defendant. An amendment to this answer which, through obvious oversight, was not signed by any one as attorney for defendant, but which was written upon the stationery of F. E. Davis, was thereafter filed in the action, bearing an indorsement acknowledging receipt of a copy thereof which was signed by counsel for plaintiff. The reporter's transcript shows that the trial of the action in the court below was conducted throughout by Mr. Dadmun as attorney for defendant. The findings of fact, presumably prepared by counsel for plaintiff and respondent, recite that the defendant was present at the trial with Mr. Dadmun, his attorney, and that stipulation was entered into in open court by and between the attorneys of the respective parties. Appellant's opening brief upon this appeal, which is signed, "F. E.

Davis, Davis & Dadmun, Attorneys for Defendant and Appellant," bears an admission of service signed by counsel for respondent. Shortly prior to the making of the present motion to dismiss this appeal the respondent applied for and obtained from the last named attorneys a stipulation extending respondent's time to file his reply brief herein, and thereupon respondent caused to be filed in this court a stipulation for such extension of time signed "F. E. Davis, Davis & Dadmun, Attorneys for Defendant and Appellant," and upon such stipulation procured an order of this court extending the time for the filing of respondent's reply brief herein.

Giving full effect to the rule invoked by respondent upon this motion, there is no room for doubt that he has waived his right to have it applied to the present case.

The motion to dismiss is denied.

195 Cal. 774

Ex parte BERTO. (Cr. 2736.)

(Supreme Court of California. April 11, 1925.)

1. Fish $\S$ 15 — Complaint need not allege "beach net" was used in waters of state or for any particular purpose.

A complaint, alleging a violation of Pen. Code, $\S$ 636, subd. 6, prohibiting use of beach nets, need not allege that beach net was used in any of the waters of the state, or that it was used for any particular purpose, in view of subdivision 7, which defines a "beach net" as any net hauled from the water to the beach or shore for the purpose of taking fish.

2. Indictment and information $\S$ 110(57) — Complaint charging use of beach net, in language of statute, is sufficient.

A complaint, in the language of Pen. Code, $\S$ 636, subd. 6, prohibiting use of beach nets, is sufficient.

3. Indictment and information $\S$ 110(4) — Complaint in language of statute is sufficient, except where fraud is element of offense charged.

Complaints in language of statute are sufficient, except where fraud forms an essential element in the crime.

4. Habeas corpus $\S$ 85(1) — Presumption is that evidence justified conviction, where conviction in justice court was affirmed by superior court.

In a habeas corpus proceeding to obtain release from imprisonment, it will be presumed that the evidence justified the conviction, where, conviction in the justice court was affirmed by the superior court.

In Bank.

Application by A. Berto for a writ of habeas corpus. Writ discharged, and petitioner remanded.

I. F. Chapman and F. A. Berry, both of San Francisco, for petitioner.

B. D. Marx Greene, of San Francisco, for respondent.

SEAWELL, J. The petitioner was charged by a complaint filed against him in the justice's court of the third township of the county of San Mateo, this state, on September 17, 1924, with the violation of subdivision 6 of section 636, Penal Code. In material allegations the complaint is as follows:

"That on or about the 14th day of August, A. D. 1924, in the county of San Mateo, state of California, the crime of misdemeanor was committed by A. Berto, who did then and there use within said county and in fish and game district No. 13, a certain beach seine, contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California. And this complainant, upon oath, accused the said A. Berto of having committed the said offense, and prays that the said accused may be brought before a magistrate and dealt with according to law," etc.

By section 636, Penal Code, it is made a misdemeanor for any person to use or operate any net, trap, line, etc., for the purpose of taking fish in the state of California at any time, or in any manner, except as otherwise provided by part 1, tit. 15, c. 1, Penal Code.

The subdivisions of section 636, Penal Code, essential to an understanding of the case are as follows:

"Sec. 6. *Beach Nets.* It shall be lawful to use beach nets (also known as beach seines or haul seines) in fish and game districts five, eight, nine, ten, eleven, eighteen, nineteen and twenty-two; provided, that in fish and game district five the meshes of any such beach nets shall measure not less than five and one-half inches in length and that in fish and game districts ten, eighteen and nineteen the meshes of the beach nets shall measure not less than one and one-half inches in length; and beach nets shall only be used in fish and game district nineteen between the first day of September and the thirty-first day of January of the year following, both dates inclusive, and for the purpose of taking smelt only.

"Sec. 7. For the purpose of this act, any net hauled from the water to the beach or shore for the purpose of taking fish, shall be known as a beach net."

Petitioner was tried and convicted in said justice's court upon said complaint, and took an appeal to the superior court of the county of San Mateo. The judgment of conviction was affirmed, and he makes application to this court for the issuance of the writ of habeas corpus.

[1] It is petitioner's contention that the complaint failed to state a public offense, in that it omits to charge that the beach net or seine was used in any waters of the state, or that it was used for any particular purpose. It is argued that, for aught that appears upon the face of the complaint, the

beach net alleged to have been used may have been used for some purpose of ornamentation or for any one of the many purposes to which it may be made adaptable. There might be some force in this suggestion were it not for the fact that said subdivision 7, § 636, Penal Code, which defines a beach net, makes its identity dependent upon the particular use made of it, to wit, catching fish in a certain manner in inhibited districts. The offense is purely statutory. A net becomes a beach net only when it is being hauled from the water to the beach or shore for the purpose of catching fish. When not thus used, a net is not a beach net, and it loses its character as such instantly upon a cessation of the use interdicted by statute. The cases cited by petitioner have to do with complaints or informations which failed in a substantive sense to state any offense. Those cases are not in point for the reason that there was no word or clause in the statute under which they were drawn which by the employment of definitive language rendered it unnecessary to set out descriptively the particular acts constituting the offense. The petitioner in *Ex parte Peterson*, 119 Cal. 578, 51 P. 859, was charged with having used a shotgun of a larger caliber than a No. 8 gauge. A shotgun of such a gauge could be used in many ways that would be harmless, and it was not the intention of the Legislature to prohibit the use of shotguns in such a manner as had no connection with the evident purpose sought to be attained. The Legislature only intended, the court there said, to prohibit the use of shotguns of No. 8 or larger caliber, in killing game or animals. While the complaint in that case followed the language of the statute, it did not sufficiently charge an offense, for the reason, as therein pointed out, the statute contained a qualification which it did not express. The use of a net is unlawful only when the use made of it offends against the inhibitions of the statute.

[2, 3] The complaint in the instant case is in the language of the statute. This is sufficient except in those cases in which fraud forms an essential element in the crime, such as obtaining property by false pretenses, forgery, etc. The defect pointed out in *Ex parte Peterson*, supra, does not exist in the statute before us. The complaint upon its face is a sufficient pleading. Petitioner could not have been misled as to the nature of the charge placed against him. Of course, upon trial it must be shown that the person charged with a violation of subdivision 6, § 636, Penal Code, did use a net in the manner forbidden by law. No claim is made that the offense was not fully proved in the court below.

[4] An appeal having been taken to the superior court, and the judgment affirmed by said court we must presume that the evidence justified the judgment of conviction.

The writ is discharged, and the petitioner remanded.

We concur: MYERS, C. J.; RICHARDS, J.; SHENK, J.; WASTE, J.; LAWLOR, J.; LENNON, J.

195 Cal. 778

In the Matter of the Application of Angelo BIARDO for a Writ of Habeas Corpus. In the Matter of the Application of Jack BIARDO for a Writ of Habeas Corpus. In the Matter of the Application of John CERRUTI for a Writ of Habeas Corpus. In the Matter of the Application of G. SPORTUNIO for a Writ of Habeas Corpus. (Cr. Nos. 2737-2740.)

(Supreme Court of California. April 11, 1925.)

In Bank.

Applications for writs of habeas corpus prayed to be directed to the Sheriff of San Mateo County, to secure release of petitioners from custody upon commitments for violating subdivision 6 of section 636, Penal Code. Petitioners remanded.

I. F. Chapman and F. A. Berry, both of San Francisco, for petitioners.

B. D. Marx Greene, of San Francisco, for respondent.

PER CURIAM. The precise point is presented in each of the above-entitled petitions as was presented and decided this day in *Ex parte Berto* (Crim. No. 2736) 235 P. 735. Upon the authority of that case, the writ is discharged, and the petitioner remanded in each of the above-entitled matters.

71 Cal. App. 628

PEOPLE v. VERNON. (Cr. 1116.)

(District Court of Appeal, Second District, Division 2, California. March 10, 1925.)

1. Homicide $\S$ 300(3) — **Instruction limiting right to take life of another in self-defense to case where done under influence of designated danger held correct.**

Conceding that an instruction that person may lawfully take life of another when circumstances are sufficient to excite fears of reasonable man, and party killing acted under influence of such fear alone, by use of word "alone," limited right to take life of another in self-defense, where done under influence of fear of danger designated, such instruction was correct and conformed to Pen. Code, §§ 197 and 198.

2. Criminal law $\S$ 829(5) — **Modification and rejection of requested instructions on self-defense not error where fully covered by instructions given by court.**

In homicide prosecution, defended on ground of self-defense, modification and rejection of defendant's requested instructions on law of self-defense held not error, where instructions given by court fully stated law of self-defense

and conformed with Pen. Code, §§ 197 and 198, and presented defendant's theory, only in different language from that submitted by defendant.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

B. T. Vernon was convicted of murder in the second degree, and he appeals. Affirmed.

A. E. T. Chapman and A. S. Brown, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen. for the People.

CRAIG, J. Appellant was charged with the crime of murder in the first degree, and upon the trial pleaded self-defense. He was convicted of murder in the second degree, and, having moved the trial court for a new trial, which was denied, he appeals from the judgment and the ruling on said motion.

It was testified by appellant and by witnesses called in his behalf that the deceased had previously to the killing threatened his life, and that about a month before the commission of the alleged offense decedent drew his gun when so threatening appellant.

The ground upon which a reversal is sought is that the court below so modified a requested instruction to the jury that they were not given the law as to circumstances and appearances under which a homicide may be said to have been justified. The instruction requested read as follows:

"You are further instructed that a person may lawfully take the life of another when the circumstances are sufficient to excite the fears of a reasonable man, and the party killing acted under the influence of such fear; that, to justify such killing, it is not necessary that the danger be actual, but that it is enough, if it be apparent, that a party may lawfully act upon appearances which would put a reasonable man in fear of danger and that he will not, when acting upon such appearances, be held liable, although it should afterwards appear that the indications upon which he acted were entirely false, and that he was in no actual peril."

The first clause above quoted was modified by adding one word, and the balance was eliminated, so that when given the instruction read as follows:

"You are further instructed that a person may lawfully take the life of another when the circumstances are sufficient to excite the fears of a reasonable man and the party killing acted under the influence of such fear alone."

[1] Appellant also takes exception to the use of the word "alone" as it appears in the instruction just quoted, apparently upon the ground that it limits the right to take the life of another in self-defense to cases where the act is done under the influence of fear of the danger designated. If it be conceded that he is correct in his interpretation of the in-

struction, it is equally certain that the instruction given contains a correct statement of the law, and conforms to the provisions of sections 197 and 198 of the Penal Code.

[2] Respondent contends that the portion omitted was covered by other instructions, three of which are called to our attention, wherein the jury were told that a bare fear that a man's life or limb is in danger is not sufficient to justify homicide, but, in order to justify a man in taking the life of another in self-defense, the circumstances must be sufficient to excite the fears of a reasonable man; that the danger must be present, apparent, and imminent, or must appear so at the time to the slayer, as a reasonable man. And they were further instructed that:

"A person may have a lively apprehension that he is in imminent danger, and believe that his apprehension is based on sufficient cause and supported by reasonable grounds; that such apprehension is reasonable and warranted from appearances as they present themselves to him. If, however, he acts on these appearances, he does so at his peril, because the law leaves it to no man to be the exclusive judge of the reasonableness of the appearances upon which he acts, but prescribes a standard of its own, which is, not only did the person acting on the appearances himself believe that he was in deadly peril of his life or of receiving great bodily harm, but would a reasonable man, situated as the defendant was, seeing what he saw, and knowing what he knew, be justified in believing himself in danger?"

Although the trial court did not state in the terms requested by the defendant that actual danger was unnecessary in order that a party might lawfully act upon appearances which would put a reasonable man in fear of peril, the true rule to determine legal liability for a homicide committed under the circumstances involved in this case was stated in the language last quoted. If the principle thus stated were applied, it must necessarily follow that a killing would be justified where the appearances were such as to put a reasonable man in fear of imminent danger of his life or of great bodily injury, and that actual danger is unnecessary. The jury were instructed also that the acts which a defendant may do and justify under a plea of self-defense depend primarily upon his own conduct and secondarily upon the conduct of the deceased; and that homicide is justifiable when resisting any attempt to murder any person or to commit a felony, or to do some great bodily injury upon any person, or, when committed in the lawful defense of such person when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury and imminent danger of such design being accomplished. It was further said in an instruction given upon request of appellant that the jury must acquit him unless every fact necessary to

establish his guilt had been proven to them beyond a reasonable doubt.

Appellant cites *People v. Dallen*, 21 Cal. App. 770, 778, 132 P. 1064, as having approved the omitted portion of the requested instruction first above quoted. What was there held was that other instructions of a similar character, requested by the defendant, were properly rejected, since that which was given fully stated the law of self-defense. We think the same is true in this case. As we have seen, the instructions given in the instant case were in conformity with sections 197 and 198 of the Penal Code.

In *People v. Fowler*, 178 Cal. 657, 670, 174 P. 892, the Supreme Court, in discussing the instructions there given under section 197 of the Penal Code, said:

"But the Legislature has the power to declare what the law shall be on this subject. It has done so by this section. If our decisions have laid down a different rule, it is the decisions which must give way and not the statute. However this may be, it cannot be disputed that error cannot be predicated upon an instruction which states the law as the Legislature has fixed it by statute and which is applicable to the case."

We think the instructions which we have summarized properly stated the law, as well as presented to the jury appellant's theory of the case, only in different language from that submitted to the trial court by his counsel.

The judgment and order appealed from are therefore affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

71 Cal. App. 532

GOLDEN WEST CREDIT & ADJUSTMENT CO. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO. (Civ. 5156.)

(District Court of Appeal, First District, Division 1, California. March 5, 1925.)

Justices of the peace § 159(6) — Superior court held without jurisdiction of appeal from justice court.

Superior court was without jurisdiction of appeal from justice court, where plaintiff excepted to sufficiency of sureties on defendant's undertaking on appeal, who failed to justify within 5 days after service of notice, as provided by Code Civ. Proc. § 978a, and defendant thereafter presented a new undertaking without giving notice to plaintiff, which undertaking was approved also without notice.

Application for writ of mandate by the Golden West Credit & Adjustment Company against the Superior Court of California in and for the City and County of San Francisco. Writ issued.

Jesse A. Mueller, of San Francisco, for petitioner.

TYLER, P. J. Application for a writ of mandate to compel the respondent, superior court, to dismiss an appeal.

The petitioner, a corporation, on the 5th day of November, 1924, commenced an action in the justice's court against one Antonio Pina, and recovered a judgment in the sum of \$60 and costs. Thereafter, on the 11th day of December, 1924, defendant filed a notice of appeal on both questions of law and fact, together with an undertaking in the sum of \$100, and a further undertaking to stay the execution of the judgment. On the 13th day of December petitioner filed and served upon defendant a notice of exception to said undertaking on appeal, wherein defendant was notified that the sufficiency of the sureties was excepted to by petitioner, and that he further excepted to the form and sufficiency of the undertaking. The sureties on said undertaking, or other sureties, failed to justify within the five days after the service of the notice, as provided for by statute, but on the 16th day of December defendant presented a new undertaking on appeal, without giving any notice to petitioner. This undertaking was approved by the justice, but also without notice to the petitioner. Thereafter, on the 19th day of December, all papers in the action were certified to by the clerk of the justice's court and filed in the superior court. Petitioner thereupon served upon defendant a notice to dismiss said appeal. The motion was premised upon failure of the sureties to justify under the original undertaking. The motion was denied, and this proceeding was thereafter instituted.

The case comes squarely within the ruling in *Wood v. Superior Court*, 67 Cal. 115, 7 P. 200. In that case appellant in perfecting his appeal gave an undertaking. The adverse party excepted to the sufficiency of the sureties. Neither the sureties in the undertaking nor other sureties justified; but, instead thereof, the appellant, as here, filed a new undertaking with other sureties. In so doing, he gave no notice as required in the last clause of section 978 of the Code of Civil Procedure. It was there held that such being the case, the appeal must be regarded as though no undertaking had been given; that the statute is peremptory. Without the justification of the sureties named in the undertaking, or other sureties in their stead, upon notice to the adverse party, the appeal was not perfected, and the superior court had no jurisdiction of the case. That part of section 978a relating to the justification of the sureties is but a reenactment of the same matter which theretofore was part of section 978, and hence the early cases construing that section are unaffected by the amendment. *Washington Council, etc., v. Superior Court*, 29 Cal. App. 45, 154 P. 298.

Respondent seeks to avoid the effect of these

decisions because of the fact that the notice of justification also excepted to the form and sufficiency of the undertaking. The bond is not before us. The question of its sufficiency was a matter that the court could have inquired into at the time of the justification of the sureties. Defendant's failure to justify in accordance with the notice rendered his appeal ineffectual. *McCracken v. Superior Court*, 86 Cal. 74, 24 P. 845. The motion to dismiss the appeal should therefore have been granted. This being so, it is hereby ordered that a writ of mandate issue, as prayed, directing the respondent to enter an order dismissing the appeal in the action above referred to.

I concur: KNIGHT, J.

71 Cal. App. 564

HOOPES et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 4939.)

(District Court of Appeal, Second District, Division 2, California. March 6, 1925.)

1. Stipulations §9—Stipulation not filed or entered in minutes of court below not recognized by appellate court.

Stipulation which does not appear to have been filed or entered in minutes of court below, as required by Code Civ. Proc. § 283, cannot be recognized by appellate court.

2. Justices of the peace §166(2) — Case which is set and then dropped is not "brought to trial."

A case which is merely brought to point of having been set and then dropped is not "brought to trial," within the meaning of Code Civ. Proc. § 981a.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Brought.]

3. Justices of the peace §166(2) — Appeal from justice's court dismissed, where not brought to trial within one year from time filed in superior court on appeal.

Appeal from justice's court would be dismissed, in view of Code Civ. Proc. § 981a, where it had been appealed before enactment of statute and had not been brought to trial within one year from time it was filed in superior court, though appellant had set same for trial and was entitled to try it when statute took effect, where he did not do so and no stipulation showing that parties agreed upon a continuance or an extension of time appeared in record.

Application for writ of mandate by Emma Hoopes and another against the Superior Court of California in and for the county of Los Angeles and Hon. Merle J. Rogers, a Judge thereof. Writ granted.

Thos. H. Cornett, of Los Angeles, for petitioners.

E. F. Gerech and C. W. Hall, both of Los Angeles, for respondents.

CRAIG, J. The petitioners were defendants in an action filed by one Joe Firman in the justice's court of Los Angeles township; judgment having gone in their favor, Firman appealed to the superior court on May 19, 1921. On July 29, 1921, the plaintiff caused his appeal to be set for trial de novo on December 8, 1921, at which time it was continued to the 9th day of February, 1922, and on this latter date the case was dropped from the calendar. No further proceedings were had therein until January 19, 1923, when the plaintiff had said case restored to the calendar, and it was then set for trial on October 2, 1923, at which time it was again dropped from the calendar. On November 13, 1923, plaintiff caused the same to be placed upon the calendar and reset for trial November 10, 1924.

On the 29th day of September, 1924, pursuant to notice, the petitioners moved the superior court to dismiss said appeal upon the ground that the plaintiff had failed to bring the same to trial within one year from the date on which it was filed, or at any other time prior to January 1, 1924, and that the time for trial had not been extended by stipulation in writing filed with the clerk.

The motion to dismiss was opposed by affidavit of plaintiff's counsel, wherein he averred that "the above-entitled action has been set for trial in department 13 for the 2d day of October, 1923, within a year of the date of appeal from the justice court and prior to the 1st day of January, 1924." It was further alleged therein that the case was called for trial on the 2d day of October, 1923, and that the plaintiff was present in court with his counsel and witnesses, and answered ready for trial, but that with permission of the court the parties retired from the room for the purpose of attempting to arrive at a compromise; that the defendants' petitioners herein then and there orally agreed to pay to the plaintiff \$100 in full settlement of his claim, including costs, whereupon the parties returned to the courtroom and verbally stipulated to that effect; that the said defendants did not pay said or any amount, as agreed, and that said appeal should not be dismissed for the reason that the same was brought to trial, and would have been tried, but for the stipulation mentioned.

Petitioners filed an affidavit denying that said appeal was brought to trial within one year from the date the same was filed, or that they ever stipulated or agreed to compromise the case, or to pay the plaintiff any amount, and alleging that no extension of time had ever been stipulated in writing.

The trial court denied the motion to dismiss the appeal, whereupon the defendants

petitioned this court for a writ of mandate directing the court below to dismiss the same, and an alternative writ was issued.

The motion here under consideration was based upon section 981a of the Code of Civil Procedure, which was approved June 14, 1923, and provides as follows:

"No action heretofore or hereafter appealed from the justice court to the superior court, shall be further prosecuted, and no further proceedings shall be had therein, and all such actions heretofore, or hereafter appealed must be dismissed by the court to which the same shall have been appealed, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, where the appealing party fails to bring such appeal to trial within one year from the date of filing such appeal in said superior court, unless such time be otherwise extended by a written stipulation by the parties to the action filed with the clerk of the superior court to which the appeal is taken; provided, however, that in any appeal pending when this section takes effect, a judgment or dismissal shall not be entered under the direction hereof sooner than January first, 1924: and provided, further, that any superior court may, by existing rule or by rule hereafter to be enacted, provide for dismissal of such appeal within a time less than one year."

It is obvious that, since the appeal was perfected in 1921, the setting for October 2, 1923, was not "within a year of the date of the appeal," as stated in the plaintiff's affidavit. It had, however, previously been set for trial December 8, 1921, and was then continued to February 9, 1922, when it went off the calendar. Prior to the enactment of the statute above quoted the action was reset for October 2, 1923, and had it not been dropped we would not hesitate to hold under the authority of *Grafton v. Superior Court* (Cal. App.) 226 P. 9, that section 981a, Code of Civil Procedure, did not apply, since the case was there already set and awaiting trial when said section became effective.

Neither the minutes of the superior court nor any stipulation in writing appears to show that the parties at any time agreed upon a continuance or an extension of time. It is provided by section 283 of the Code of Civil Procedure that an attorney or counselor is vested with authority "to bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise." And, as was said in *Swim v. Superior Court* (Cal. Sup.) 226 P. 2:

"The facts alleged in defendant's affidavit above quoted amount to nothing more than an assertion that a verbal stipulation was entered into by and between the parties to the effect that further proceedings in the action should be indefinitely postponed. * * * In the face of the plain and unambiguous language used in the code section above quoted, clearly evidencing the legislative intent to require a written stipulation filed with the clerk of the su-

perior court for the purpose of extending the time for bringing the case to trial, we cannot say that a verbal stipulation should be permitted to answer the same purpose. * * * He must be assumed to have entered into the agreement with the plaintiff with the knowledge of the statutory provision which required nothing less than a written stipulation to protect him from the liability to a dismissal."

[1, 2] We cannot therefore recognize, or be influenced by, any stipulation which does not appear to have been filed or entered in the minutes of the court below. The fact is vital to a decision of this matter that, although the case at bar was set for trial prior to the enactment of section 981a, Code of Civil Procedure, it was not tried pursuant to such setting, but was dropped from the calendar. That section requires that, unless an action theretofore or thereafter appealed shall have been brought to trial within the period of time specified, it must be dismissed. A case which is merely brought to the point of having been set, and is then dropped, cannot be said to have been brought to trial. In *Boyd v. Southern Pacific Co.*, 185 Cal. 344, 197 P. 58, it was said:

"The mandatory character of these provisions of the statute is evident, and our decisions have held that such is in fact their character. *Larkin v. Superior Court*, 171 Cal. 719, Ann. Cas. 1917D, 670, 154 P. 841. In the present case, the action was once set for trial at a time something over a year after issue joined by answer, but the trial date was continued indefinitely by stipulation. Some years later, and a few months before the expiration of the five-year period, the plaintiff moved that the cause be set again for trial, and this was done but for a date after the expiration of the period. Upon the expiration of the period and before the trial date, the defendant moved that the action be dismissed, and the order of dismissal was made.

"The contentions of the plaintiff are two. The first is that the cause was 'brought to trial' within the meaning of the statute when it was set for trial, although the date set as the actual trial date was later. Counsel's argument is that when the plaintiff applied to have the cause set he had done all that he could do, that the fixing of the date at which it would be tried was wholly in the power of the court and beyond the plaintiff's control, and that the expression 'brought to trial' should be taken to mean only that which the plaintiff could control and for which alone, therefore, he should be held responsible. But the meaning of the expression 'brought to trial' seems to us too plain to be in doubt. The trial of an action and the setting of it for trial are quite distinct things, and an action is certainly not brought to trial until the trial is commenced."

It is manifest that, while the plaintiff herein had set his case, and was entitled to try it when the section in question took effect, he did not see fit to avail himself of the opportunity to do so, but permitted it to be re-

moved from the court's calendar and hence to lapse into the category of the actions specifically barred thereby. It then occupied the same status as though it had never been set. On the 13th day of November, 1923, therefore, Firman's counsel undertook to set for November 10, 1924, a case which had been appealed before the enactment of said statute, and which had not been brought to trial within one year from the time that the same was filed in the superior court on appeal.

Ravn v. Planz, 37 Cal. App. 735, 174 P. 690, involved the question of continuances by a trial court, upon motion of the defendant, without fault of the plaintiff, and it was there said:

"This action was not brought to trial within the designated time, and it is not claimed that the parties entered into a stipulation in writing extending the time within which it might be tried. To save this case from the operation of the statute the plaintiff shows that on several occasions the trial of the action was postponed upon the motion of defendant, and that upon a date within about six months prior to the expiration of the five years after the case was at issue, it being then upon the calendar for trial, he appeared in court with his counsel and witnesses ready to proceed; but upon motion of the defendant, and over his objection, a further postponement of the trial was granted. Later the case was again called for trial, when a motion to dismiss was made by the defendant and granted.

"The provision of section 583 above set forth is mandatory. *Romero v. Snyder*, 167 Cal. 216, 138 Pac. 1002; *Larkin v. Superior Court*, 171 Cal. 719, Ann. Cas. 1917D, 670, 154 P. 841. The circumstance, therefore, that the trial of the cause was postponed several times without plaintiff's consent, one of those occasions being a relatively short time before the date when the defendant would be entitled to require the court to dismiss the action, is a matter of no significance. Courts are, of course, loth to deny to a litigant a trial upon the merits; but the section of the Code of Civil Procedure above recited directs in plain terms that it shall be done when a case falls within the conditions stated; and the present is such a case. The trial court had no discretion. The motion being made, its duty was to dismiss. To relax the rule to cover hard cases would be to set at naught the express will of the Legislature."

[3] Section 981a of the Code of Civil Procedure is no less mandatory than section 583 of the same Code, and a motion made two and one-half years after date of appeal, which resulted in setting the same for trial three and one-half years from such date, is clearly within the express inhibition of the statute.

The peremptory writ of mandate is therefore granted, and the superior court is directed to dismiss the appeal.

We concur: FINLAYSON, P. J.; WORKS, J.

71 Cal. App. 799

Emma HOOPES and Daniel W. Hoopes, husband and wife, Petitioners, v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY and Hon. Merle J. Rogers, a Judge thereof, Respondents. (Civ. 4938.)

(District Court of Appeal, Second District, Division 2, California. March 7, 1925.)

Thos. H. Cornett, of Los Angeles, for petitioners.

E. F. Gerecht and C. W. Hall, both of Los Angeles, for respondents.

CRAIG, J. Petitioners herein were defendants in an action commenced in the justice's court of Los Angeles township by one Jay Smith. Otherwise the record before us in this proceeding is the same in all respects as that presented in *Hoopes v. Superior Court* (No. 4939) 235 P. 739.

The questions involved herein have been discussed and decided in the opinion filed in case numbered 4939, *supra*.

The peremptory writ of mandate is therefore granted, and the superior court is directed to dismiss the appeal.

We concur: FINLAYSON, P. J.; WORKS, J.

71 Cal. App. 611

EULESS v. WESTPHAL. (Civ. 5082.)

(District Court of Appeal, First District, Division 2, California. March 10, 1925. Hearing Denied by Supreme Court May 8, 1925.)

1. Appeal and error $\hookrightarrow$ 931(1)—**Allegations of count presumed not proved, in support of judgment for defendant.**

Where court made no finding expressly referring to allegations in one count of complaint, but made general finding that no facts "other than the facts hereinabove found" were proven in support of allegations of either count in complaint, appellate court, in absence of anything in other findings to support judgment for plaintiff, must presume, in support of judgment for defendant, that allegations of former count were not proved.

2. Contracts $\hookrightarrow$ 169—**Interpreted, in view of surrounding circumstances.**

Contract must be interpreted, in view of surrounding circumstances, to arrive at parties' intention.

3. Brokers $\hookrightarrow$ 40—**Owner's letter to agent held not contract of employment to sell property.**

Friendly letter, informing confidential agent in charge of writer's property that there was party wanting option thereon, but that writer would rather not give it to him if there were any prospect of agent selling any of property, and stating that writer would give \$5,000 to "any one" making sale at price quoted to such party, *held* not employment contract; latter statement being mere expression of readiness to contract with any broker giving promise of making sale on such terms.

4. Brokers $\hookrightarrow$ 45—**Agent's delay in offering prospect held sufficient to support judgment for defendant in action for commission.**

That agent did not offer prospect until two years after date of letter from owner stating, "Wish you would see if you could get an offer for the 12 lots," *held* sufficient to support judgment for owner, in action for commission on sale, if such letter constituted contract of employment.

5. Appeal and error $\hookrightarrow$ 704(2)—**Meaning and effect of contract for trial court, and cannot be reviewed in absence of evidence.**

Meaning and effect of contract is for trial court to determine in light of all facts and surrounding circumstances, and appellate court, when meaning is doubtful and none of evidence is before it, cannot say that lower court was wrong.

6. Brokers $\hookrightarrow$ 88(14)—**Findings held not to require judgment for appellant broker.**

Findings, in action for commission on sale of realty, that defendant caused letter, stating that he would give \$5,000 to any one making sale at stated price, to be sent to plaintiff, and that latter acted in reliance on that and other letters in seeking purchaser, *held* not to require judgment for plaintiff, in view of finding that defendant never employed plaintiff to sell property.

7. Trial $\hookrightarrow$ 394(3)—**That finding of fact appears under heading conclusions of law no ground for reversal.**

Fact that holding of trial court appears under heading conclusions of law rather than in findings of fact is no ground for reversal.

8. Appeal and error $\hookrightarrow$ 907(4), 1170(10)—**No reversal, in absence of showing that trial court did not have evidence, not brought up by appellant.**

In absence of evidence in record, requiring interpretation of letter from defendant to plaintiff as binding contract of employment to sell realty within statute of frauds, appellate court may assume that such evidence was adverse to plaintiff and should not reverse judgment for defendant, in absence of showing that trial court did not have such evidence; no prejudice, within Const. art. 6, § 4½, being shown.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by J. M. Eules against F. D. Vanderlip, on whose death Ella M. Westphal, as executrix, etc., was substituted as party respondent. Judgment for defendant, and plaintiff appeals. Affirmed.

N. Lindsay South, of Fresno, and George A. Clough, of San Francisco, for appellant.

Humphrey, Grant, Zimdars & Warren, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued F. D. Vanderlip to recover a commission for the sale of real property situated in Fresno county and owned by said Vanderlip. Judgment

went for defendant, from which plaintiff appeals on the judgment roll alone. Since the appeal was taken the defendant died and E. M. Westphal, as executrix of his estate, has been duly substituted in his stead.

The action was tried on plaintiff's amended complaint and the answer thereto. The amended complaint was framed in two causes of action. The first was in the form of a common count and alleged that within one year last past the defendant became indebted to plaintiff for services rendered in the sum of \$8,250. The second alleged that the defendant was the owner of certain real property in the county of Fresno; that on the 3d day of January, 1919, he employed plaintiff to sell the same under a written memorandum which is attached to the amended complaint and marked Exhibit A; that pursuant to said memorandum the plaintiff procured a purchaser, willing, ready, and able to purchase and who did purchase the property for \$165,000 on terms satisfactory to the defendant; that said memorandum provided that defendant would pay to any one making a sale a commission in the sum of \$8,250; that the sale was consummated on April 22, 1920; and that plaintiff has demanded payment of the sum of \$8,250, which demand has been refused. The writing of January 3, 1919, on which the plaintiff sued, reads as follows:

"Mr. J. Euless—Dear Friend: Want to tell you there is a party here that wants an option on all of my Fresno property, but, if there is any prospect of your selling any of it, would rather not give it to him. Have priced it to him at \$125,000. Will give \$5,000 to any one making a sale at that price. If I give this man an option, will give him a letter to you and you can show him the property and do all you can to help the thing along. Wishing you all a Happy New Year, am as ever, sincerely yours, F. D. Vanderlip."

[1] Directing our attention to the first cause of action, it appears that the trial court made no finding expressly referring to the allegations made therein; but it did make the general finding that—

"Other than the facts hereinabove found, no facts were proven in support of the allegations set forth in either count set forth in the complaint on file herein."

We do not see anything in the other findings which would support a judgment in favor of plaintiff on his first cause of action and we much therefore, in support of the judgment rendered, presume that the allegations of that cause were not proved.

The second cause of action was based on the letter of January 3, 1919, quoted above. The findings are full of matters covering other letters and oral conversations, none of which is within the issues framed by the pleadings. As to the letter upon which the

cause of action is based, the court found that the defendant "caused [it] to be written and forwarded to plaintiff"; that "there is no evidence to show whether said letter was written in the room of defendant, or in the room of his daughter, or that defendant had seen the letter prior to the trial hereof"; that it was written by defendant's daughter, Ella Westphal, who had written all his letters for eight or nine years prior to the trial; that, though these letters were written by the daughter at defendant's request and instruction, she "had no written authority of any kind" to sign his name. The trial court also found that, "pursuant to the request contained in said letters and in each of them," plaintiff promised the defendant to endeavor to sell said property; that, "subsequent to the writing of said letters, and prior to the appearance of" the purchaser, defendant orally informed plaintiff that he had raised the price of said property to \$130,000; that, pursuant to the provisions contained in said letters, the plaintiff did, on the 16th of October, 1919, procure a purchaser in the name of one Droge who was ready, willing, and able to purchase said property for \$130,000 and who paid the plaintiff \$1,000 as a deposit on account of the purchase price thereof; that defendant refused to sell to Droge on the terms offered, and that an action was thereupon commenced by Droge against this defendant to compel the specific performance of "his contract" to sell said property; that on November 17, 1919, defendant served on plaintiff a notice of revocation of his authority to sell the property; that in April, 1920, after negotiations conducted by the defendant alone, part of the property was sold by defendant to an association of persons, of which Droge was one, for the sum of \$165,000; and that the balance of defendant's property in Fresno and included in Droge's offer of \$130,000 was of the value of \$18,000. From these facts, the trial court concluded that the defendant did not employ plaintiff to sell the property mentioned.

[2] On the appeal, we are referred to *Curran v. Hubbard*, 14 Cal. App. 733, 736, 114 P. 81, 82, where the owner wired to the broker to "Get me an offer"; to *Kennedy v. Merickel*, 8 Cal. App. 378, 383, 97 P. 81, 83, where the language used was, "Hoping to hear from you again with a proposition"; and to *Toomy v. Dunphy*, 86 Cal. 639, 642, 25 P. 130, where the owner wrote, "Henry Toomy can arrange for the sale of my ranch." In each of the cases cited, the appellate court held that the writing was sufficient to constitute a contract of employment. But any contract is to be interpreted in view of the surrounding circumstances with the aim to arrive at the intention of the parties, and cited cases are of little aid, unless they arise out of similar circumstances.

[3] Here the court found that for many

years past the plaintiff had been the confidential agent of the defendant in charge of all the latter's property in the county of Fresno. The letters which appear in the record are all of a friendly confidential nature, such as might pass between persons occupying positions of trust and confidence. No one of them is of the character which would be expected when one of the parties standing in that relation would seek to change the relation to an employment for an entirely different purpose. The letter of January, 1919, upon which plaintiff's cause of action is based, is merely a friendly letter of information telling the agent of defendant's own efforts regarding the sale of the property—a matter wholly foreign to the subject of the agency then existing between the parties. The statement therein that the owner "will give \$5,000 to any one making a sale at that price" (\$125,000) is not in itself an agreement to pay that sum to the plaintiff if he made a sale. It is merely the expression of the readiness of the owner to enter into a contract with any broker who gives promise of making a sale on those terms.

[4] We do not know why the plaintiff picked on the letter of January, 1919, as the basis of his suit, unless it was because that letter was one of the last in point of time written. If any one of the letters in the record shows a contract of employment within the holding of the cases above cited, it is the letter of October 31, 1917, where the defendant wrote, "Wish you would see if you can get an offer for the 12 lots." The other letters plainly indicate the defendant's anxiety regarding the sale. Some of them plead with the plaintiff to do something looking toward the sale of a part or all of the lots. If the letter of October, 1917, is to be treated as a contract of employment, the fact that, so far as this record is concerned, the plaintiff did nothing—did not even offer a prospect—until two years later, is sufficient to support the judgment; the offer not having been made within a reasonable time.

[5-7] Our own interpretation of the letter of January, 1919, based solely on the record before us, is that it was nothing more than a part of a friendly correspondence of information and inquiry between a principal and his agent. If it had been the intention of the owner to employ the plaintiff to sell the property, he would not have used the expression, "will give \$5,000 to any one making a sale."

This is particularly true when we recall that in the same letter the owner told the plaintiff that he was then contemplating giving an option to purchase all the property to another party. But we are not required to speculate as to what was before the trial court when it reached its interpretation of the letter. It is the function of the trial court to determine the meaning and effect of an alleged contract in suit in the light of all the facts and surrounding circumstances. When the meaning is doubtful we are not able to say on appeal that the trial court was wrong when we have none of the evidence before us. The findings of fact do not necessarily require a judgment in favor of the plaintiff. It is true that the court found that the defendant caused the letter of January, 1919, to be sent to the plaintiff and that the plaintiff, in seeking a purchaser, acted pursuant to and in reliance upon all the letters mentioned in the findings. But it also found that the defendant did not on January 3, 1919, or at any other time, employ plaintiff to sell the property described. Of course, the fact that this latter holding appears under the heading of conclusions of law rather than in the findings of fact is no ground for the reversal of the judgment. *Burton v. Burton*, 79 Cal. 490, 495, 21 P. 847.

[8] If there was any evidence which would compel the court to interpret the letter as a binding contract of employment within the terms of the statute of frauds, it was the duty of the appellant to place that evidence before us on this appeal. From the fact that he has not done so, we may fairly assume that this evidence was adverse to him, because if it had been favorable he would have placed the facts before this court so that we would have been in a position to determine whether prejudice resulted from the error complained of. Putting it in another way, when the record before us discloses a case where the judgment of the trial court would be correct if certain evidence had been before it, we should not reverse the judgment in the absence of a showing that the trial court did not have that evidence, because, in such a case, we cannot say that prejudice has resulted within the meaning of section 4½ of article 6 of the Constitution.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

71 Cal. App. 534

GARRATT et ux. v. AUTOMOTIVE FINANCE CORPORATION et al.
(Civ. 5092.)

(District Court of Appeal, First District, Division 2, California. March 5, 1925. Hearing Denied by Supreme Court May 4, 1925.)

Vendor and purchaser ⇨244—Evidence held to sustain finding that defendants were not good-faith purchasers of vendor's equities in land by reason of unpaid purchase price.

In action to establish and foreclose vendor's lien, on ground that no part of purchase price had been paid, and that defendants were successive grantees of property, without consideration and with knowledge of plaintiff's equities, by reason of unpaid purchase price, inconsistent and contradictory evidence of defendants held to sustain finding in favor of plaintiff.

Appeal from Superior Court, Sonoma County; Ross Campbell, Judge.

Action by M. W. Garratt and wife against the Automotive Finance Corporation and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

W. F. Cowan, of Santa Rosa, and P. A. Vincillione, of San Francisco (A. W. Hollingsworth, of Santa Rosa, of counsel), for appellants.

Marcel E. Cerf, C. H. Sooy, and Martin P. Brunton, all of San Francisco, and Geary & Geary, of Santa Rosa, for respondents.

LANGDON, P. J. Plaintiffs brought an action to establish and foreclose a vendor's lien upon certain real property situated in Sonoma county, Cal. In substance, it was alleged that this property had been conveyed to the defendant Automotive Finance Corporation upon the agreement of said corporation to pay \$4,000 for the same to the plaintiffs; that no part of said purchase price had ever been paid; that the other defendants were successive grantees of this property, without consideration and with knowledge of the facts relating to the unpaid purchase price of the same.

The trial court found the facts to be substantially as alleged and gave judgment for the plaintiffs establishing and foreclosing their vendors' lien. The defendant R. H. Jones has appealed from this judgment. The only question presented by the record is whether the court was justified by the evidence in finding, in effect, that Jones was not a purchaser in good faith, for value without notice of the equities of the plaintiffs.

Ordinarily, when an attack is made upon the correctness of findings, it is customary for this court to review in its opinion the specific evidence justifying the trial court's action; but in the instant case it is impos-

sible to give an adequate idea of the general effect and the pronounced atmosphere of this record without copying into this opinion each and every portion of it. It is because isolated portions of the record in and of themselves, perhaps, do not sustain the findings that the appellant is able to make a plausible argument by considering numerous statements appearing in the record, taken out of their general setting. But there is something more vital and more trustworthy in arriving at truth than a literal acceptance of segregated portions of a record upon appeal. This is demonstrated by the record before us here. The testimony of the appellant with its positive assertions about a few matters calculated to constitute him an innocent purchaser for value, and its uncertainties, its vagaries, its indirectness and incoherence in other particulars, and, above all, its direct opposition in innumerable particulars to the testimony of Kemp with relation to the same matters, creates an impression, an atmosphere, as it were, which is unescapable. It doubtless so impressed the trial judge and influenced his conclusions. He was not obliged to accept literally the statements of any witness when other matters in connection with the testimony of that witness created a grave doubt as to the entire testimony.

Simply, the story of this action is about as follows: The plaintiffs are husband and wife. They owned a mountain ranch in Sonoma county. The husband had an acquaintance with the defendant Kemp, who was an automobile salesman and employed by the Automotive Finance Corporation, of which one Herrick was the president. Kemp undertook to sell Garratt's ranch for a commission. He wrote to Garratt that he would bring a prospective purchaser to examine it. He brought Herrick. The two spoke largely of their profitable business and their huge earnings and displayed a check for "thousands of dollars"; spoke of a "Cadillac" automobile owned by Herrick's wife which was too splendid a conveyance for mountain use; of Herrick's wealth and his purchase of other real property. In short, they used all the cheap, gaudy means of impressing the unsophisticated. The result of their efforts was that Garratt deeded his ranch to Herrick's company and accepted in payment therefor merely the unsecured notes of this company. If this company was not then in financial distress, it became so shortly thereafter, and at the time of the trial of this action its affairs were being administered by a trustee for its creditors. This "successful deal" was manipulated with as much speed as skill, and Herrick and Kemp returned to San Francisco the same night, after having stopped upon their way home at Santa Rosa to have the deed recorded. But

the details of their acquisition of the property are not of great importance here. They have not appealed from the judgment, and no one before this court has attempted the impossible task of covering their part in this transaction with any veneer of fair dealing.

Garratt discovered his mistake in a day or so, after discussing the matter with his bank, and he came to San Francisco and attempted to get some security for the notes which had been given him, but this was refused by Herrick. About a month later Kemp and Herrick were about to sever their business relations. Herrick claimed that about \$300 was due Kemp for commissions earned. Kemp's account of the matter is so varied in the record that we are unable to state what it is. At one place he claimed about \$2,900, although this is almost twice what he stated at other portions of the record was due him. At any rate, there was no money available to pay him anything, and Herrick, as president of the Automotive Finance Corporation, signed a deed of the Garratt ranch, conveying the same to Kemp. Herrick claimed this was done to enable Kemp to borrow \$500 upon the property and retain \$300 due him, and pay over the balance to the company; Kemp insisted that the property was given him, absolutely, in payment of this elastic amount of his commissions, which even at its highest estimate was about \$600 less than the amount which Herrick had promised to pay Garratt for the property. Later Herrick attempted to have Kemp arrested for his alleged breach of trust in mortgaging the property for \$1,500, but that phase of the matter does not concern us here. We shall follow Kemp: He took this deed, which was defective in being signed only by the president of the corporation when it recited upon its face that the corporation had authorized the president and secretary to sign the same, and called at the office of his uncle, an attorney at law. He did not find that gentleman at his office, but he found another attorney who has been called his "partner" in the record. Kemp explained to this attorney his pressing need for money and his desire to mortgage this property, and the attorney offered to take him to a client of his. He did so, and in this client we meet the defendant Jones. True, Mr. Jones is not bound by all we have heretofore stated, but we can better understand his activities when we have a picture of the scene upon which he enters. Mr. Jones has never seen the real property in question; he does not know Mr. Kemp. He is a different type of man from the former actor, Mr. Garratt. Mr. Jones is an attorney at law, practicing in Chinese exclusion cases at Angel island; he loaned money at 1 per cent. a month, secured by first mortgage upon real estate; he stated that he sometimes held property for people

in trust. For 30 years he has been engaged in such activities, so we must credit him with considerable wordly wisdom and experience. But for a moment or so, at least, he is naively trusting. Mr. Kemp tells him that he has been offered a loan of \$2,500 upon the property, but that he did not like the amount nor the term for which the loan was to run, and so he is seeking a \$1,500 loan from Mr. Jones. Mr. Jones, although he has never before seen Mr. Kemp, and had never seen the land, deduced from this assertion that the property was easily good security for a \$1,500 loan. He asked Kemp if he had borrowed any other money on the property, and, upon Kemp's statement that he had not, Jones also accepted that as a fact, and without further investigation concluded to loan the money at 1 per cent. a month interest. Kemp bought a blank form of mortgage, submitted it to Mr. Jones' attorney after it had been filled out, and Jones states he advanced \$1,500. But by this time his caution and business experience had returned to his aid, and he did not do the obvious and simple thing. He drew this money out of the safe deposit box, according to his statement, and, although Kemp desired the cash immediately (not exactly a "rush act," Jones says, but a decidedly hurried proceeding), Jones purchased a cashier's check with the money and then introduced Kemp and had the check cashed immediately. The check was available as evidence in this case, and seems to settle the matter according to the appellant's view. Jones says Kemp received the proceeds of that check, and Kemp agrees in this statement. Kemp did not deposit this money anywhere, and it left no trace so far as this record is concerned. It was simply carried around in his pocket and spent, according to his statement. He states also that he gave Mr. Jones' attorney, who advised Jones about the loan and the papers evidencing it, a commission of \$50 for arranging for the same.

A little later Jones decided to purchase this property from Kemp. The plaintiffs had the foresight to take the depositions of these two men before the trial of the action and to exclude one from the room while the other was testifying. It is exceedingly interesting, in a search for the truth in this case, to read these two depositions together. And it is because of the interest and illumination that lies in this exercise that this opinion can give no adequate idea of the content of this record taken as a whole and fitted together. True, their statements are in agreement as to the payment of the consideration by Jones, his lack of any notice of Garratt's equities, etc., but, upon events and details upon which questions could not have been anticipated, they are radically different. Take, for instance, the matter of the prospective purchase by Mr. Jones. He tells us that Mr. Kemp came into his office

and said he wished to sell the property, and his wife had suggested that perhaps Mr. Jones, being a sportsman, would purchase it for deer hunting; that Kemp was a "born salesman" and gave a graphic account of the hunting and fishing upon the place; that Jones said he would look at the place, and, if it was as described, he would buy it. Mr. Kemp, however, did not recall this incident. He narrated that he and Mr. Jones started down to the property to hunt; that on the way to Santa Rosa he stated he would probably sell the property; that Jones, thereupon, said he might buy it if it suited him; that at this time Kemp had with him a deed to the property conveying the same to Jones and signed by himself and wife before a notary public, which had been prepared upon the possibility that, somehow, he might sell the property to Jones. Although this idea came to Mr. Jones as they were riding along the highway, it had taken form sufficiently when they reached Santa Rosa to cause Jones to go to an abstract company and deposit his check for \$1,900, which was to be the balance of the purchase price over and above the amount previously advanced on the mortgage. Kemp also deposited his deed, and the abstract company was instructed to hold these papers until further notice from Jones. They then proceeded to the property and spent an hour or so there. Jones did not know the exact boundaries, but he was satisfied, and the two returned to San Francisco. We must not forget that before this "hurry up" transaction, Jones had been told of the attempted criminal prosecution of Kemp by Herrick over this property, and he also had the preliminary statement of the abstract company pointing out the defect in the deed from the corporation to Kemp and suggesting the execution of another deed, but Jones was not concerned about either of these important matters; his naive simplicity had returned.

It is impossible to ascertain from the conflicting statements—conflicts not only as between the parties, but in the statements of either standing alone—what was actually paid for this property, but, including the amount asserted to have been advanced previously, it is claimed to be something between \$3,200 and \$3,500.

Respondent collects in his brief various portions of the record upon which he seeks to charge Jones with constructive notice of Garratt's equities from his continued possession of the property, based upon the fact that, when Jones visited the property before completing the alleged purchase, Garratt had some sheep pastured there and some person-

al property in the cabin upon the land. It is sought by means of this evidence to bring the case within the rule of *Pell v. McElroy*, 36 Cal. 268. On the other hand, appellant considers this evidence, piece by piece, and demonstrates, to his satisfaction, that it is not sufficient to charge Jones with constructive notice. But the judgment need not rest upon that phase of the case alone. It may rest upon the bad faith of appellant in acquiring the record title of the property. Now, it is obvious that Jones' bad faith, if any, is a matter which is most difficult for the plaintiffs to demonstrate. The situation is akin to the cases where fraud is established by indirect evidence, because of the inherent impossibility of proving it directly. We hesitate to discredit the testimony of any witness, and we should not do so in this case if the trial court, in watching the witnesses upon the stand, had not reached a conclusion which even the cold printed pages seem to justify. It is our duty to uphold the findings of the trial court wherever possible. The trial court is better able to judge of truth, from its personal contact with the witnesses, than are we, and, when our impression from the printed record is so exactly in harmony with the conclusion drawn by the trial court from its point of vantage, neither our inclination nor our duty permit us to reverse a judgment.

It is interesting to observe that at the time of the trial the testimony of Mr. Kemp and Mr. Jones was rather carefully harmonized, in marked distinction to the divergence in their depositions taken earlier, when the transactions were fresher in their minds. It is also significant to observe how directly and intelligently Mr. Jones and Mr. Kemp were able to answer questions which might have been anticipated in an action of this character, and how incoherent and rambling and "out of character" are their answers in the record upon other matters. The respondents have printed examples of this in their brief, and they would be pertinent here along with the numerous other matters we have mentioned and a great many additional circumstances appearing in the record, if time and space permitted of their inclusion.

However, we think we have said enough with reference to the record before us. No specific thing or things warrants the conclusion of the trial court, we concede that to the appellant; but the entire record, each part taken in connection with each other part, compels such conclusion.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

71 Cal. App. 542

HART v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.
(Civ. 2936.)

(District Court of Appeal, Third District, California. March 5, 1925.)

1. Statutes $\S$ 74(1), 76(1), 85(4)—Workmen's Compensation Act, $\S$ 19, subd. 3, permitting Industrial Commission to receive the report of attending or examining physician as evidence, is constitutional; "court."

Workmen's Compensation Act, $\S$ 19, subd. c. as amended by act May 23, 1917 (St. 1917, p. 849), providing that Commission may receive reports of physicians as evidence, does not violate Const. art. 1, $\S$ 11, providing for uniform operation of general laws, or Const. art. 4, $\S$ 25, subd. 3, prohibiting local or special laws regulating practice in courts, or Const. art. 4, $\S$ 25, subd. 33, directing that, where general law can be made applicable, it is duty of Legislature to so provide, since Industrial Accident Commission is not a "court" within Constitution.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Court (Of Justice).]

2. Master and servant $\S$ 417(7)—Weight of examining physician's report is for Commission.

The weight and credibility to be given reports of an examining physician is for the Industrial Commission, and not for the court.

3. Master and servant $\S$ 405(4)—Commission may act on report of examining physician rather than on medical books.

Industrial Accident Commission is justified in acting on report of an examining physician relating to the cause of injury rather than on theories and statements contained in medical books.

4. Master and servant $\S$ 417(7)—Commission's denial of rehearing for newly discovered evidence conclusive.

Unless alleged newly discovered cumulative evidence was such as to lead to a different conclusion as to proximate cause of injury than that arrived at by Commission, it was duty of Commission to deny a rehearing, and its determination is final and conclusive, under Workmen's Compensation Act $\S$ 67, subd. c.

5. Master and servant $\S$ 405(4)—Evidence held to sustain denial of compensation for hernia.

Evidence held sufficient to sustain findings by Industrial Accident Commission that hernia did not arise out of or was proximately caused by the employment.

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by J. E. Hart, opposed by E. G. Engman and the Aetna Life Insurance Company, insurer. To review an award of the Industrial Accident Commission of California,

denying compensation, claimant applied for certiorari. Affirmed.

W. F. Cowan and A. W. Hollingsworth, both of Santa Rosa, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondents.

PLUMMER, J. This matter is based upon the petition of J. E. Hart to review the proceedings of the Industrial Accident Commission of the state of California, denying compensation in the case of J. E. Hart v. E. G. Engman and the Aetna Life Insurance Company.

The return of the Commission sets forth by questions and answers the testimony of petitioner taken upon the hearing, which we summarize as follows:

"I am an automobile mechanic, and have been with this firm four and one-half years. On September 26th, I was adjusting brakes and grabbed hold of a tire with the brakes set, and they let loose, and I slipped and fell. I was under quite a strain. I went down and hurt myself, and a little while afterwards, I felt a peculiar sensation in my right side, and that evening I went to see the doctor. It was not a great pain, but I could feel it when I straightened up after I got through. Very shortly after—10 or 15 minutes—I felt it just a few minutes after it happened, nothing before that. It bothers me now enough to prevent me working, and it pains me at times in certain positions that I get in doing nothing. When I am sitting down or laying down, I do not feel it, but when I am even walking around doing nothing I can feel it, a sort of a thorn in there, it doesn't seem right at all. I went home and changed my clothes, and I found a little swelling about half the size of a walnut. I did not stop work at the time and went right on and finished adjusting the brakes. I went up Thursday night (to the doctor's office on the evening of the accident) and I have not done anything since. I have never had any swelling or any sensation of pain in my right side before. That is the first time I ever had any pain there. If there was any swelling there, it didn't hurt me at all, and I never paid any attention to it. I didn't realize it was serious until I went home and saw the lump."

Included in the return, as a part of the testimony taken before the Commission, is a letter written by Dr. Bartlett, an examining physician in this case, under date of October 1, 1924, as follows:

"Attention Dr. R. N. Gray:

"Mr. J. E. Hart, of 521 8th street, Santa Rosa, Cal., reporting at my office October 1st for examination and report, regarding hernia.

"History—White, male, married, 36, employed as mechanic, claims injury on Friday, September 26th, 1924, at 4 p. m.

"Patient was testing out the brakes on a car by attempting to turn the rear wheel with the brake set. To accomplish this he grasped the tire with his hands and placed his right foot on a lug nut. Simultaneously he pressed down

with his right foot and pulled with his hands. His foot slipped off of the lug nut and he pitched forward on to the ground. About 10 or 15 minutes later patient became conscious of a pain in his right groin. He does not describe this pain very accurately but says that it was a sort of swelling sensation. He finished his day's work under some handicap from pain but without great distress. That evening, from one to two hours later, when changing his clothes he discovered a swelling in this groin at the site of pain. The pain has been quite constant ever since the accident, though not so severe as on the first day and only barely noticeable when he is lying down. The swelling is present excepting when he lies down. Patient has not worked since the day of the accident because he was afraid he might further damage himself.

"Patient claims that he has never had any troubles in his groins before such as pain, swelling or rupture. He has always done very heavy work.

"Examination—The right external inguinal ring is very large. The inguinal canal is enormously dilated. A huge mass descends by way of the cord and protrudes about 5 cm. beyond the edges of the external ring whenever the patient strains, or when he stands up. The mass goes back very easily. There is gurgling on pressure. The conjoined tendon is quite relaxed, the internal ring is enormously dilated. There is no tenderness in the ring.

"On the opposite side the structures seem to be normal. Patient complains more of the examination on the left side than on the right side. The scrotal contents are normal except for a markedly atrophic testicle on the right, the result of an orchitis about 12 years ago.

"Conclusion—Patient has a right indirect advanced inguinal hernia. This is an old hernia inasmuch as it is too large to have developed in 5 days and tenderness is lacking.

"Edwin I. Bartlett."

Upon the foregoing testimony, the Commission made the following findings of fact:

"That J. E. Hart, on the 26th day of September, 1924, at Santa Rosa, Cal., while in the employ of defendant, E. G. Engman, at which time the employer was insured against liability under the Workmen's Compensation, Insurance, and Safety Act of 1917 by defendant Aetna Life Insurance Company, was found to be suffering from a right inguinal hernia which condition constitutes the basis of the claim herein asserted," and "that the evidence herein is insufficient to establish as a fact that said hernia arose out of or was proximately caused by the aforesaid employment."

In accordance with these findings, it was ordered that the claimant take nothing by reason of his application for compensation. Within the time provided by the Workmen's Compensation Act, the applicant filed with the Commission his petition for a rehearing, based upon two grounds: 1. That the evidence does not justify the findings of fact; 2. Newly discovered evidence.

Thereafter the Commission passed upon the applicant's petition for a rehearing, as follows:

"Findings and award having been approved herein on the 9th day of October, 1924, and the applicant having on October 14, 1924, filed his petition herein asking for a rehearing, and no good cause appearing why said petition should be granted, now therefore, it is hereby ordered that said petition for rehearing be, and it is hereby, denied. Dated at San Francisco, Cal., this 31st day of October, 1924. * * *"

[1] The first error on the part of the Commission assigned by the applicant herein as a reason why the findings should be annulled and a rehearing granted is based upon the action of the Commission in receiving, and, therefore, acting upon, hearsay testimony which consisted in the report of an examination upon the applicant made by Dr. Bartlett. The existence of legislative sanction for the admission of such testimony is recognized but the constitutionality thereof is questioned.

Subdivision c of section 19 of the Workmen's Compensation Act, as amended May 23, 1917 (St. 1917, p. 849) in relation to the receipt of evidence by the Commission, provides as follows:

"The Commission may receive as evidence, either at or subsequent to a hearing, and use as proof of any fact in dispute, the following matters, in addition to sworn testimony presented in open hearing: (1) Reports of attending or examining physicians. * * *"

The remainder of the subdivision is not pertinent to this inquiry. The petitioner contends that this subdivision of section 19 of the Workmen's Compensation Act is violative of section 11 of article 1, and of subdivisions 3 and 33 of section 25 of article 4 of the state Constitution. Section 11 of article 1, supra, reads: "All laws of a general nature shall have a uniform operation." Subdivision 3 of section 25 of article 4, supra, specifies that the Legislature shall not pass local or special laws regulating the practice of courts of justice, and subdivision 33 of said section 25 directs that in all cases where a general law can be made applicable, it is the duty of the Legislature so to provide.

A complete answer to the foregoing objections is found in the fact that the act in question does not, either in purport, or in effect, regulate in any particular the practice of any court of justice, and the act in question, in relation to the admission of testimony, is general in all cases coming before the Commission. It is true that the Supreme Court of the state has held that, under the provisions of the state Constitution, as now amended, the Industrial Accident Commission is invested with certain judicial powers, but this does not, in and of itself, constitute the Commission a court in any sense of the word as that term is used in the state Constitution. It has been frequently decided that such bodies, as boards of supervisors, exer-

cise judicial functions, but it has never been contended that therefore a board of supervisors, when exercising such functions, becomes a court, as that term is used and defined in our state Constitution.

As to the general proposition concerning the admission of hearsay testimony, the Supreme Court of this state, in *P. G. & E. Co. v. Industrial Accident Commission*, 180 Cal. 497, 181 P. 788, has held:

"In view of section 60 (a) of the Workmen's Compensation, Insurance, and Safety Act (Stats. 1917, p. 871), a finding of the Industrial Accident Commission of the existence of the relationship of employer and employee based upon hearsay evidence is binding upon the reviewing court."

See, also, *McFeely v. Industrial Accident Commission* (Cal. App.) 223 P. 413, where the authorities supporting the admission of such testimony are fully set forth.

[2] As to whether reports of examining physicians are reliable and whether credence may be given thereto and action based thereupon are not matters for this court to determine. The Legislature has amended the law so as to admit the receipt of such testimony by the Commission, and the weight and credibility to be given thereto is for the Commission, and not for the court.

[3] A considerable portion of the petitioner's brief is given over to a consideration of the causes of hernia, its origin, its symptoms and results, based upon quotations from De Quervain on Clinical Diagnosis and Buckman's Operative Surgery. These writers differ somewhat from the conclusions reached by Dr. Bartlett, but we have no means of determining whether these writers are more accurate in their statement, or better informed, or more likely to give correct information, than Dr. Bartlett. The argument of counsel reduced to a simple statement is the placing of hearsay testimony against hearsay testimony, the writing found in a book against the writing constituting the report of an examining physician. We think the Commission justified in acting upon the report of the examining physician, rather than upon theories, or suppositions or statements found in books, because the writer of the report undoubtedly knew at the time of making the same that he was subject to the call of the Commission and could be specifically and thoroughly interrogated as to any matters or statements contained therein. In any event, these are matters for the Commission, and are within the exclusive jurisdiction of the Commission.

A number of cases have been cited where findings of the Commission have been set aside and the causes remanded for rehearing, but an examination of such cases shows they are based upon nonconflicting testimony, and the questions presented were simply whether the testimony was legally sufficient or in-

sufficient to support the findings of the Commission. Our attention is also called to the case of *Clapps Parking Station v. Industrial Accident Commission*, 51 Cal. App. 624, 197 P. 369, where the award of the Industrial Accident Commission was annulled on certiorari for insufficiency of the evidence to sustain a material finding of the Commission, and the case remanded for further proceedings before the Commission, as per the request of the Commission for the taking of additional testimony. The question involved was whether the injury was occasioned at a time when the deceased was actually in the service as well as in the employ of his employer, and it was held by the court that the undisputed testimony failed to show such service. That case does not present an instance where the Industrial Accident Commission is passing upon conflicting testimony. In the case at bar, we have the testimony of the applicant, the statement of the examining physician, and also the fact that the Commission had before it an application for a rehearing based upon a petition setting forth the nature and character of the additional testimony possible to be presented for consideration by the Commission, just as presented to this court, and, with these facts before it, the Commission reaffirmed its conclusion that the petitioner was not entitled to compensation.

[4] The foregoing statement brings us to the situation presented by subdivision c of section 67 of the Workmen's Compensation Act, wherein it is set forth that:

"The findings and conclusions of the Commission on questions of fact shall be conclusive and final and shall not be subject to review; such questions of fact shall include ultimate fact and the findings and conclusions of the Commission. * * *"

The additional testimony sought to be introduced is only cumulative, and its character is sufficiently foreshadowed by the affidavits presented to enable the Commission to determine whether it would have any weight or bearing upon the vital issue involved in this case, to wit, the proximate cause of the hernia, and, unless the alleged newly discovered evidence was such as to lead to a different conclusion from that arrived at by the Commission as to the proximate cause, it was the duty of the Commission to deny a rehearing. We think the jurisdiction of the Commission to pass upon these questions and the finality of their decision are embraced within said subdivision c of section 67, supra.

[5] The record discloses sufficient evidence to support the findings and award of the Commission. It therefore follows that the award of the Commission must be, and the same is, hereby affirmed.

We concur: FINCH, P. J.; HART, J.

4. Vendor and purchaser ⇨44—Statement of vendor's agent that vicinity was practically frostless not shown to be true.

In action to recover back purchase price of orange grove because of fraudulent misrepresentations by vendor's agent, evidence *held* not to show truth of representation that district was practically frostless.

5. Vendor and purchaser ⇨37(4)—Representations to purchaser of orange grove as to value of crop on trees, and that district was practically frostless, *held* representations of fact.

In action to recover purchase price of orange grove, representations of vendor's agent as to value of crops on trees, and that district was practically frostless, *held* positive representations of fact, and not mere expression of opinion.

6. Vendor and purchaser ⇨37(2)—Statement to purchaser of orange grove that there were 10 acres of 12 year old trees instead of nine substantial misrepresentation.

In action to recover purchase price of orange grove on grounds of misrepresentations of vendor's agent, statement that there were 10 acres of 12 year old trees instead of nine *held* substantial misrepresentation.

7. Vendor and purchaser ⇨37(4)—Statement to purchaser of orange grove that there were three bare acres, which in fact were planted with pomegranates, substantial misrepresentation.

In action to recover purchase price of orange grove on ground of fraudulent misrepresentations of vendor's agent, statement that there were three acres of bare land, which in fact were planted to pomegranates, *held* substantial misrepresentation.

8. Vendor and purchaser ⇨37(6)—Misrepresentation of single material fact on which purchaser relied will support recovery of purchase price.

Misrepresentation of a single material fact on which purchaser had a right to and did rely will support an action to recover back purchase price.

9. Vendor and purchaser ⇨37(5)—Intent to make misrepresentations immaterial.

In action to recover purchase price on grounds of misrepresentations, that agent of vendor did not intend to deceive purchasers by his representations is immaterial; the essential element being intent to induce the other party to enter the contract, under Civ. Code, § 1572.

10. Vendor and purchaser ⇨37(4)—Purchaser need not show property was worth less than he paid to recover for misrepresentations.

In action to recover purchase price on grounds of fraudulent misrepresentations of vendor's agent, purchaser need not show property was worth less than price to be paid; fact that it was represented at a greater value than it had being sufficient.

196 Cal. 8

HARRIS et al. v. MILLER. (Sac. 3531.)

(Supreme Court of California. April 11, 1925.)

1. Fraud ⇨11(1)—Expression of opinion relied on treated as statement of fact.

When representation concerning subject-matter of transaction, which ordinarily might be only expression of opinion as to existence of fact, has reasonable tendency to induce other party to consider and rely upon such representation as a fact, it will be treated as an assertion of an existing fact within meaning of rule as to fraudulent representations.

2. Vendor and purchaser ⇨44—Finding that representation of vendor's agent that there was \$4,000 crop of oranges on trees was merely an opinion, not supported by evidence.

In action to recover back purchase price of orange grove, on grounds of fraudulent representations by vendor's agent, who was experienced in cultivation of oranges and sale of orange crops and groves, to purchasers who had no experience therein, finding that statement that there was \$4,000 crop of oranges on trees was but expression of opinion rather than statement of fact *held* not supported by evidence.

3. Vendor and purchaser ⇨37(1)—Responsibility for inducing purchase, by opinion as to facts known to be nonexistent, cannot be avoided.

One who induces a purchase, by estimates or opinions, professedly based on alleged facts and known to be nonexistent, will not be allowed to escape responsibility on plea that he was merely declaring an opinion.

11. Vendor and purchaser ⇐339—Failure of purchaser of orange grove to tender proceeds from orange crop held not to defeat right to recover purchase price.

Where purchaser of orange grove rescinded contract on grounds of fraudulent misrepresentations of vendor's agent, and vendor had taken possession, failure to offer return of proceeds from sale of crop of oranges on trees at time of purchase *held* not to defeat right to recover purchase price already paid, where proceeds of crop had been spent in caring for orchard.

12. Vendor and purchaser ⇐214(2)—Contract for purchase of orange grove assignable.

Contract for purchase of orange grove to be paid for in installments, together with rights incidental thereto, *held* assignable.

13. Vendor and purchaser ⇐214(5)—Assignment of interest in contract for purchase of orange grove carried with it right to rescind for fraud.

Assignment of purchaser's interest in contract for sale of orange grove *held* to carry with it right to rescind on ground of fraud.

14. Evidence ⇐219(3)—Proof that vendor had accepted compromise of purchaser's claim for fraudulent representations would be admissible.

In action to recover purchase price of land on grounds of fraudulent misrepresentations of vendor's agent, proof that vendor had accepted a compromise of purchaser's claim through its agent would be admissible as an admission against interest, though a mere offer of compromise would not be admissible.

15. Evidence ⇐258(1)—Evidence that vendor's agent had accepted compromise properly excluded, where authority of agent to accept it was not shown.

In action to recover purchase price of orange grove on grounds of misrepresentations of vendor's agent, evidence that agent had accepted compromise of purchaser's claim was properly rejected, in absence of any showing of authority and acceptance as agent of vendor.

In Bank.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Samuel P. Harris and another against Lottie Tate Miller. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

Theodore L. Breslauer, of San Francisco, and Farnsworth, McClure & Burke, of Visalia, for appellants.

Power & McFadzean and W. W. Middlecoff, all of Visalia, for respondent.

LENNON, J. In this action the plaintiffs' complaint pleaded a cause of action against the defendant in the form of a common count, for moneys had and received in the sum of \$8,500. Defendant, answering, denied all of the material allegations of the complaint. The evidence, adduced in response to

the issues made by the pleadings, discloses that the gravamen of the plaintiffs' cause of action is for fraud and deceit, and consists of claimed false and fraudulent representations alleged to have been made to the plaintiffs, by an agent of the defendant, whereby Samuel P. Harris, one of the plaintiffs, was induced to enter into a written agreement with the defendant for the purchase at the agreed price of \$26,000, of a 20-acre tract of land planted to oranges and situated in the county of Tulare.

By the terms of the agreement the plaintiff, Samuel P. Harris, was to pay the sum of \$1,000 cash upon the execution of the contract; the remainder was to be paid in certain specified installments at certain designated intervals of time following the initial payment. The contract in controversy contained, among other covenants, the provisions that "in the event the present orange crop upon said property is ready for marketing before the first \$12,000 is paid upon the said purchase price, the said crop shall be marketed through the Strathmore Orange Grove Company and the proceeds or returns derived therefrom to be paid to the said party of the first part (the defendant) and be by her credited upon the said \$12,000 payment."

The plaintiffs paid the installments contracted for until the sum of \$8,500 had been paid to the defendant. It was the plaintiffs' claim, and the proof offered and received in support of their case tends to show, that they were persuaded to purchase the property in question by false representations made by the defendant's agent as to the number of orange trees growing upon the land, the value of the crop upon the trees; and the character of the climatic conditions relative to the production of oranges in the locality in which the land is situated. More precisely stated, the material misrepresentations claimed and relied upon by the plaintiffs as an inducement to enter into the contract were these: The defendant's agent said to them that there was a \$4,000 crop of oranges growing upon the trees at the time that the contract was entered into; that the locality in which the orchard was situated was free from frosts; that 10 acres (one-half of the tract) was planted in twelve-year old navel orange trees, and that the other half of the tract, with the exception of one acre, which was devoted to a family orchard, was planted in six year old orange trees; that all of the trees were in good condition save those in the family orchard; and that there never was a frost in the locality of the tract.

Some time in September, 1920, so the evidence shows, the plaintiffs went to Porterville and came in contact with Mr. Farmer, the agent of the defendant. He showed the plaintiffs generally around the district, and finally took them to the Miller property.

They inspected the house partially, but made no detailed inspection of the orange grove. The agent gave to the plaintiffs a typewritten prospectus which reads in part as follows:

"Miller Twenty Acres." "This property consists of 10 acres Washington Navel orange trees, 12 years old; nine acres Washington Navel orange trees, 6 years old; one acre family orchard. * * * There is a \$4,000 crop now hanging on the trees marketable in November."

It is an admitted fact in the case that the defendant's agent was aware, during all of the time the agreement in controversy was being negotiated, of the undisputed fact that the plaintiffs had no experience in or knowledge of orange growing; were utterly ignorant of the value of orange lands and orange crops, and had no knowledge whatever of climatic conditions in the locality in which the tract of land is situate, and had not inspected the grove in question prior to its purchase by them from the defendant.

The evidence shows that the defendant's agent who negotiated the agreement had resided in the vicinity of the land in question for 12 years; that he was an experienced fruit man; that he had particular experience in growing and cultivating oranges; that he owned and operated the "Strathmore Orange Grove Company," the company named in the contract to which the money received from the sale of the crop was to be paid on account of the purchase price of the land; that he frequently bought and sold orange groves on his own account in the vicinity of the tract of land in controversy. It is not disputed that, when the agent of the defendant told the plaintiffs that there was a \$4,000 crop of oranges on the trees at the time the contract was negotiated, he meant \$4,000 net; nor is it disputed that the defendant's agent told them that there were in fact 10 acres of land planted to twelve-year old-trees and that the district in which the grove in question is located was practically frostless.

The findings of the trial court are to the effect that the defendant's agent did not represent or guarantee that there was a \$4,000 crop of oranges then growing on the trees in the orchard, but did express an opinion that there was a \$4,000 crop of oranges then growing on the orchard; that the orchard was in good condition; that there were nine acres of six-year-old trees in which there was a tract consisting of about three acres of pomegranate trees; that the defendant's agent, prior to the time of entering into the contract, stated to the plaintiffs that said three acres would have to be replanted and should be replanted to deciduous trees; that in said locality the frost had never injured navel orange fruit, and that said orchard was all of the navel orange variety; that the

frost had never been known to injure trees over six years old; that no representations made by the agent of defendant to plaintiffs, or either of them, were made with intent to deceive or defraud the plaintiffs or either of them; and neither of the plaintiffs was defrauded or damaged in any sum by reason of any of the representations or acts of the defendant or her agent. It will be noted that the trial court did not find that the defendant did not say to the plaintiffs that the district in which the grove in question is located "was practically free from frost." Nor did the trial court find one way or the other concerning the alleged representations of the agent relative to the number of acres planted to twelve year old trees.

From the judgment in favor of the defendant based upon the foregoing findings plaintiffs appealed.

[1, 2] The finding of the trial court to the effect that the statement of Farmer, the agent of the defendant, that there was a \$4,000 crop of oranges on the trees, was but the statement of an opinion rather than the asseveration of an existing fact is not, we think, supported by the evidence. It is the general and well-settled rule that, when a representation concerning the subject-matter of a transaction which might, ordinarily, be only the expression of an opinion is asserted as an existing fact, material to the transaction, and which has a reasonable tendency to induce one of the parties to the transaction to consider and rely upon such representation as a fact, the statement then becomes an assertion of an existing fact within the meaning of the general rule as to fraudulent representations. 2 Pomeroy [3d Ed.] § 878; Herdan v. Hanson, 182 Cal. 538, 189 P. 440; Sheer v. Hoyt, 13 Cal. App. 622, 110 P. 477; Winkler v. Jerrue, 20 Cal. App. 555, 129 P. 804; Myers v. Lowery, 46 Cal. App. 682, 189 P. 793; Edge v. Bryan, 47 Cal. App. 312, 190 P. 476; Stockton v. Hind, 51 Cal. App. 131, 196 P. 122; Tracy v. Smith, 175 Cal. 161, 165 P. 535; Crandall v. Parks, 152 Cal. 772, 93 P. 1018; Muller v. Palmer, 144 Cal. 305, 77 P. 954.

Every element necessary to the invocation and application of the rule stated is to be found in the undisputed facts of the instant case. The plaintiffs had no knowledge of orange growing. The defendant's agent was an experienced man in the cultivation of oranges and the sale of orange crops and orange groves. The defendant's agent knew that the plaintiffs were relying upon him absolutely. That the value of the crop was a material representation cannot be doubted, for, by the very terms of the contract, the crop was to go to the defendant in payment of the \$3,500 installment provided for in the contract. That it was instrumental in procuring plaintiff's signature to the contract is evidenced by the fact that the defendant's

agent insisted that, if the plaintiffs did not enter into the contract at once, the crop would be withdrawn from the terms of the agreement.

Although the agent of the defendant testified that his assertion to the plaintiffs that there was a \$4,000 crop on the trees was only his "estimate" of the value of the crop, he did not testify that he did not say to the plaintiffs that there was a \$4,000 net crop of oranges on the trees. In short, he did not inform the plaintiffs that his statement concerning the value of the crop was only an opinion rather than the statement of a known fact.

[3] The agent of the defendant admitted that he had visited the grove in question some three months prior to the sale for the purpose of estimating the value of the crop, and that in doing so he walked two or three times diagonally between the trees. The agent also admitted that he observed the crop on the trees within a month of the sale, and that he then estimated the number of boxes of oranges on the trees to be 1,500 loose or 1,000 packed, which he figured at the time he made the estimate would bring \$4 a box packed. The first pool of the oranges sold at \$4.15 a box, which price, if maintained, would have brought \$4,150 gross. The total crop, however, ultimately brought approximately only the sum of \$2,200, or an average of \$2 a box. On cross-examination the defendant's agent admitted that, in order to approximate his estimate of the value of the crop as \$4,000 net, the oranges should have sold for \$6 a box. It is at once apparent that the agent's own estimate of 1,000 boxes, selling at \$4 a box, would not approximate his representation that the value of the crop was \$4,000 net, and therefore the agent must have known at the time he made the representations concerning the value of the crop that there was not and could not be a \$4,000 net crop on the trees. "A party inducing another to contract in reliance upon estimates or opinions professedly based upon alleged facts known to the party stating them to be nonexistent will not be permitted to escape responsibility by the plea that he was merely declaring his opinion." *Henry v. Continental, etc.*, 156 Cal. 667, 680, 105 P. 900, 965.

[4] It is not disputed that the defendant's own agent represented to the plaintiffs that the tract of land within which the Miller property is located was situated in a vicinity which was "practically frostless." He stated that this was one of the reasons the value of the land in the vicinity was so high. The uncontradicted evidence shows, however, that as a matter of fact there had been two frosts in the vicinity during the time the agent resided there, and that one of these frosts was an exceptionally heavy frost, which destroyed the three acres of young orange trees

(one-third of the new orchard planted in 1912) subsequently planted to pomegranate trees. Although the agent testified that he was not aware of the destruction of these three acres of orange trees by the frost of 1913, it is scarcely possible that he could have resided in the district at the time and remained ignorant of the fact that there had been a frost. The frost of 1916 did not injure the trees then on the property, for the reason that at that time they were old enough not to be injured. The defendant's agent testified that he said that there was no danger of frost for the reason that the orange trees on the property were navel oranges and these were usually harvested in December before the frosts came. According to the testimony of defendant's own witness, the crop of navel oranges in the low ground were frozen in 1916. While it may be true that the frost ordinarily falling in the vicinity of the grove in question may not have been sufficiently severe to injure full-grown trees, nevertheless, it is an uncontradicted fact in the case that such frosts were sufficiently severe to injure any new orange trees which might be set out on the three-acre tract of land which the agent said was bare land and should be replanted. Consequently it cannot be said, as is contended, that the evidence shows the truth of the agent's statement that the district "was practically frostless."

[5] Considered alone and standing by themselves, the representation as to the value of the crop and the statement as to the climatic condition obtaining in the district where the land in controversy was located might be held to be mere expressions of opinion and therefore could not be made the basis of an action for deceit and misrepresentation. But, when taken together and then coupled with all of the admitted and undisputed facts and circumstances of this case, the conclusion is inescapable, it seems to us, that they were, as a matter of law, positive representations rather than a mere expression of an opinion of existing facts made by one assuming to have knowledge of the subject and which were undoubtedly and admittedly material inducements to the making of the contract in controversy. *Muller v. Palmer, supra*; *Tracy v. Smith, supra*; *Myers v. Lowery, supra*.

[6] Clearly, the number of orange trees planted to the grove in question was a material factor in the making of the contract in controversy. And the record shows without contradiction that the plaintiffs were told prior to the consummation of the contract that there were ten acres of twelve-year-old orange trees, whereas, in truth and in fact, there were but nine acres of such trees. The trial court failed to find upon this phase of the case. This discrepancy in the representation as to the number of acres planted

to twelve-year-old orange trees makes a difference of \$1,000 in the actual value of the land and a substantial depreciation in the producing power of the grove as a whole. The plaintiffs undoubtedly were entitled to have delivered to them the grove which they contracted for in substantial accord with the inducing representations of the agent of the defendant. The difference between nine and ten acres of twelve-year-old trees is a substantial difference.

[7] While it is true there is a conflict in the evidence as to whether or not the agent of the defendant prior to the consummation of the contract informed the plaintiffs with reference to the other half of the tract that there were six acres of six-year-old trees and three acres of bare land instead of nine acres of six-year-old trees as represented in the prospectus, still the fact remains undisputed that there were not three acres of vacant orange land, for the reason that three of the nine acres referred to were planted to pomegranates. The plaintiffs were not required to take nine acres of twelve-year-old orange trees in lieu of the ten acres contracted for. Nor were they required to take three acres of land planted to pomegranate trees for three acres of unplanted land.

[8] It will thus be seen that several misrepresentations of material matters of fact entered into the procurement and consummation of the contract in controversy. And it is well settled that the misrepresentation of even a single material fact upon which the plaintiffs had a right to and did rely will suffice to support plaintiffs' cause of action. *Davis v. Butler*, 154 Cal. 623, 98 P. 1047; *Thomas v. Hacker*, 179 Cal. 731, 178 P. 855; *Scott v. Delta L. & N. Co.*, 57 Cal. App. 320, 207 P. 389.

[9, 10] The fact that the agent of the defendant, as the court found, had no intent in making the representations in question to deceive the plaintiffs will not militate against the plaintiffs' cause of action. The party making misrepresentations which operate as an inducement for the making of a contract, which he knows to be untrue or having no ground for believing them to be true, will not be held immune from the consequences resulting therefrom by an absence of an intent to deceive. The essential element in causes of action of the character of the instant case is the "intent to induce another party to enter into the contract." Civ. Code, § 1572. Nor is it essential that it be shown that the property contracted for was worth less than the price agreed to be paid for it. It will suffice if it appears that, if the property purchased had been as represented, it would have been of greater value than it actually was. *Spreckels v. Gorrill*, 152 Cal. 383, 92 P. 1011.

[11] Treating the cause of action as did the parties and the trial court as one of re-

scission, there is no merit in the contention that the right to rescind was lost because, with the demand for the return of the \$8,500 in suit, no offer was made to return to the defendant the sum of \$2,200 which was derived from the sale of the crop of oranges. This money was applied by the Strathmore Orange Grove Company, who handled the sale of the crop, to the expenses of caring for the orchard, such as spraying, fertilizing, etc. The defendant, before the filing of the suit, had retaken possession of the property. The plaintiffs had not been given title to the property nor had they received any benefit or anything of value from the transaction. It cannot be said that the plaintiffs' failure to return or offer to return something which they did not have and which the defendant did have operated to defeat the cause of action.

[12, 13] The contract in controversy was signed only by Samuel P. Harris and the defendant, Lottie Tate Miller. And, while Samuel P. Harris is joined as plaintiff with M. Kate Harris, it appears that, prior to the institution of the action, said Samuel P. Harris assigned by written instrument all of his right, title, and interest in said contract and to the land to which it related to the plaintiff M. Kate Harris. The contract and the rights incidental thereto were assignable (*More v. Massini*, 32 Cal. 590; *Rued v. Cooper*, 109 Cal. 682, 34 P. 98; *Kemp v. Enemark* [Cal. Sup.] 230 P. 441; *Henderson v. Henshall*, 54 F. 320, 4 C. C. A. 357), and, under all of the particular circumstances of the instant case, the assignment, we think, carried with it the right to rescind on the ground of fraud.

[14, 15] The plaintiffs complain of a ruling of the trial court which precluded proof in their behalf of the fact that the defendant had accepted a compromise of plaintiffs' claim effected by Farmer as agent of the defendant. The proffered proof was objected to upon the ground that no foundation for such evidence was laid in this, that it was not shown that Farmer, at that particular time was authorized to act as the agent of the defendant in effecting such compromise and rescission. The objection was sustained by the trial court upon the ground stated and upon the further ground, volunteered by the trial court, that to admit the evidence "would be * * * destructive of the objection against admitting offers of compromise."

The plaintiffs offered in evidence several letters and telegrams which tended to show that the defendant, through Farmer, had entered into negotiations for the purpose of effecting a compromise of the plaintiffs' claim and that these negotiations had proceeded to a point where the compromise had been accepted by Farmer, the agent of the defendant. Upon this phase of the case the evi-

dence showing, as we think it did, the acceptance of an offer to compromise plaintiffs' claim of fraud and misrepresentation, was admissible as evidence from which an admission of the defendant against interest might be inferred. 2 Jones on Evidence, § 291. Of course, it is the general rule that a mere offer of compromise, for familiar reasons, is not admissible in evidence. But, when it is shown that the offer of compromise has been accepted, it becomes a completed agreement, and the offer and its acceptance were admissible in evidence. 2 Jones on Evidence, § 291; 22 Corp. Jur. § 352; Dugger v. Kelly, 168 Iowa, 129, 140, 150 N. W. 27. Nevertheless, the ruling of the trial court must be sustained upon the ground that it was not shown nor attempted to be shown that Farmer was authorized to and did accept as the agent of the defendant the offer of compromise.

The judgment appealed from is reversed and the cause remanded for a new trial.

We concur: RICHARDS, J.; SHENK, J.; WASTE, J.; SEAWELL, J.; LAWLOR, J.

195 Cal. 743

WILLIAMS v. CITY OF STOCKTON et al.
(Sac. 3648.)

(Supreme Court of California. April 4, 1925.)

1. Municipal corporations ⚡342—Mayor required to sign contract for construction of city hall.

Under Stockton City Charter (St. Ex. Sess. 1911, p. 289), § 95, providing that all contracts should be drawn under supervision of city attorney in writing and executed by officer authorized to sign same, and resolution awarding contract for construction of a new city hall to plaintiff, and authorizing mayor to execute contract which had been approved by city attorney, mayor was required to sign contract and could not refuse to do so without legal justification.

2. Mandamus ⚡92—Would lie to compel mayor to execute contract for construction of new city hall; "ministerial act."

Mandamus would lie to compel mayor to sign contract for construction of new city hall, though such duty did not arise under any charter provision, where he was authorized and directed by resolution of council to sign same, his duty then being ministerial only and involving exercise of no discretion, and plaintiff having no plain, speedy, and adequate remedy in ordinary course of the law; "ministerial act" being one which a public officer is required to perform, on a given state of facts in a prescribed manner in obedience to mandate of legal authority, without regard to his own judgment or opinion concerning propriety of act to be performed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ministerial Act.]

3. Mandamus ⚡71 — Proper to compel performance of ministerial duty.

Mandamus is proper remedy to compel performance of a ministerial duty.

4. Mandamus ⚡7—Writ granted as matter of right, where substantial right cannot be otherwise enforced.

While mandamus is a discretionary writ and will not issue where its enforcement would work an injustice or accomplish a legal wrong, yet where one has a substantial right which cannot otherwise be enforced and a failure of justice would result in refusing it, writ issues as a matter of right.

5. Mandamus ⚡3(4)—Would lie to compel mayor to execute contract for construction of new city hall.

Mandamus would lie to compel mayor to execute contract for construction of new city hall, though charter provided that all contracts should be in writing and contract sought to be enforced was not signed by both parties, where plaintiff was seeking to compel signing of contract so that when it was properly executed he might proceed with proper performance of work, and had no adequate remedy for damages against city, as contemplated by Code Civ. Proc. § 1086.

6. Constitutional law ⚡121(2)—Contractor's rights to enforce contract for construction of new city hall not impaired by new charter.

Assuming that New Stockton City Charter (St. 1923, p. 1321) lodges in mayor a discretion to refuse to sign contracts, rights of contractor awarded contract for construction of new city hall under old charter (St. Ex. Sess. 1911, p. 254) to enforce same would not be thereby impaired.

7. Constitutional law ⚡121(2)—Government of municipal corporations may be changed at any time, but existing contract relations may not be thereby impaired.

Organization or government of municipal corporations may be changed at any time, but when so changed existing contract obligations may not be thereby impaired.

8. Municipal corporations ⚡244(2)—Contract for construction of new city hall calling for expenditure within funds provided by bond issue held not void.

Contract for construction of new city hall, calling for expenditure within funds provided by bond issue, under St. 1901, p. 27, held not void, though with other expenditures it would require city to exceed amount provided thereby, where amount provided for city hall purposes was merely an estimate and authorities in submitting proposition to electors had not confined themselves to an absolutely definite plan of construction and expenditure, and had proceeded in good faith in accordance with program based on estimated cost.

In Bank.

Appeal from Superior Court, San Joaquin County; George F. Buck.

Application for writ of mandate by Howard S. Williams, directed against the city of

Stockton, a municipal corporation, and another. Judgment for defendants, and plaintiff appeals. Reversed.

William P. Hubbard, of San Francisco, for appellant.

J. Le Roy Johnson, and Clarence A. Grant, both of Stockton, for respondents.

SHENK, J. This is an appeal from a judgment denying a writ of mandate following an order sustaining a demurrer to the petition without leave to amend. The facts are therefore undisputed.

On October 5, 1920, the electors of the city of Stockton authorized a bond issue of \$600,000 as the estimated cost of the acquisition, construction, and completion of a new city hall, including the land, equipment, furnishings, appliances, and necessary appurtenances, for the housing of the several departments of the city and for general municipal uses. The bonds were duly issued and sold at par and a premium of \$50,556. The sum of \$4,146.25 was realized from the sale of buildings on the land purchased for the site and the rental thereof for one month. A total of \$654,702.25 was therefore available for the new city hall as proposed. Notwithstanding the exercise of all practicable diligence in procuring a site and making other arrangements for the project it was more than 2½ years before the city council was in position to advertise for bids for the construction work. Pursuant to notice inviting proposals the appellant submitted his bid on the general construction contract. By resolution of the council, No. 6070, adopted on June 22, 1923, and approved in writing by the mayor on the same day, the bid of the appellant in the net sum of \$360,897 was accepted, the contract was awarded to him, and the mayor was thereby "authorized and directed to execute and enter into a contract on behalf of the city" with the appellant. Within 10 days after the adoption of said resolution a contract in due form was prepared, approved by the city attorney, signed by the appellant, filed with the city clerk, and presented to and left with the mayor for his signature.

The appellant also in due time executed and filed the required faithful performance bond. The mayor retained possession of the contract, assuring the appellant from time to time that he would sign it, until the expiration of his term of office, on July 2, 1923, but did not attach his signature thereto, although due demand was made upon him so to do. In the meantime, the appellant incurred an indebtedness of \$5,400 as the premium on his faithful performance bond, and, in reliance upon the award of the contract to him, made and entered into contracts with subcontractors and materialmen for work, labor, and materials necessary to carry out the contract and refrained from soliciting other

contracts which could have been obtained, all to his detriment in the estimated sum of from \$35,000 to \$40,000.

Upon the incoming of the new city administration at 8 o'clock p. m. on July 2, 1923, the new city council, as one of its first acts, adopted a resolution wherein it recited the expenditure from the fund available for new city hall purposes of the sum of \$184,347.77 for the site, architects' fees, and other items, the awarding of the general contract to the appellant in the sum of \$360,897, the receipt of a bid from Edward L. Gnekow for plumbing, electrical work, heating, and ventilation, in the sum of \$60,869, and the receipt of a bid from the Pauley Jail Building Company for jail equipment in the sum of \$36,463. The resolution further recited that no arrangement had been made for inviting proposals for furnishing the new city hall; that the reasonable estimate for such equipment was approximately \$92,000; that certain architects' fees remained unpaid in the sum of \$10,800, all of which would leave for the account of furnishings the sum of \$1,200 only; that there were no other moneys in said bond fund, or in any other fund then available for furnishings, except the said sum of approximately \$1,200; that the estimate for the acquisition, construction, and completion of said city hall according to the plans and specifications theretofore adopted would exceed the amount on hand for such purposes by approximately \$90,000; that it was believed to have been the intention of the electors who authorized the bond issue that the sum realized therefrom should result in a city hall ready for use and that the bids theretofore received should be rejected. It was accordingly resolved that the bid of the appellant for the general construction work, the bid of Edward L. Gnekow for plumbing, electrical work, heating, and ventilation and the bid of the Pauley Jail Building Company be rejected, and that all acts and proceedings taken relative to said bids and subsequent thereto be rescinded. Upon the refusal of the new mayor on demand to sign the contract awarded to the appellant this proceeding was brought in the superior court to compel him to do so.

It is the contention of the appellant that it was the duty of the mayor to sign the contract pursuant to the authorization and direction of the resolution adopted June 22, 1923, and that he had no discretion to do otherwise. Further, that upon the award of the contract to him and compliance with all requirements on his part he obtained a right to whatever benefits might accrue to him under the contract when signed, and that he could not be divested of such right by the adoption of the second resolution.

[1-4] At the time the contract was awarded to the appellant the charter of the city of Stockton provided that the council should be

the governing body of the city; that the mayor should be the president of the council and should preside at its meetings (Stats. Extra Session 1911, p. 269, §§ 55, 56). In section 95 of the Charter it was provided that all contracts should be drawn under the supervision of the city attorney and that they "must be in writing, executed in the name of the city of Stockton by an officer or officers authorized to sign the same." The contract in question was approved by the city attorney. The mayor was a member of the deliberative body which accepted the bid and awarded the contract. He was also the officer of the city authorized and directed by that body to sign the contract. Under the charter provision and the terms of the resolution it is clear that it was the duty of the mayor to sign the contract as he was authorized and directed to do, and that he could not refuse to do so without legal justification. An examination of the charter as then in effect discloses that the signing of contracts was no part of the charter duties of the mayor. It may be deemed no more than a coincidence that the mayor was designated to execute this particular contract. The council could have authorized and directed any other officer of the city to sign the same on behalf of the city, as, for instance, the city clerk, or the street superintendent, or any of the other officers mentioned in section 43 of the Charter. But although the duty of the mayor to sign the contract in question did not arise under any specific provision of the charter, when he, as an officer of the city, was authorized and directed by the duly adopted resolution of the council to sign the same, it became his duty to do so as a duty resulting from his office. The mayor's duty to sign the contract was ministerial only, and involved the exercise of no discretionary power (see *Earl v. Bowen*, 146 Cal. 754, 81 P. 133).

"A ministerial act is one which a public officer is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed." *McQuillin on Mun. Corps.* vol. 5, p. 5275, and cases cited.

And mandamus is the proper remedy to compel the performance of the ministerial duty. *Mechem on Public Officers*, § 947, and cases cited. The facts which rendered it the ministerial duty of the mayor to sign the contract were here present. The discretion of the city's governmental body, which alone could determine whether or not the contract should be awarded, had been exercised. We find no provision of the charter which gave the mayor a veto power over the award of contracts. The contract was awarded in all respects as required by law. It was prepared and approved by the city attorney. The

mayor, as an officer of the city, was authorized to sign the same by resolution of the council duly adopted and approved by the mayor. By reason of his office and such authorization and direction, it became his duty to do so unless he was lawfully justified in his refusal. We find no legal justification for his refusal to sign. Under such circumstances the appellant became vested with a right to have the contract signed as directed by the council. *McConoughey v. Jackson*, 101 Cal. 265, 35 P. 863, 40 Am. St. Rep. 53. While the writ of mandamus is, in a measure, a discretionary writ, and will not issue where its enforcement would work an injustice or accomplish a legal wrong (*Cal. Highway Comm. v. Riley*, 192 Cal. 97, 218 P. 579; *Fawkes v. Burbank*, 188 Cal. 399, 205 P. 675), yet, where one has a substantial right enforceable by mandamus, and which cannot otherwise be enforced, and a failure of justice would result in refusing it, he is entitled to the writ as a matter of right, or, in other words, it would be an abuse of discretion to refuse it (*Barnes v. Glide*, 117 Cal. 1, 48 P. 804, 59 Am. St. Rep. 153; *Gay v. Torrance*, 145 Cal. 144, 78 P. 540; *Potomac Oil Co. v. Dye*, 10 Cal. App. 534, 102 P. 677; 16 Cal. Jur. 768, and cases cited). It appears that appellant has no other means of enforcing his rights than by the issuance of the writ herein applied for. It is conceded that he has no cause of action in damages in the premises against the city or any officer thereof. It is therefore clear that he has no plain, speedy, and adequate remedy in the ordinary course of law.

The situation here disclosed is almost identical with that presented in *Neal Publishing Co. v. Rolph*, 169 Cal. 190, 146 P. 659. In that case the board of supervisors of the city and county of San Francisco had awarded a contract for the furnishing of certain printing supplies and the mayor had approved the award. Subsequently the mayor refused to sign the contract for reasons which he stated at the time. The petitioner, to whom the contract had been awarded, applied for a writ of mandate to compel the mayor to sign the same. The peremptory writ was granted for the reason that the proceedings had so far progressed that the signing of the contract by the mayor was the performance of a ministerial duty—did not involve the exercise of any discretion whatever, and the reasons assigned for the refusal did not constitute legal justification. See, also, *City of Los Angeles v. Hance*, 137 Cal. 490, 70 P. 475; *City of Oxnard v. Bellah*, 21 Cal. App. 33, 130 P. 701.

[5] The respondents take the position that because the charter of the city of Stockton provided that all contracts be in writing, and that as this contract was not signed by both parties, therefore the appellant had no rights which may be enforced in this proceeding. They rely on the cases of *Los Angeles Gas*

Co. v. Toberman, 61 Cal. 201; Frick v. Los Angeles, 115 Cal. 512, 47 P. 250; and Times Publishing Co. v. Weatherby, 139 Cal. 618, 73 P. 465. The Los Angeles Gas Company Case was a mandamus proceeding to compel the approval of a claim for gas for street lighting furnished by the petitioner under a contract which was held not to have been executed in accordance with section 1 of article 12 of the City Charter, which provided:

"The city of Los Angeles shall not be, and is not bound by, any contract, or in any way liable thereon, unless the same be made in writing by order of the council, the draft thereof be approved by the council, and the same ordered to be, and be signed, by the mayor or some other person in behalf of the city."

The council awarded the contract to the petitioner and ordered the mayor to sign the same. Upon his refusal to do so the clerk of the council, upon order of the council, signed it in behalf of the city. It was held that the contract was not binding on the city and the claim could not be paid for the reason that the order directing the clerk to sign the contract was not adopted by the number of votes required by another section of the charter. The Frick Case was an action for damages for alleged prevention of performance of an alleged contract for the construction of a public sewer. The council awarded the contract to the plaintiff and directed the mayor to sign the same on behalf of the city, which he did not do. It was held that there was no liability on the part of the city under the alleged contract, because it was not executed with the formality required by section 207 of the Charter (Stats. 1889, p. 506), which was a re-enactment of section 1 of article 12 of the former charter. In the Times Publishing Company Case the plaintiff sought by mandamus to compel the treasurer of the city of Eureka to pay a warrant allowed by the city council for city printing. After advertisement for bids the council awarded the contract for city printing to the plaintiff, who thereupon entered upon the performance of the work. The charter of the city of Eureka contained a provision (section 167) which was the same in effect as section 207 of the Los Angeles Charter. No written contract was executed, and as there was no compliance with the sweeping provisions of said section 167, it was held that no right to payment for printing done could be predicated upon a contract not executed in the manner specifically prescribed.

It will readily be seen that those cases do not apply to the situation in the case at bar. There the plaintiffs were asserting rights under alleged contracts which were found to be not binding on the cities because the provisions of their respective charters had not been followed. Here the appellant concedes that the contract, to which he claims to be entitled, is not in writing. He

is not asserting rights as under a contract duly executed, but is seeking to compel the signing of a contract so that when it is properly executed he may proceed with the performance of the work with full confidence in its due execution and with assurance that payments thereunder will be made as the work progresses. In those cases rights were asserted by the plaintiffs on the theory that contracts were in existence. In this proceeding the right to the execution of a contract is asserted. When there is no discretion to refuse to do that which will cause the contract to comply with the formalities of the charter, the right to its execution would seem to be clear. The charter of the city of Stockton contained no such provisions as section 207 of the Los Angeles charter and section 167 of the Eureka charter. Under the law as it stood at the time of the award, the right of the appellant to have the contract signed became fixed and the rule as stated in Donnelly on the Law of Public Contracts would apply. It is said in section 143 thereof that:

"When an award has once been made the public body has no discretion but to execute the contract. The rights of the parties then become fixed, and the power to cancel the award or reject the bids does not exist. The obligation of the contract made cannot thus be impaired at the option of one of the contracting parties."

The rule is also stated in McQuillin on Municipal Corporations, vol. 2, § 1226, as follows:

"While it is true that a municipal corporation has a discretion as to the time and manner of making of corporate improvements and the purchase of supplies, still when this discretion has been exercised and a contract made relative thereto, the legislative function has been exhausted, and the duty has become purely ministerial, and a contract so made cannot be impaired at the option of the municipality. Hence, when a bid has been accepted by the proper authorities, such acceptance cannot be revoked."

In their supplemental brief the respondents also rely on and quote from Mr. Donnelly wherein it is said in section 148:

"Even if the proceedings are all regular and conducted according to law, and the bidder has in all respects conformed to the provisions and requirements of the advertisement and the charter, he may not have a writ of mandate to compel the execution of a contract to him."

But immediately following that statement the author says:

"The reason for this rule is that he has a right of action against the public body for damages which he has sustained by reason of the refusal to execute and carry out the contract."

The rule under which the writ in such cases is denied is therefore based on the fact that a right of action for damages would lie which, as contemplated by our code section (1086, Code Civ. Proc.) would constitute a

plain, speedy, and adequate remedy at law and which it is conceded is not available to the appellant in this case.

[6, 7] On January 29, 1923, the new charter of the city of Stockton was approved by the Legislature (Stats. 1923, p. 1321). Section 3 of article 23 thereof provides that:

"All contracts shall be signed on behalf of the city by the mayor and attested by the city clerk."

This provision became effective on July 2, 1923, the day on which the resolution of the new council purporting to reject all bids and to rescind all proceedings thereunder was adopted. The respondents therefore contend that at the time of the application for the writ in the superior court there was no resolution of the council in existence directing the mayor to sign the contract on behalf of the city, and that the new charter provision vested in the mayor a discretion to refuse to sign the contract. It may be assumed as respondents contend that the adoption of the resolution of June 22, 1923, awarding the contract to the appellant was in the exercise of a legislative function (see *Hopping v. Council of City of Richmond*, 170 Cal. 605, 150 P. 977), and that under general rules a legislative act may thereafter be amended or repealed. It will be noted, however, that the new charter provision also imposes upon the mayor of the city the duty to sign contracts. It went into effect prior to the adoption of the resolution purporting to withdraw the authorization and direction. So that as to this particular contract, the duty of the mayor to sign the same has been continuous from the time of the award, first under the resolution of June 22, and then under the charter. If it be assumed, as respondents contend, that the new charter provision lodges in the mayor a discretion to refuse to sign contracts, it would not follow that the rights of the appellant arising out of the award of this contract would thereby be extinguished or impaired. It is competent to provide by law that the organization or government of municipal corporations may be changed at any time, but when so changed existing contractual obligations may not thereby be impaired (*Bates v. Gregory*, 89 Cal. 387, 26 P. 891; 12 C. J., p. 1016, and cases cited). In the *Bates Case*, at page 392 (26 P. 892) it is said:

"In *Von Hoffman v. City of Quincy*, 4 Wall. 535, the Supreme Court of the United States, discussing this subject, says: 'It is also settled that the laws which subsisted at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement.' And in the same case the court further says: 'Nothing can be more material to the obligation than the means of enforcement. Without the remedy the

contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against invasion. The obligation of a contract "is the law which binds the parties to perform their agreement." The prohibition has no reference to the degree of impairment; the largest and the least are alike forbidden.'"

[8] Respondents further contend that the contract which the appellant is seeking to have signed would be void if executed. The basis of this contention is the fact that if the city became obligated under the contracts awarded to the appellant and to Gnekow and pays other obligations properly chargeable to this particular bond fund approximately \$1,200 only will remain for the purchase of furnishings, which amount is alleged to be insufficient to properly furnish the building, and it is insisted that the rules laid down in *Jenkins v. Williams*, 14 Cal. App. 89, 111 P. 116, and *O'Farrell v. County of Sonoma*, 189 Cal. 343, 208 P. 117, would render the contracts void. We do not so conclude. In *Jenkins v. Williams*, supra, it appeared that the county of Sacramento had voted bonds for numerous public improvements, including the construction of new bridges and the repairing of old bridges. By appropriate order the board of supervisors specified each improvement to be made and the amount of money proposed to be expended for each improvement, not as an estimate, but as a definite amount to be devoted to each improvement. Thirty bridges to be constructed or repaired were described in the order and proclamation calling the election with the exact amount of money required for each. In the list was "Twelfth street American river bridge, repairs—\$5,000," and the proposition appeared on the ballot also in that form. The board entered into a contract with the plaintiffs to perform the repair work on the bridge for the sum of \$5,388. After the plaintiffs had completed their work they were paid \$5,000 from the bond fund created for that purpose and no more. They then presented their claim to the board of supervisors for \$503.16 and it was allowed. The county auditor refused to draw his warrant for the same and it was sought by writ of mandate to compel him to do so. The evidence showed that there was a surplus in other bridge bond funds sufficient to pay the demand, but it was held that by reason of the form of the order of the board definitely allotting to the Twelfth street bridge the particular fund provided and the mandatory provisions of section 4088 of the Political Code under which the bond proceedings were taken, the auditor was justified in refusing to issue the warrant. Among the provisions of said section 4088 is the following:

"The revenue derived from the sale of said bonds shall be applied to the purpose specified in the order of the board, and no other. Should there be any surplus, it shall be applied toward the payment of said bonds."

In the case of *O'Farrell v. County of Sonoma*, supra, the provisions of section 4088 of the Political Code were again under consideration. A proposed bond issue for county road improvements was submitted to the electors of the county. In its order and resolution calling the election the board of supervisors recited the necessity of improving the highways of the county and specified among others the proposed construction of a road from "Sebastopol to Freestone (definitely describing the route)—Distance 4.0 miles—\$85,000." After the bonds were sold the board proceeded to let a contract for 1.93 miles of highway for the sum of \$72,840.60, making no provision for the improvement of the remaining 2.07 miles, an estimated cost of which would exceed the cost of improving the 1.93 miles. The plaintiff contended that because of the form of the proposition submitted to the voters the board had jurisdiction only to ask for bids for the construction of the road, Sebastopol to Freestone, as an entirety, and that if the bids were too high the board was not entitled to proceed further without authority from the electors. This court held that "when the defendant board was contemplating a bond issue * * * it had the statutory right to make its order just as broad, and just as narrow, and just as specific as it was willing to be bound by, so long as the provisions of the statute were complied with"; that it could have asked generally for the consent of the electors to issue bonds in a specific sum for the construction of roads in the county but it did not do so; on the contrary it specified road by road, name by name, length by length, with a definite and specific sum for each piece of road to be constructed. It was held that the plaintiff as a taxpayer was entitled to an injunction restraining the board from proceeding with the execution of the contract; that by the order calling the election in the manner and form there disclosed and the ratification of the order by the electors, a contractual status was created which could not be altered at the will of but one of the parties. On this subject it was further said:

"When by its order, duly accepted by a vote of the electors, the length of the road had been specifically defined, its terminals specifically located, and the cost of the whole established—these elements became a part of the contract. * * * If the defendant board has the statutory right to let contracts to build said roads in sections, then, * * * all of the funds may be spent on one mile in the discretion of the board. But the board may not let the contracts piecemeal. It has waived its right to do so."

In the present case the proceedings were not taken under section 4088 of the Political Code for that section applies to counties only. They were taken under the city charter and the municipality bond act of 1901 (Stats. 1901, p. 27). Under that statute the council is not bound to specify in the ordinance calling the election the exact amount which will be required to acquire, construct, and complete the public improvement contemplated. On the contrary, the statute requires that the estimated cost shall be set forth. This requirement was strictly complied with. In the ordinance calling the election it was recited that the estimated cost of the acquisition, construction, and completion of the proposed municipal improvements, and of each and every one thereof, would be too great to be paid out of the ordinary annual income and revenue of the city; that it was proposed in proposition 1 to incur an indebtedness in the sum of \$600,000 for the acquisition, construction, and completion of a city hall. In section four of the ordinance it was provided:

"The estimated cost of the municipal improvement referred to under the designation of proposition 1 in the preceding section of this ordinance is the sum of \$600,000."

The amount provided for city hall purposes was therefore merely an estimate. In spite of due diligence on the part of the city officials in furthering the project to the point of letting the contracts over 2½ years elapsed, and in the meantime the cost of building construction had increased from 20 to 25 per cent. It quite often inevitably happens that the ultimate cost of a proposed public improvement exceeds the preliminary estimate. If the city authorities having the power and responsibility of proposing the bond issue have not, by the form employed in submitting the proposition to the electors, confined themselves to an absolutely definite and inflexible plan of construction and expenditure, and have proceeded in good faith in accordance with the program based upon estimated costs, no good reason appears why they should not be permitted to continue with the improvement to the extent of the funds available. The good faith of the respondent city is here unquestioned. The contract, which appellant seeks to have signed, calls for an expenditure within the funds available for the purpose intended. Under the facts alleged in the petition, the appellant was entitled to the issuance of the writ, and the demurrer should have been overruled.

The judgment is reversed.

We concur: MYERS, C. J.; RICHARDS, J.; SEAWELL, J.; WASTE, J.; LAWLOR, J., LENNON, J.

195 Cal. 757

Edward L. GNEKOW, Plaintiff and Appellant, v. CITY OF STOCKTON (a Municipal Corporation) and Raymond J. Wheeler, as Mayor of Said City of Stockton, Defendants and Respondents. (Sac. 3647.)

(Supreme Court of California. April 4, 1925.)

In Bank.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Levinsky & Jones, of Stockton, for appellant.
J. Le Roy Johnson, of Stockton, for respondent.

SHENK, J. This is an appeal from a judgment denying a writ of mandate and dismissing the petition therefor following an order sustaining a demurrer to the petition without leave to amend.

The appellant was the successful bidder for a contract to install the plumbing, electrical work, heating, and ventilating system for the proposed new city hall for the city of Stockton. After advertising for bids, the city council by resolution, duly adopted and approved by the mayor on June 22, 1923, awarded the contract to the appellant and authorized and directed the mayor to sign the same. Within 10 days after the passage of the resolution, the contract was duly prepared, approved by the city attorney, signed by the appellant, and presented to the mayor for his signature. The mayor failed, neglected, and refused to sign the contract. His term of office expired on July 2, 1923, when a new city charter went into effect and a new set of city officers assumed their duties. One of the first acts of the new administration was to adopt a resolution purporting to reject all bids for contracts in connection with the new city hall project and to rescind and set aside all awards of contracts and proceedings taken thereunder. This resolution was adopted on the evening of July 2, 1923, and is the same resolution which purported to reject the bid and set aside the award of contract to Howard S. Williams. The resolution is referred to more at length in the case of *Williams v. City of Stockton* (Sac. No. 3648) 235 P. 986, this day decided. In this case the appellant alleges generally the facts set forth in the *Williams* Case and in addition that in order to enable him to fulfill his contract with the city and relying on its execution in due time he filed the required faithful performance bond, became obligated to pay the sum of \$915 as the premium thereon, entered into contracts for the purchase of and ordered large quantities of materials from various manufacturing distributors in the eastern part of the United States and will be compelled to accept and pay for large quantities of said materials which are unsaleable for the reason that there is no demand therefor except for structures of the kind and character of the proposed city hall, all to his loss in excess of \$10,000.

After the adoption of said resolution on July 2, 1923, the appellant made a written demand on the new mayor to sign said contract, but the mayor refused to do so for the reasons set forth in said resolution. This proceeding was then brought to compel him to do so. Further facts applicable to this case and in common with the facts in the case of *Williams v. City of*

Stockton, supra, are set forth in the decision in that case. From the facts here presented the same legal conclusions must be drawn as were arrived at in that case. On the authority of that case the judgment herein is reversed.

We concur: MYERS, C. J.; RICHARDS, J.; SEAWELL, J.; WASTE, J.; LAWLOR, J.; LENNON, J.

195 Cal. 759

FINN et al. v. BUTLER et al. (S. F. 11418.)

(Supreme Court of California. April 7, 1925.)

1. Execution ☞402—Order directing bank not party to pay to judgment creditor money alleged to belong to judgment debtor held void.

In supplementary proceedings, order directing bank to pay over money in its hands, alleged to belong to judgment debtor, to judgment creditor, *held void*, in view of Code Civ. Proc. §§ 714-721, where bank was not a party to proceedings or to action to which supplementary proceedings had been instituted.

2. Execution ☞387—Bank indebted to judgment debtor not made party to supplementary proceedings by order directing its employé to appear as witness.

That in supplementary proceedings referee in examination of judgment debtor subpoenaed an employé but not an official of bank alleged to be indebted to judgment debtor as a witness did not make bank a party to proceeding nor subject to jurisdiction of referee, so that it could be ordered to pay indebtedness over to judgment creditor.

3. Execution ☞387—Referee held without jurisdiction to determine whether money in hands of bank was property of judgment debtor.

In supplementary proceedings in which bank alleged to be indebted to judgment debtor was not made a party to proceedings nor to action to which proceedings had been instituted, referee was without jurisdiction, under Code Civ. Proc. § 719, to determine whether any money or property lawfully in keeping of bank was property of judgment debtor.

4. Execution ☞402—Order directing bank to pay over money in its hands, alleged to belong to judgment debtor, to judgment creditor held void.

In supplementary proceedings, order directing bank to pay over money in its hands, alleged to belong to judgment debtor, to judgment creditor, *held void*, in view of Code Civ. Proc. §§ 717-719, irrespective of whether it was made a party to proceeding, where, on hearing before referee, it was shown that money was claimed by two claimants who had made and filed with sheriff their verified claims and demands in conformity with section 689, setting forth an interest therein adverse to judgment debtor.

5. Prohibition ☞28—Writ would lie to restrain referee in supplementary proceedings from ordering bank to pay over funds to judgment creditor, though referee's order had issued.

Writ of prohibition to restrain referee, in supplementary proceedings, from directing bank to pay over money in its hands, alleged to belong to judgment debtor, to judgment creditor, would lie, though referee had made such order, where court was satisfied that petitioners were entitled to whatever relief would be appropriate to facts and law of case as developed on hearing on return to alternative writ of prohibition.

In Bank.

Application by Thomas F. Finn and others for a writ of prohibition, to be directed to Frank I. Butler and others, to restrain defendant Butler as referee from proceeding with certain matters pending before him. Order of referee annulled.

Reisner & Deming, of San Francisco, for petitioners.

H. L. Sacks, of Los Angeles, Edward T. Bishop, County Counsel, and Mortimer O. Kline, Deputy County Counsel, all of Los Angeles, for respondents.

RICHARDS, J. The petitioners herein on December 9, 1924, filed in this court their application for a writ of prohibition wherein they sought to have the respondents herein, and particularly the respondent Frank I. Butler, as referee, etc., prohibited and restrained from proceeding with, passing upon, or deciding certain motions and proceedings pending before him as referee in a certain action then pending in the superior court in and for the county of Los Angeles, and from making, signing, or issuing a certain order which he was threatening to make, sign, and issue in connection with certain supplementary proceedings pending before him as such referee under the appointment of said court. On December 11, 1924, the said petitioners filed and presented a supplementary petition, setting forth that the said referee had, on December 9, 1924, and after the filing of their said original petition, above referred to, but before any action by this court thereon, proceeded to make, sign, and issue said order in said proceeding pending before him, and that, unless restrained by this court, he and his correspondents would further proceed to enforce the same. The respondents in due course appeared and presented their demurrer and answer to said application; but, before hearing had upon the issues thus presented, the parties to this proceeding presented and filed their stipulation as to the facts upon the basis of which it was respectively claimed these petitioners should as a matter of law be granted or denied, the relief sought. The facts as thus agreed upon may be summarized as follows:

In the year 1916 one L. Paggi obtained a judgment in the superior court in and for the county of Los Angeles against Karl Elliott for the sum of \$3,344.58 and costs, which judgment became final on December 28, 1916, and which has never been satisfied. On November 26, 1924, said L. Paggi caused to be issued in said cause and out of said court and pursuant to an order thereof an execution directed to the sheriff of the city and county of San Francisco, one of the petitioners herein, and which execution was by said sheriff levied upon a Packard automobile then in said city and also upon certain moneys in the Liberty Bank therein standing in the name of "Karl Elliott, Agent." Upon such levy and upon receiving notice thereof, John Schuster and Kathryn Elliott, two of the petitioners herein, filed with said sheriff duly verified third party claims as provided in section 689 of the Code of Civil Procedure, setting forth their ownership of said property and money so levied upon and the whole thereof. Thereupon the said sheriff notified said Paggi that he would not hold said property under said levy, unless he were indemnified as provided in section 689 of the Code of Civil Procedure. Said Paggi refused to so indemnify the said sheriff, but, on the contrary commenced an action in the superior court of the city and county of San Francisco against said sheriff and Karl and Kathryn Elliott, seeking an injunction to restrain the said sheriff from releasing said property, and in said action obtained a temporary restraining order, restraining the defendants therein and each of them from removing or incumbering said property, and from withdrawing, alienating, or otherwise disposing of said or any moneys in said Liberty Bank, save and except to turn said money over to said Paggi, or his counsel, to be applied toward the satisfaction of said judgment. On December 2, 1924, upon the application of said Paggi, the superior court of the county of Los Angeles made and filed an order in said action pending before it, requiring said Karl Elliott to appear before the respondent herein, Frank I. Butler, who was appointed a referee by said order, to testify concerning his property. Said Karl Elliott appeared before said referee pursuant to said order and at a hearing thereon had in the city and county of San Francisco on December 8, 1924, and being then sworn testified that all of said property and money belonged to the third party claimants. Kathryn Elliott, one of the third party claimants, was also called and sworn as a witness for the plaintiff before said referee, and testified that the entire property levied upon was owned by herself and said John Schuster. Charles F. Partridge, assistant cashier of the Liberty Bank, was also subpoenaed and called as a witness for said plaintiff, and testified that said bank was carrying an account in the name of "Karl

Elliott, Agent," to the amount of \$6,327.93 when said execution was levied, and that Karl Elliott was the only one authorized to draw upon said account. Said Partridge, who was merely an employee of said Liberty Bank, did not claim any interest in said moneys nor deny the indebtedness. The affidavits and claim of third party ownership above referred to were produced before said referee at said hearing, and were examined by him, though not formally introduced in evidence. There was certain other evidence produced before said referee at said hearing bearing upon the ownership of said property and money by said Karl Elliott. On the 9th day of December, 1924, the day following the conclusion of said hearing, the said referee made and signed an order in which he directed the Liberty Bank, one of the petitioners herein, to pay to said L. Paggi or his counsel forthwith the sum of \$5,238.42 in satisfaction of his said judgment. Said order of said referee was later filed for record in the original action pending in the superior court of Los Angeles county.

[1-5] It is the contention of the petitioners herein and each of them that the said Frank I. Butler, acting in his capacity of referee pursuant to the provisions of the Code of Civil Procedure relative to proceedings supplementary to execution (§§ 714 to 721, Code Civ. Proc.), acted without and beyond his jurisdiction as conferred by said sections of the Code, and particularly by sections 719 and 720 thereof, in assuming to make the orders above referred to, or in attempting to direct the execution of the same. With respect to the said order, in so far as the referee therein undertook to decree the Liberty Bank to forthwith pay over to L. Paggi or his attorney the moneys in its hands, in whatever capacity the same was held by it, it should suffice to say that such order was utterly void, for the all-sufficient reason that said Liberty Bank was not a party to said proceeding nor to the action in the course of which said supplementary proceeding had been ordered and instituted, and hence could not be made the subject of such an order without being made such a party, and without an opportunity to be heard. The order appointing said Butler as a referee in said action directed the examination by him of Karl Elliott, the judgment debtor, upon supplementary proceedings, and of no other person. True, the said referee in the course of such examination of the judgment debtor caused a subpoena to be issued and served requiring one Charles F. Partridge, an employee, but not an official, of the Liberty Bank, to appear and be examined as a witness, and he did so appear. But that fact did not make the Liberty Bank a party to said proceeding nor subject it to the jurisdiction of the referee to make the order complained of. *Deering v. Richardson-Kimball Co.*, 109 Cal. 73, 83, 41 P. 801; *Schino v. Cinquini*, 7 Cal. App. 244, 247, 94 P. 83. The re-

spondents, however, contend that the referee had power to make such an order under the terms of section 719 of the Code of Civil Procedure, which provides that upon supplementary proceedings "the judge or referee may order any property of the judgment debtor, not exempt from execution, in the hands of such debtor, or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment." The difficulty with the application of this provision of the Code to the matter before us is that the power of the referee to make the order referred to is, by the express terms of said provision of said section, confined in its application to the property of the judgment debtor, and that, as to the Liberty Bank, not a party to such proceeding, the referee had no jurisdiction to determine that any money or property lawfully in its keeping was "the property of the judgment debtor." There is another reason, however, why we think this order of the referee is void as beyond his power. The record herein discloses that upon the hearing before him it was shown by the testimony of a third party claimant to the ownership of the property and money which had been levied upon that the whole thereof was claimed by two such claimants, and that these claimants had made and filed with the sheriff their verified claims and demands in conformity with the requirements of section 689 of the Code of Civil Procedure setting forth an interest in the said property and money adverse to the judgment debtor. This being so, the Liberty Bank, even if it had been a party to the proceeding before the referee, would have been shown to be merely the garnishee under the writ of execution of a fund as to which third party claims, admittedly in due form, had been filed with the sheriff levying said writ. As such garnishee its holding of said moneys was subject to such claims, and to that extent amounted to an interest therein adverse to that of the judgment debtor, which would have justified the bank in refusing to pay over said moneys, either to the judgment debtor or to the judgment creditor, while such outstanding claims existed and were being urged in the manner provided by section 689 of the Code of Civil Procedure. *Deering v. Richardson-Kimball Co.*, supra. The record disclosing these undisputed facts, it would follow that the Liberty Bank, even had it been a party to this proceeding, could not have been subjected to an order obedience to which would be a violation of its rights and duties respecting said money thus subject to such garnishment and to such third party claims. This being so, the referee was not only not empowered but was not permitted under the provisions of sections 717 to 719 of the Code of Civil Procedure to make any order directing said property, or any portion thereof, thus adversely claimed, to be turned over to the judgment creditor or

applied to the satisfaction of his judgment. Under such conditions the proper and only procedure is that provided for in section 720 of the Code of Civil Procedure, which permits the judgment creditor to maintain an action against any person or persons claiming an interest in the property adverse to him, in which event the court or judge may by order forbid a transfer or other disposition of the interest or debt until such action can be commenced and prosecuted to judgment. It may be that the action which was commenced by the judgment creditor against the petitioners herein in the superior court of the city and county of San Francisco, seeking an injunction to prevent the said sheriff from releasing said property and money from the lien of said execution upon the presentation of said third party claims and upon failure of the judgment creditor to furnish an indemnifying bond, is such a proceeding, but whether it is so or not cannot affect the right of these petitioners in this proceeding to such a writ as will afford relief from the effect of the said void order of the referee. It is, however, contended by the respondents herein that the petitioners are not entitled to have a writ of prohibition issued herein, for the reason that the said referee had already made his order, the validity of which is assailed herein before the issuance of the alternative writ herein, and that, having done so, there is no longer any act or order of said referee upon which said final writ can operate. The petitioners' application for a writ of prohibition was filed in this court on December 9, 1924, from which it appeared that the said referee was threatening to sign and issue the order in question. Subsequent thereto, but prior to the issuance of the alternative writ herein, the referee did make and sign said order. Thereafter, and on December 11, 1924, the petitioners filed their supplementary petition herein, setting forth the foregoing facts and the form of said order, and further alleging that the said referee and the said superior court were about to enforce the said order affecting the Liberty Bank and take other proceedings based upon said order which would deprive petitioners of their property without due process of law. Having before us the original and supplemental petitions showing the foregoing facts, this court issued the alternative writ herein upon the theory that upon a hearing thereon this court could make and issue whatever form of writ would afford such relief as the petitioners might be shown to be entitled to under the facts alleged and shown upon the hearing thereon. We are satisfied that, upon the facts of the case, as stipulated by the parties hereto and upon the law of the case as above declared, the petitioners herein are entitled to whatever relief would be appro-

priate to the facts and the law of the case as developed upon the hearing. In similar cases where writs of prohibition have been sought in the first instance this court has afforded the relief given upon writs of review when the record as presented upon the hearing warranted such relief. *Van Hoosear v. Railroad Comm.*, 189 Cal. 228, 207 P. 903; *Traffic Truck Sales Co. v. Justices' Court*, 192 Cal. 377, 220 P. 306. We are satisfied that this record presents a situation where such relief should be afforded.

It is ordered that the said order of the referee be and the same is hereby annulled.

We concur: MYERS, C. J.; SHENK, J.; SEAWELL, J.; LAWLOR, J.; LENNON, J.; WASTE, J.

195 Cal. 766

**LIBERTY BANK et al. v. SUPERIOR COURT
OF CALIFORNIA, IN AND FOR LOS
ANGELES COUNTY. (S. F. 11478.)**

(Supreme Court of California. April 7, 1925.)

1. Execution $\S$ 402—Recitals in order in supplementary proceedings held not to show that assistant cashier was an "officer or member" of bank.

Recitals in order in supplementary proceedings directing assistant cashier of bank to show cause why he should not turn over money in bank, alleged to belong to judgment debtor, to judgment creditor, *held* not to show that he was an "officer or member" of bank, within Code Civ. Proc. $\S$ 717 and 719.

2. Execution $\S$ 387—Order in supplementary proceedings directing assistant cashier of bank to turn over money in custody of bank to judgment creditor held void.

Order in supplementary proceedings directing assistant cashier of bank to show cause why he should not turn over money, in bank alleged to belong to judgment debtor, to judgment creditor *held* void, in view of Code Civ. Proc. $\S$ 717, where neither order nor affidavit on which it was founded showed that any other debtor of judgment debtor than bank was sought to be brought before court, or that assistant cashier was "officer or member" of bank, within sections 717 and 719.

3. Execution $\S$ 395—Order in supplementary proceedings, if regarded as directing assistant cashier to appear and be examined as witness, would be void.

Order in supplementary proceedings directing assistant cashier of bank to show cause why he should not turn over money in bank alleged to belong to judgment debtor, to judgment creditor, if regarded as an order requiring such person to appear and be examined as a witness regarding judgment debtor's property, under Code Civ. Proc. $\S$ 718, would be void, in view of section 1989, where it required him to appear and testify as a witness in a county other than that in which he was shown to re-

side, and which was several hundred miles from place of his residence.

In Bank.

Application for writ of prohibition by the Liberty Bank and others against the Superior Court of the State of California in and for the County of Los Angeles. Writ issued.

Cullinan & Hickey and Reisner & Deming, all of San Francisco, for petitioners.

H. L. Sacks, of Los Angeles, for respondent.

RICHARDS, J. This application is by the petitioners herein for a writ of prohibition preventing the superior court in and for the county of Los Angeles from taking any further proceedings upon or in connection with a certain order set forth in said application. The facts which form the basis of the present application and for the order of said superior court affected by this proceeding are in the main set forth in the decision of this court in the cause entitled *Finn et al. v. Butler et al.* (S. F. 11418), 235 P. 992, this day filed. In addition thereto the following facts appear: On or about the 11th day of December Frank I. Butler, the referee of said court referred to in our former decision, filed in said court, and in the case of *L. Paggi v. Karl Elliott* pending therein, his report, and the order made by him thereon, and which was the subject of said former decision. Thereafter, and on January 10, 1925, one H. L. Sacks presented and filed in said superior court and in said action the following affidavit:

"H. L. Sacks, being first duly sworn, deposes and says:

"That he is the attorney in the above-entitled action; that an execution was issued out of the superior court in the above-entitled action for the sum of \$3,344.58, on the 2d day of December, 1924, and that the sheriff of the county of San Francisco did, by virtue of said execution, levy and garnisheed all moneys of the defendant in the Liberty Bank, San Francisco, standing in the name of Karl Elliott. That there was at the time of said garnishment \$6,317.56 money in the said bank, which belongs to said defendant Karl Elliott. That the said bank refuses to turn over said moneys. That the money is the property of said judgment debtor, and that it should therefore be applied to the satisfaction of said judgment. That a demand has been made upon the said Liberty Bank to turn the said money over in pursuance to the writ of execution, a copy of which was served on the said bank, but that the said Liberty Bank declines and refuses to turn said funds over.

"Wherefore, deponent prays that this court make an order that the said Liberty Bank turn over the said moneys towards the satisfaction of said judgment in pursuance to the writ of execution heretofore served upon it, and issued in the above entitled action." (Signed H. L. Sacks and duly verified.)

Thereupon, and on said January 10, 1925, the said court made the following order:

"Upon reading the affidavit of H. L. Sacks, verified the 10th day of January, 1925, and good cause appearing therefor it is hereby ordered:

"That Charles F. Partridge, assistant cashier of the Liberty Bank of San Francisco, Cal., be and personally appear in Department 25 of the above entitled court, in the county court house, Los Angeles, California, on the 23d day of January, 1925, at 10 o'clock a. m. thereof, then and there to show cause if any he has why an order should not be made directing him as assistant cashier of the Liberty Bank, to turn over to the plaintiff in the above entitled action all sums of money owing to and deposited to the credit of Karl Elliott or sufficient to satisfy said judgment pursuant to an execution issued and served upon said bank in the above entitled action.

"Dated this 10th day of January, 1925.

"John M. York, Judge."

(Seal of the Superior Court.)

Thereafter, and on January 12, 1925, a copy of said order was served upon Charles F. Partridge, one of the petitioners herein, in the city and county of San Francisco. Said Charles F. Partridge is an assistant cashier of the said Liberty Bank, which is a corporation organized under the laws of the state of California and having its principal and only place of business in the city and county of San Francisco. Said Partridge, while an assistant cashier of said corporation, is not the president or other managing head thereof, nor is he vice president or secretary, or assistant secretary or cashier thereof. The residence of said Partridge is at Menlo Park, in the county of San Mateo, state of California. The petitioners herein allege that the plaintiff in said action is by said affidavit and order seeking to enforce the order of the said referee which was the subject of the said former proceeding in this court and of our decision therein this day filed. This averment the respondent herein denies, but in connection with said denial avers that the order above set forth in full was predicated upon the affidavit of Sacks, also above set forth, and that said order was made and is based upon the provisions of section 717 of the Code of Civil Procedure relating to an examination of the debtor of a judgment debtor, and that said respondent intends after the examination of said Partridge to make an order in conformity with the facts as will appear at said examination, in compliance with the law, as made and provided in sections 717 to 720, inclusive, of the Code of Civil Procedure. The respondent, also in its answer herein, basing its denial upon its want of information and belief, denies practically all of the averments of the petition herein relating to the proceedings before the referee, with the exception of the referee's order; but, since these matters appear in the report of said referee filed in said action and in said court, these denials must be held to be insufficient to present an issue as to said averments in

the petition. It is also alleged in the answer of the respondent that the service of said order to show cause upon Charles F. Partridge, assistant cashier of the Liberty Bank, was made at the special instance and request and for the accommodation of said bank, and that said Charles F. Partridge was authorized by said bank to accept service of any and all papers in the action of *Paggi v. Elliott*. It is further alleged in the same connection that a stipulation was entered into between counsel for said Paggi and the petitioners herein to the effect that said Partridge need not appear in person in response to said order, but might present an affidavit on behalf of the petitioners to the court upon the hearing thereon, and that his personal appearance would be waived by the plaintiff in said action. The foregoing averments in the respondent's answer were in the nature of affirmative defenses, the burden of supporting which was upon the respondent at said hearing, but no attempt was made at said hearing to sustain them by any sort of evidence or showing as to their truth, and for that reason these averments must be disregarded in our consideration of this cause.

If the order of the superior court which is assailed in this proceeding is to be taken to be an order issued by it in furtherance and in execution of the order of the referee, it must fall with our decision this day filed holding that the said order of the referee was void as beyond his statutory power. However, the respondent, in its answer herein and also at the hearing, has denied that its said order was made or was intended as an order in furtherance or in execution of the said referee's order and report, and the respondent asserts, both in its answer and at said hearing, that its said order was solely predicated upon the affidavit of said Sacks, above set forth, and was issued by said court under the provisions of section 717 of the Code of Civil Procedure, relating to the examination of a judgment debtor. It will therefore be considered as to its validity from that aspect. Section 717 of the Code of Civil Procedure provides as follows:

"After the issuing or return of an execution against property of the judgment debtor, or of any one of the several debtors in the same judgment, and upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same."

[1, 2] It will be seen from a reading of this section that the power of the court to order the examination of a debtor of a judgment debtor, or of those having property belong-

ing to him, is predicated upon proof by affidavit or otherwise being made to the satisfaction of the judge of said court that such person or corporation has property or money of such judgment debtor or is indebted to him. It is in the nature of a special proceeding initiated by the filing of the affidavit or the making of such other proof as will justify the making of the order. *Carter v. Los Angeles Nat. Bank*, 116 Cal. 370, 374, 48 P. 332. In the instant case the order in question is predicated upon the affidavit of Sacks and has admittedly no other foundation. The affidavit of Sacks, liberally interpreted, would seem to have been sufficient to support an order of the court requiring the Liberty Bank, a corporation, or any officer or member thereof, to appear and answer respecting the matters set forth in said affidavit. Had the Liberty Bank, a California corporation, having its principal place of business in the city and county of San Francisco and not elsewhere, been made the direct subject of said order, the interesting question would be presented as to whether the superior court of the county of Los Angeles had jurisdiction to order the attendance of said corporation or any officer or member thereof in a county other than the place of business of said corporation or than the residence of its officers or members affected by said order, in view of the provision in section 714 of said chapter of the Code forbidding the making of such an order requiring the judgment debtor himself to attend before a judge or referee outside of the county in which he resides or in which his place of business is, and in view, also, of section 1989 of said Code, providing that:

"A witness is not obliged to attend as a witness before any court, judge, justice, or any other officer, out of the county in which he resides, unless the distance be less than fifty miles from his place of residence to the place of trial."

But, however this may be, the affidavit filed herein as the foundation for said order, and upon which the order itself recites that it is predicated, nowhere shows that any other debtor of the judgment debtor than the Liberty Bank is sought to be brought before said court by virtue of the order prayed for; and, if it be claimed that under the wording of section 717 of said Code the court or the judge thereof had power to order any "officer or member" of said corporation to appear at the designated time and place, it must still have been made to appear that the person who is thus ordered to appear is an "officer or member" of such corporation within the intent and meaning of sections 717 and 719 of said Code. The order in question is not directed in terms against the Liberty Bank, a corporation nor in terms against an "officer or member thereof." It is directed against one Charles F. Partridge, who is designated in said order as

"assistant cashier of the Liberty Bank of San Francisco, Cal.," and it orders him to appear personally "in the county court house, Los Angeles, Cal., in department 25 of the above-entitled court * * * then and there to show cause, if any he has, why an order should not be made directed to him, as assistant cashier of the Liberty Bank, to turn over to the plaintiff in the above-entitled action all sums of money owing to and deposited to the credit of Karl Elliott * * * pursuant to an execution issued and served upon said bank in the above entitled action." The recital in said order, that said Charles F. Partridge is the assistant cashier of said corporation, cannot be held to be a sufficient recital that he is either an "officer or member" of said corporation. Ordinarily, as was said by this court in the case of *Golden Gate, etc., Co. v. Superior Court*, 65 Cal. 187, 191, 3 P. 628, an order to show cause which may be made the basis of a contempt proceeding when directed against a corporation must be served in the same manner as a summons which must be upon "the president or other head of the corporation, vice president, secretary, assistant secretary, cashier, or managing agent thereof." Ordinarily an assistant cashier of a corporation is neither an officer nor a member thereof in the sense that he exercises any such control over the disposition of the property or money in the custody of such corporation as would render him the proper subject of an order requiring him in that capacity to turn over the said money or property in the custody or keeping of such corporation to a stranger to it and in an action to which it is a stranger. The order in question herein, so far as it undertakes to direct said Partridge, as assistant cashier of the Liberty Bank, to appear and show cause in said court why he should not in that capacity turn over the money or property in the custody of said bank to the plaintiff in said action is entirely lacking in any basis for its issuance, either in the affidavit upon which it is predicated or in the recitals of the order itself.

[3] It may be contended, however, that the order in question is sufficient in form to

require the said Charles F. Partridge, in either his personal or representative capacity, to appear in said court and be examined as a witness regarding the money or property of the judgment debtor of which the Liberty Bank is alleged to be the custodian, under the provisions of section 718 of the Code of Civil Procedure. But, if this is to be the interpretation and effect of said order, it must be held to be nothing more than a citation or subpoena requiring the person named therein to appear and testify as a witness in a county other than that in which he is shown to reside and which is several hundred miles from the place of his said residence. This is not permitted under section 1989 of the Code of Civil Procedure, and any such citation, subpoena, or order compelling such attendance would be void, and any such witness who might be subjected to the perils and penalties of an attachment or contempt proceedings as a result of his disobedience of such order would have the right to invoke the aid of a writ of prohibition to stay the threatened enforcement thereof in a judicial proceeding, when the power to make or enforce such order was beyond the statutory power of the court undertaking to make or threatening to enforce the same. Viewed from either aspect, therefore, whether said order is to be considered as an order directing the Liberty Bank, a corporation, directly or through an officer or member thereof, to appear in said court and show cause as required in said order; or whether said order is to be regarded as an order directed to said Charles F. Partridge requiring him to appear and be examined as a witness in said action and proceeding, it is lacking in any proper foundation, either in the affidavit upon which it is predicated or in the statute upon the terms of which it is sought to be justified. The petitioners herein are therefore entitled to a writ prohibiting the enforcement of said order.

Let a writ be issued accordingly.

We concur: MYERS, C. J.; SHENK, J.; SEAWELL, J.; WASTE, J.; LENNON, J.; LAWLOR, J.

LA MESA, LEMON GROVE & SPRING VALLEY IRR. DIST. v. HALLEY et al.
(S. F. 11502.)

(Supreme Court of California. April 4, 1925.)

1. Parties ⇨40(2)—Intervener must have interest in matter in litigation or in success of either party or interest against both; "intervention."

Intervention takes place when third person is permitted to become party to action or proceeding between other persons, which third person under Code Civ. Proc. § 387, must have an interest in matter in litigation or in success of either of parties or interest against both.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Intervene—Intervention.]

2. Parties ⇨40(2)—Intervener must have direct interest such that he will either gain or lose by direct effect of judgment.

Interest in matter in litigation to warrant intervention, under Code Civ. Proc. § 387, must be of such direct and immediate character that intervener will either gain or lose by direct legal operation and effect of judgment.

3. Mandamus ⇨153—Owners and mortgagors of land within irrigation district held not entitled to intervene in suit against district officers to compel signing and attestation bonds.

Landowners and mortgagors of land within irrigation district held not so directly affected or interested in suit for mandamus to compel president and secretary of board of directors to sign and attest bonds, claimed to have been duly authorized by district, pursuant to Code Civ. Proc. § 1085, as to entitle them under section 387 to intervene therein.

4. Mandamus ⇨153 — Interveners may not urge claims and contentions having proper forum elsewhere.

Persons permitted to intervene in mandamus proceedings cannot be heard to broaden scope or function of such proceeding by urging claims or contentions, which have their proper forum elsewhere.

5. Mandamus ⇨153 — Pleading ⇨8(15) — Facts constituting fraud must be specifically pleaded; allegations of fraud by intervener in mandamus proceeding held mere conclusions.

Facts constituting fraud charged must be specifically pleaded and allegations in petition for leave to intervene in mandamus proceeding that application was "collusive, unnecessary, and not defended in good faith" were mere conclusions.

In Bank.

Application by La Mesa, Lemon Grove & Spring Valley Irrigation District for writ of mandate to be directed to J. H. Halley and J. C. Scott, President and Secretary, respectively, of petitioner. On application of third parties for leave to file complaint in intervention. Application denied.

Herbert C. Kelly, of San Diego, for interveners.

PER CURIAM. The La Mesa, Lemon Grove & Spring Valley irrigation district has filed an application for a writ of mandate to compel the respondents to sign and attest certain bonds claimed to have been duly authorized by the irrigation district of which the respondents are respectively the president and secretary. That application is pending and undetermined. The alleged purpose of the bond issue is the acquisition of an additional water supply and the purchase of a distributing system from the Cuyamaca Water Company. Elsie W. Sullivan and Jerry Sullivan have requested leave to file a complaint in intervention alleging, in substance, that they have an interest as owners and mortgagors of lands within the district; that the said bonds will be invalid because the indebtedness to be evidenced thereby is beyond the power of the district to assume; that the pending proceeding for a writ of mandate is collusive, unnecessary, and not defended in good faith; that no exigency or necessity exists for the issuance of said bonds; that there is and has been no shortage of water within the district; that a large part of the water supply and system proposed to be acquired by the district is now applied to and located in territory outside of the limits of the district; that the purchase of the Cuyamaca Water Company system by the district has not been approved by the railroad commission; that the title to the water distributed by the Cuyamaca Water Company is the subject of litigation with the city of San Diego; that the railroad commission has submitted to the district, the city of San Diego, and the Cuyamaca Water Company a proposal for the settlement and compromise of conflicting claims to such waters, which proposed settlement, it is anticipated, will be approved by the votes of the city and of the district; that when the proposed settlement is effected the district will be relieved of the necessity of expending the proceeds of the said bond issue; that no public exigency exists requiring the action of this court in the proceeding; that there are outstanding bonds of the district of a prior issue sufficient for all necessary indebtedness contemplated by the district, and for that reason the proposed bonds are unnecessary and without authority; that the directors of the district have never estimated the amount of money necessary to be raised for the purposes of the district or for any of the purposes specified in the Irrigation District Act.

[1] An intervention takes place when a third person is permitted by leave of court to become a party to an action or proceeding between other persons, either by joining with the plaintiff in claiming what is sought by the complaint, or by uniting with the defend-

ant in resisting the claims of the plaintiff, or by demanding something adversely to both the plaintiff and the defendant. An intervenor must have an interest in the matter in litigation or in the success of either of the parties or an interest against both. Section 387, Code Civ. Proc.

[2, 3] The interest in the matter in litigation, as contemplated by the Code section, must be of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. *Elliott v. Superior Court*, 168 Cal. 734, 145 P. 101. The interest must be direct, and not consequential, and must be such an interest as is proper to be determined in the proceeding in which the intervention is sought. *Isaacs v. Jones*, 121 Cal. 257, 53 P. 793, 1101. The matter in litigation in the pending proceeding is whether or not the respondents have refused, without legal justification, to do that which the law specifically requires them to do, as duties resulting from their respective offices. Section 1085, Code Civ. Proc. The court in said proceeding is not concerned with the necessity or the propriety of authorizing or issuing said bonds. Those questions are for the determination of the officers and electors of the district. Assuming that mandamus is the proper remedy, we are then only concerned with the propriety of the refusal of the president and secretary to sign and attest the bonds as required by law. It is difficult to see how the petitioning interveners can gain or lose by any judgment which may be entered in that proceeding. If the writ be granted, the enforcement of the judgment would not directly affect their property interests. The bonds, when signed and attested, would not be a lien on their property, although, if thereafter sold, they may lead to the creation of a lien. *Drumhiller v. Wright*, 64 Cal. App. 498, 222 P. 166. Nor would compliance with the writ, if issued, create a cloud upon their title. If the respondents sign and attest the bonds they must be sold before the lands of the proposed interveners may be taxed to pay the principal and interest thereof. The sale will be contingent on obtaining a proper price after advertising for bids. The bonds may never be sold. The present plans for the acquisition of an additional water supply and a distributing system may be abandoned. It is clear that the interest of the petitioning interveners is remote and contingent and not of the direct and immediate character required by law. *Elliott v. Superior Court*, supra.

[4] It may be assumed, as counsel for the proposed interveners contends, that the rules as to intervention apply to mandamus proceedings the same as to ordinary actions. Such intervention was permitted in *Wright v. Jordan*, 192 Cal. 704, 221 P. 915, which

was a mandamus proceeding. But concerning the propriety of their presence in that proceeding this court said:

"As to the interveners herein it will suffice to say that, while they were permitted to intervene to the extent and for the purpose of sustaining or opposing the respective contentions of the petitioners and respondents herein, their rights as interveners herein go no further, since they cannot be heard to broaden the scope or function of this special proceeding by urging claims or contentions which have their proper forum elsewhere, and in which forum they are already embattled. *McNeil v. Morgan*, 157 Cal. 373-377, 108 P. 69."

[5] The proposed complaint in intervention attempts to enlarge the issues raised by the petition for a writ of mandate and the return thereto by charging that the pending "application is collusive, unnecessary, and not defended in good faith." These allegations are mere conclusions. They do not state a cause of action in fraud. Facts constituting the charge must be alleged. See *Kent v. Snyder*, 30 Cal. 674; *Campbell v. Genshlea*, 180 Cal. 213, 180 P. 336; 12 Cal. Jur. 801, and cases cited.

There is not the slightest indication in the record herein that the mandamus proceeding is not prosecuted and defended in good faith. Indeed, all of the questions which may properly be raised in said proceeding, and which are sufficiently alleged in the proposed complaint in intervention appear to be incorporated in the return of the respondents herein. If the proposed interveners desire to file a brief as amici curiæ in the pending proceeding, application to that end would no doubt receive favorable consideration.

For the reasons hereinabove stated, the application to file the complaint in intervention is denied.

196 Cal. 77

FRANCHISE MOTOR FREIGHT ASS'N et al. v. SEAVEY et al., Members of State Railroad Commission. (S. F. 11456.)

(Supreme Court of California. April 27, 1925.
Modified May 26, 1925.)

1. Constitutional law §70(2)—Legislative determination as to justification of classified legislation not disturbed by courts unless palpably arbitrary.

The authority and duty to ascertain facts which will justify classified legislation rests in first instance with Legislature, and its decision as to what is a sufficient distinction to warrant classification will not be disturbed by courts unless palpably arbitrary.

2. Statutes §72—When statute "discriminatory," stated.

A statute is discriminatory if it confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in same relation to privileges

granted and between whom and those not favored no reasonable distinction can be found.

3. Constitutional law ~~§~~205(2), 241—Statutes ~~§~~72—Act exempting those engaged in transportation of products and implements of husbandry from regulation held unconstitutional and discriminatory.

There being no constitutional distinction as between those transporting farm products and implements by motor truck and common carriers hauling various kinds of freight, including farm products and implements, and the exemption of former from regulation being detrimental rather than beneficial to farmers as well as public generally, *held* that Auto Stage and Truck Transportation Act, § 5, as amended by St. 1923, p. 644, exempting those engaged in transporting products or implements of husbandry from regulation of such act, is an arbitrary classification, and violative of Const. U. S. Amend. 14, and Const. Cal. art. 1, §§ 11, 21.

In Bank.

Application for writ of mandate by the Franchise Motor Freight Association and others against Clyde L. Seavey and others, as members of the State Railroad Commission. Writ granted.

H. J. Bischoff, of San Diego, for petitioners.

Carl I. Wheat and Woodward M. Taylor, both of San Francisco, for respondents.

MYERS, C. J. This is an application for a writ of mandate to compel the respondent Commission to assume and exercise jurisdiction over certain persons engaged in the business of transportation of property as common carriers for compensation over the public highways in this state, between fixed termini or over regular routes, and to require such persons to cease operating until they shall have applied for and obtained from the respondent Commission certificates of public convenience and necessity therefor. The truck operators referred to are engaged exclusively in the movement of products or implements of husbandry and other farm necessities from farm to farm or between farms and loading points. There is no dispute as to the facts herein, and the matter is submitted upon a general demurrer to the petition. The refusal of the respondent Commission to assume and exercise jurisdiction herein is predicated upon chapter 310, Statutes of 1923, purporting to amend section 5 of the Auto Stage and Truck Transportation Act of 1917 so as to exclude such persons from the regulations of said act. Prior to 1917, the Railroad Commission exercised no jurisdiction over transportation companies operating as common carriers of freight or passengers over the public highways by motor stage or motor truck. In December, 1916, this court held that under section 22 of article 12 of the Constitution, as

amended in 1911, the Railroad Commission was vested with the jurisdiction and the duty to regulate rates and charges of such carriers of freight and passengers by motor truck; that this provision of the Constitution could not be rendered nugatory by the omission of the Legislature to prescribe procedural provisions for the carrying out thereof; and a peremptory writ of mandate was issued requiring the railroad commission to assume and exercise its jurisdiction over such carriers. *Western Association of Short Line Railroads v. Railroad Commission*, 173 Cal. 802, 162 P. 391, 1 A. L. R. 1455. Thereupon the Auto Stage and Truck Transportation Act was enacted by the Legislature to provide the procedural rules for the exercise of such jurisdiction. Stats. 1917, p. 330. The title of this act and certain sections thereof were amended in 1919. Stats. 1919, p. 457. The term "transportation company," as used in the act, is defined in section 1 thereof to include—

"every corporation or person * * * owning, controlling, operating or managing, any automobile, jitney bus, auto truck, stage or auto stage used in the business of transportation of persons or property, or as a common carrier, for compensation, over any public highway in this state between fixed termini or over a regular route, and not operating exclusively within the limits of an incorporated city or town or of a city and county." (With certain exceptions not pertinent herein.)

The validity of this definition of the term "transportation company," as used in the Constitution, is not challenged or questioned by either of the parties hereto. The truck operators who are referred to in the petition herein are transportation companies within the meaning and purview of this definition, and it is not questioned that under the provisions of this act as it existed from 1917 to 1923, they were subject to all of the regulatory provisions thereof. In 1923, section 5 of the act, which provided for the issuance of certificates of public convenience and necessity, and forbade the operation by transportation companies upon the public highway without such certificates, was amended by adding thereto the following provisions:

"Each application for a certificate of public convenience and necessity, * * * must be accompanied by a fee of fifty dollars; provided, however, the movement of products or implements of husbandry and other farm necessities from farm to farm or from and to farm to and from loading point, warehouse or other initial point shall not be subject to the regulations of this act." Stats. 1923, p. 644.

Since the passage of this amendment the Railroad Commission in obedience thereto has refrained from exercising jurisdiction over the transportation companies referred

to therein, and has declined to issue certificates of public convenience and necessity to such transportation companies, or to require them to apply for and obtain such certificates. In re Application of Geyer, 23 Opinions and Orders of Railroad Commission, p. 865. The interest of the petitioners in this proceeding consists in the fact that they are themselves engaged in the business of transportation of property as common carriers for compensation, operating over the same routes which are followed by the truck operators referred to in the petition. Petitioners are operating under certificates of public convenience and necessity obtained from the Railroad Commission, are subject to all of the regulations of the Commission, and by reason of the failure of the Commission to act in the premises, petitioners are subjected to the unrestricted and unregulated competition of those other truck operators. Petitioners contend that the amendment of 1923 is violative of sections 11 and 21 of article 1 of the Constitution of this state, and of the Fourteenth Amendment to the federal Constitution, in that it makes an arbitrary classification and distinction not based upon any natural, intrinsic, or constitutional ground of classification. In short, their contention is that the amendment which purports to exempt from the regulations of the act those transportation companies which are engaged in hauling the products and implements of husbandry constitutes an unreasonable, unjust, and unlawful discrimination in favor of those transportation companies and against these petitioners. The respondents concede that the jurisdiction and power which is constitutionally vested in the Railroad Commission to regulate the rates of, to examine the books, records, and papers of, and to hear and determine complaints against such transportation companies cannot be taken away or abridged by the Legislature. They suggest, however, that the additional powers commonly exercised by the Commission, such as the power to issue certificates of public convenience and necessity, to regulate the accounts, service and safety of operations of transportation companies, to fix their classifications, rules and regulations, to require them to file reports, to regulate the issue by them of stocks, bonds, etc., and the sale or transfer of certificates of convenience, etc., were conferred upon the Commission, not by the Constitution, but by the Legislature, and are therefore subject to withdrawal by the Legislature which conferred them.

[1, 2] The question, therefore, is whether or not the exemption created by the proviso of 1923 constitutes a lawful classification. Concededly, the classification here made does not rest upon a constitutional distinction, and some natural or intrinsic distinction must therefore be found as a basis for it.

It is well settled that the authority and duty to ascertain the facts which will justify classified legislation rests in the first instance with the Legislature. Every presumption is in favor of the validity of the legislative determination, and its decision as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary. *Anastasion v. Superior Court* (Cal. Sup.) 227 P. 762; *People v. Monterey Fish Products Co.* (Cal. Sup.) 234 P. 398. It is equally well settled that a statute makes an improper and unlawful discrimination if it confers particular privileges upon a class arbitrarily selected from a larger number of persons, all of whom stand in the same relation to the privileges granted, and between whom and the persons not so favored no reasonable distinction or substantial difference can be found justifying the inclusion of the one and the exclusion of the other. 5 Cal. Jur. 825, and cases cited.

[3] What reasonable ground of distinction is there between a common carrier engaged in the business of hauling various kinds of freight, including products and implements of husbandry, by motor truck over a regular route upon the public highway, and another common carrier engaged in the business of hauling freight, which consists solely of the products and implements of husbandry, by motor truck over the same route, which justifies the subjection of the one to the regulations imposed by the Auto Stage and Truck Transportation Act, and the exemption of the other from the burden of those regulations? The only basis for such a distinction which has been suggested to us is that a continuance of the development of the state demands that the cultivation and marketing of farm products be encouraged and assisted, and that the intent of the Legislature in making this provision was the encouragement of the farmers to larger production, and the assurance of accessibility of markets for that production, to the end that the products of the soil might be placed within the ready reach of all, and their production fostered and assisted. This suggestion, as it seems to us, overlooks the main purpose of the regulation of rates and charges provided for in the Constitution, and of the regulation of service, competition, safety provisions, issuance of securities, etc., provided for in the act here in question. It seems plain to us that the primary purpose of such regulation is to insure the adequacy, regularity, and reliability of service and the reasonableness of rates and charges therefor. Such regulation is for the benefit of the producing and consuming public. It follows that the exemption from regulation of those transportation companies engaged in hauling farm products and implements would be a detriment, rather than a benefit, to the farm-

ers, as well as to the public generally, and would be of benefit solely to the particular class of transportation companies so exempted. Assuming, however, that the provision here in question was designed for the benefit of the farmers, and that it may conceivably so operate, the weight of authority is to the effect that it is an unwarranted discrimination. A closely similar question came before the Supreme Court of the United States involving the validity of the Illinois Anti-Trust Law of 1893 (Laws 1893, p. 182), which prohibited a combination of capital, skill, or acts of two or more persons, etc., to create or carry out restrictions in trade, to limit production, or increase or reduce prices or prevent competition, and which contained a proviso that, "The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser." Section 9. That court, after an exhaustive consideration of the case, held the statute invalid solely upon the ground that the exception in favor of the farmers was an unreasonable and unwarranted discrimination, violative of the Fourteenth Amendment. In the course of its opinion the court observed:

"That if combinations of capital, skill or acts, in respect of the sale or purchase of goods, merchandise or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and live stock are not also hurtful." *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 S. Ct. 431, 46 L. Ed. 679.

And so here it may be observed that if the regulation of transportation companies engaged in the business of hauling miscellaneous freight and commodities is helpful to the public welfare, it is impossible to perceive why like regulation in respect of transportation companies engaged in hauling products and implements of husbandry is not also helpful. The precise question here under consideration came before the federal courts under the so-called Lever Food Control Act, which was enacted by Congress in 1917 (40 Stat. 276 [U. S. Comp. Stat. 1918, U. S. Comp. Stat. Ann. Supp. 1919, § 3115½ et seq.]) "to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel." That act, which was enacted as a war measure, made unlawful the destruction, waste or hoarding of necessities for the purpose of restricting the supply or increasing the price thereof. By its terms it was made applicable to all persons, but subject to the following provisos:

"Provided, that any storing or holding by any farmer, gardener, or other person of the prod-

ucts of any farm, garden, or other land cultivated by him shall not be deemed to be a storing or holding within the meaning of this act: Provided further, that farmers and fruit growers, co-operative and other exchanges, or societies of a similar character shall not be included within the provisions of this section." Section 26 (section 3115½qq).

In the district court for the district of Indiana, the contention was made that the exemptions created by the provisos constituted an arbitrary and unlawful classification, violative of the due process clause of the Fifth Amendment, and that if enacted by a state Legislature it would be equally violative of the like clause of the Fourteenth Amendment. In support of the act the contention was made there, as here, that the exemption of the farmers was justified upon the ground that it would promote the general welfare by stimulating them to greater production. That contention applied with much greater force to the situation then obtaining, with the nation involved in a great war, than it possibly could to the present situation. It was argued that Congress might well have determined that the safety of the nation depended upon the increased production and conservation of food supplies, and that the national welfare would be promoted by exempting the farmers from the drastic provisions of the act, and thus stimulating them to increase their production. But the court held that the exemption was unreasonable, unjust, and wholly arbitrary and could not constitute a valid classification. Judge Anderson said:

"The indulgence to the excepted class is in respect to the farm products produced or raised upon land owned, leased, or cultivated by the members of it. But this does not differentiate the instant case from the *Connolly Case* [184 U. S. 540], for there the exception was to apply to 'agricultural products or live stock while in the hands of the producer or raiser.' My conclusion is that the classification in amended section 4 is arbitrary and not natural or reasonable; that such section is repugnant to the 'due process' clause of the Fifth Amendment, and is therefore void."

He also held that the words "due process of law" must have the same meaning in the Fifth and Fourteenth Amendments (*Hurtado v. California*, 110 U. S. 516, 4 S. Ct. 111, 292, 28 L. Ed. 232), from which it would follow that if the exception in the Lever Act is violative of the Fifth Amendment, the exemption in the Auto Stage and Truck Transportation Act would be equally violative of the Fourteenth Amendment. *U. S. v. Armstrong* (D. C.) 265 F. 683. The same question came before the federal district court for the Western district of Pennsylvania, and was decided in the same way, Judge Thomson saying: "Surely such classification is

unjust and arbitrary in the extreme, violating both the letter and the spirit of the Fifth Amendment." *U. S. v. Yount* (D. C.) 267 F. 861. The Circuit Court of Appeals of the Second Circuit held the Lever Act constitutional as a war measure. Judge Manton, in his opinion, concluded that the exemption in favor of the farmers was not, under the circumstances then existing, so palpably arbitrary as to authorize a judicial review of the legislative judgment. It is to be noted, however, that Judge Manton's opinion cannot be regarded as the opinion of the court in that case. His associates concurred specially in separate opinions. Judge Ward based his concurrence upon the extraordinary powers vested in Congress for the maintenance of the national security in time of war. Judge Hough emphasized this by saying:

"If we were in a state of 'official' peace, this statute would * * * be constitutionally obnoxious because it is a gross piece of class legislation; incapable of distinction from that condemned in *Connolly v. Union, etc., Co.*, 184 U. S. 540, 22 S. Ct. 431, 46 L. Ed. 679. But the statute is begotten by war, and is constitutionally excused (i. e., justified) by the war power, which is superior to, and not to be measured by, the police powers of the several states." *C. A. Weed & Co. v. Lockwood* (C. C. A.) 266 F. 785.

It may be noted in passing that this decision of the Circuit Court of Appeals was in effect reversed by the Supreme Court, but upon other grounds, without passing upon the validity of the exemption in favor of the farmers. *C. A. Weed & Co. v. Lockwood*, 255 U. S. 104, 41 S. Ct. 305, 65 L. Ed. 532. We do not mean to infer that every classification, based upon a distinction between farmers on the one hand and all other persons on the other, is unconstitutional, but we are impelled to conclude that no natural, intrinsic, or constitutional distinction is to be found as a basis for the exemption of the transportation companies described in the 1923 amendment, *supra*, from the regulations prescribed in the Auto Stage and Truck Transportation Act, and that such attempted exemption is violative of the Fourteenth Amendment to the federal Constitution, and of like provisions in our state Constitution. It is not claimed, and, in view of the legislative history of the act, could not be claimed, that the provisions of this exception are so intimately and inherently related to and connected with the general provisions to which it relates as to invalidate the latter.

It is ordered that a peremptory writ of mandate issue as prayed herein.

We concur: WASTE, J.; SHENK, J.; SEAWELL, J.; LAWLOR, J.; LENNON, J.; RICHARDS, J.

In re BONDS OF OROSI PUBLIC UTILITY DIST.

OROSI PUBLIC UTILITY DIST. v. McCUAIG.

(Sac. 3682.)

(Supreme Court of California. April 15, 1925.)

1. Constitutional law ☞290(3)—Legislature may create public utility district without hearing on question of benefits to land within district.

Legislature may create public utility district to be assessed for benefit of a public improvement and determine its boundaries, without giving property owners hearing on question of benefits to land included within district, as they are conclusively presumed to have been heard through representatives in Legislature.

2. Municipal corporations ☞450(4)—Owners of property included in assessment district entitled to be heard on question of benefits.

In formation of assessment district under general law, delegating determination of what lands to include to some commission, property owners are entitled to hearing, or opportunity to be heard, on question of benefits, before their lands are included, and also upon amount of tax to be assessed against property.

3. Municipal corporations ☞2—Act providing for formation of assessment district distinguished from one providing for quasi municipal corporation.

An act providing for formation of assessment district, practically authorizing property owners without notice to place burdens on property of others for purpose of improving their own property, is clearly distinguishable from an act providing for formation of quasi municipal corporation or municipality which does not directly affect private property.

4. Municipal corporations ☞2—Districts benefiting lands not formed for "municipal purposes."

Districts formed for purpose of draining, irrigating, reclaiming, or otherwise directly benefiting lands affected cannot be considered formed for municipal purposes, being merely special organizations created for some special local improvement, which may exercise only powers conferred to affect object of creation, and may carry out purposes only through assessments or local taxes upon property benefited.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal Purposes.]

5. Municipal corporations ☞405—Exactions of public utility district are assessments for local benefits.

Exactions, which public utility districts created for specific purpose of directly benefiting lands affected, are entitled to enforce to carry out purposes, are merely special assessments, but, even if in form of a tax, are really assessments for local benefits.

6. Municipal corporations ⇨2—Districts formed for benefiting lands not "municipal corporations" within Constitution.

Public utility districts formed for purpose of draining, irrigating, reclaiming, or otherwise directly benefiting the lands affected thereby are not municipal corporations in contemplation of the Constitution.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal Corporations.]

7. Statutes ⇨90(1)—All municipal corporations need not be organized and prescribed under one general law.

All municipal corporations need not be organized under one general law prescribing mode of organization and powers they can exercise, notwithstanding Const. art. 11, § 6, requiring that corporations for municipal purposes shall not be created by special laws, as they may be organized under any number of general laws.

8. Municipal corporations ⇨56—Cities may operate public utilities under Constitution.

Since adoption of 1911 amendment to Constitution of 1879 (Const. art. 11, § 19), cities have been entitled without question to own and operate public works for supplying light, water, heat, transportation, telephone service, and other means of communication.

9. Municipal corporations ⇨2—Public utility district quasi municipal corporation to provide utilities for inhabitants.

Intention of Legislature in enacting St. 1921, p. 906, under which Orosi public utility district was created, was to furnish inhabitants of unincorporated territory with same kind of utilities as cities were authorized to operate under Const. art. 11, § 19, and therefore to provide for creation of public corporations of a quasi municipal character with power to carry on particular functions committed to them.

10. Municipal corporations ⇨2—Public utility district need not exercise all powers of local self-government.

A district like the Orosi public utility district, organized under St. 1921, p. 906, need not exercise all the powers of local self-government, usually pertaining to municipal corporations, in order to be classed as a municipal corporation, but need only have such governmental powers as necessary to carry out purposes of organization.

11. Municipal corporations ⇨1—"Municipal corporations" not mere political subdivisions for governmental purposes.

Object of municipal corporations is not merely formation of political subdivisions of state for governmental purposes, but is also the association of members of community for administration of local affairs in matters largely outside the sphere of government as such.

12. Municipal corporations ⇨3—Legislature may create public utility districts in unincorporated territory.

Legislature had power to create public utility districts in unincorporated territory for the purpose of association of people therein to obtain advantages in use and benefit of certain utilities.

13. Municipal corporations ⇨57—Public service activities are "municipal" affairs.

Public service activities, such as supplying water to inhabitants, construction of reservoir for their benefit, sale and distribution of electrical energy, and establishment and operation of transportation service, which were once regarded as being of strictly private nature, are now considered municipal affairs.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal.]

14. Municipal corporations ⇨57—Municipality operating public utility is engaging in business upon municipal capital for municipal purposes.

A municipality operating public utility, though not performing governmental function, is engaging in business upon municipal capital and for municipal purposes, and tax for supplying such capital is general tax like any tax imposed for carrying on governmental functions of cities, and not tax for local improvements on property benefited.

15. Municipal corporations ⇨2—Utility district held quasi municipal corporation, without primary purpose of assessing benefits.

The Orosi public utility district, organized under St. 1921, p. 906, providing for operation of public utilities in unincorporated territory, held a quasi municipal corporation without primary purpose of assessing benefits upon private lands, especially in view of section 38, providing that only revenue producing utilities be acquired, and since levy for payments due on bonded debt, provided under section 39, is authorized only where the revenues are inadequate.

16. Municipal corporations ⇨3—No constitutional limitation on power of Legislature to form municipal territory.

There is no constitutional limitation on power of Legislature in determination of what shall constitute municipal territory.

17. Constitutional law ⇨278(2) — Municipal corporations ⇨10—Public utility district, organized without hearing to property owners as to whether they should be included within boundaries, held not unconstitutional.

Public utility district, organized under St. Cal. 1921, p. 906, without giving property owners hearing as to whether their property should be included within district, although act has since been amended to do so (St. 1923, p. 299), held not violative of federal Const. Amend. 14 and the state Constitution, as taking property without due process, notwithstanding power of district to levy tax to discharge sums due on bonded indebtedness, since tax was general tax for purpose for which district was formed; a construction analogous to that placed upon St. 1889, p. 358.

In Bank.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Proceeding by the Orosi Public Utility District to determine the validity of bonds of the district, opposed by J. F. McCuaig. From

a decree sustaining validity of bonds, opponent appeals. Affirmed.

Walter C. Haight, of Visalia, for appellant.

Fred C. Scott and Leroy McCormick, both of Visalia, for respondent.

Edward F. Treadwell, of San Francisco, *amicus curiae*.

WASTE, J. The Orosi public utility district was organized under the provisions of an act providing for the incorporation of public utility districts in unincorporated territory. Stats. 1921, p. 906. The board of directors of the district brought an action in the superior court of the county of Tulare to determine the validity of an \$18,000 bond issue voted by the people of the district for the purpose of raising money for developing, pumping, storing, and distributing water. John F. McCuaig, a resident freeholder and taxpayer, answered the petition, alleging that all proceedings in relation to the issuance of the bonds were null and void for the reason that the utility district was not duly organized and incorporated, because the act of the Legislature under which it was formed was unconstitutional. The trial court determined all issues in favor of the due organization and incorporation of the district, and the legality of the bonds, and entered its decree, affirming their validity. The taxpayer has appealed on the judgment roll alone.

The act providing for the incorporation of public utility districts in unincorporated territory states that, whenever electors equal in number to 15 per cent. of all the votes cast for all candidates for governor within such unincorporated territory at the last preceding general election, at which a governor was elected, desire to organize such a district, they shall sign a petition setting forth the boundaries of the proposed district, and present same to the board of supervisors of the county in which the unincorporated territory is situated. The board of supervisors shall, within 15 days after the presentation of the petition, publish a copy thereof, together with a statement that the proposition involved therein, which shall be briefly specified, will be submitted by it to the qualified electors of the unincorporated territory at a special election, after publication of the required notice. Within 5 days after the result of the election is ascertained, if it appears that a majority of the votes cast is in favor of the incorporation of the district, the board of supervisors shall so declare, and shall in a proper order state the name and boundaries of the district, and that such utility district is formed under the provisions of the act (*supra*). After the date of the filing of certain certificates with the secretary of state, the territory described in the petition shall be deemed incorporated as a public utility dis-

trict, under the provisions of the statute, with all the rights, privileges, and powers set forth therein.

Under the provisions of the act, any public utility district so formed shall have power to have perpetual succession, to sue and be sued, to adopt and alter a seal, to acquire, hold, and dispose of real and personal property necessary to the full and continued exercise of its power, to acquire, construct, own, operate, control, or use works for supplying the inhabitants of the district with light, water, power, heat, transportation, telephone service, or other means of communication, or means for the disposition of garbage, sewage or refuse matter, and to do all things necessary or convenient to the full exercise of the powers granted by the act. Whenever there is a surplus of water, light, heat, or power above that which may be required by the inhabitants or municipalities within the district, the district may sell or otherwise dispose of the surplus outside of the district. It also may exercise the right of eminent domain for the condemnation of private property for public use, and may construct its works across or along any street or highway, or over the lands and property of the state, and in that connection is given the same rights and privileges as are granted to municipalities. It may borrow money and issue bonds or other evidence of indebtedness within certain limitations, levy and collect, or cause to be levied or collected, taxes for the purpose of carrying on its operations and paying its obligations, and may make contracts, employ labor, and do all acts necessary or convenient for the full exercise of the powers granted to it, which are to be exercised by a board of directors elected by the voters in the district, which board may act by ordinance or resolution signed by its president and attested by the secretary. The act further provides (section 39) that if from any cause the revenues of the district shall be inadequate to pay the principal or interest on any bonded debt as it becomes due, or if funds are needed to carry out the objects and purposes of the district, which cannot be provided for out of the revenues of the district, the board of directors may levy a tax for that purpose on the taxable property situated in the district. It may by ordinance, the provisions of which shall be conformable to the general law, provide the mode and manner of assessing, correcting or equalizing assessments, and the levying and collecting of taxes which may be by actions or legal proceedings; or it may elect to avail itself of the assessment made by the county assessor of the county in which the district is situated. All taxes levied under the provisions of the act are a lien on the property on which they are levied, and the enforcement of the collection of the taxes may be had in the same manner and by the same means as provided by law for the en-

forcement of liens for state and county taxes.

[1] The act of 1921, as originally enacted, and as it stood when the respondent district was formed, did not provide for any notice of the hearing of the petition for the formation of the district. The property owners within the proposed district were not given an opportunity to protest against having their property included within its boundaries, nor were they accorded an opportunity to be heard as to whether their property was or could be benefited by being included within such boundaries. For that reason, the appellant takes the position that the act is unconstitutional and in contravention of the Fourteenth Amendment of the federal Constitution, and contrary to similar provisions in the Constitution of the state, in that it provides for a taking of his property without due process of law. It follows, he argues, that all proceedings taken for the organization of the district, and the subsequent proceedings relating to the issue of the bonds, which are dependent upon the validity of the organization of the district, are null and void, and, as a necessary consequence, the bonds sought to be validated by this proceeding are invalid. After the proceedings involved in this case were had, the act was amended (Stats. 1923, p. 299) to provide for a notice and a hearing by the board of supervisors of the petition for the formation of a utility district. It is now provided that the board must hear all competent and relevant testimony offered in support of, or in opposition to, the petition. It shall make such changes as it may deem advisable in, and shall define and establish the proposed boundaries. At the time the proceedings for the formation of the Orosi district were taken no discretionary power whatever was vested in any legislative body. Upon presentation of the petition therefor, the board of supervisors was compelled to immediately submit the question of the formation of the district to the voters residing within the described limits. The question whether or not the exact territory described in the petition should be included in and constitute the utility district, was made to depend solely upon an affirmative vote of the body of the electorate residing therein. Appellant contends that to permit a district, formed under such a statute, to levy a tax on property for nonpayment of which the property may be sold is to subject the property owner to deprivation of his property without due process of law.

It is not contended that any of the steps leading to the formal declaration by the board of supervisors of Tulare county that the respondent district was in fact created were omitted, or that they were not properly taken. The sole question to be determined on appeal relates to the constitutionality of the act under which the district was created.

Our first consideration is therefore directed to the nature of the district which may be formed under its provisions. If it be one formed for the primary purpose of assessing upon the lands within its boundaries benefits to be derived by the lands from some public improvement for which purpose the district is created, we must hold with appellant, and declare the act unconstitutional as violating the "due process clause" of the federal Constitution. Such districts can be legally created in but one of two ways, neither of which was followed in this case. The Legislature itself may create a district to be assessed for the benefit of a public improvement, and determine its boundaries, either by describing them or by laying down a fixed rule by which they may be determined. If it does so, the property owners are not entitled to a hearing on the question of benefits to the land included within the district, for they are conclusively presumed to have been heard through their representatives in the Legislature. *Tarpey v. McClure*, 190 Cal. 593, 604, 213 P. 983; *Miller v. Lux, Inc., v. Drainage Dist.*, 182 Cal. 252, 265, 187 P. 1041; *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 174, 17 S. Ct. 56, 41 L. Ed. 369.

[2] Instead of creating the district by special act, the Legislature may, by a general law, provide for its formation, and may delegate to some board, commission, or tribunal the determination of what lands shall be included within its boundaries. In the event that the district be formed under such an act, the inquiry becomes judicial in its nature to such an extent that property owners are entitled to a hearing, or an opportunity to be heard, on the question of benefits before their lands are included. If the district be formed under this method of delegated power, it is essential that the property owners whose property is to be included shall be given a hearing upon the question whether their lands should be assessed at all, that is to say, whether or not such lands would be benefited by the proposed improvement, and also a hearing upon the amount of the tax to be assessed against the property. *Spencer v. Merchant*, 125 U. S. 345, 356, 8 S. Ct. 921, 31 L. Ed. 763; *Fallbrook Irr. Dist. v. Bradley*, supra, p. 174; *Brookes v. City of Oakland*, 160 Cal. 423, 431, 117 P. 433; *Miller & Lux v. Board of Supervisors*, 189 Cal. 254, 261, 208 P. 304. Somewhere during the process of arriving at the amount of any special assessments which may be levied on property the taxpayer must have an opportunity to be heard as to the validity and extent of the tax, and that notice and opportunity must be provided as an essential part of the statutory provision. *Security Trust Co. v. Lexington*, 203 U. S. 323, 333, 27 S. Ct. 87, 51 L. Ed. 204; *Central of Georgia Ry. v. Wright*, 207 U. S. 127, 138, 28 S. Ct. 47, 52 L. Ed. 134, 12 Ann. Cas. 463.

The respondent district was not created by the Legislature itself, and the act providing for its formation makes no provision for the submission of the question as to what lands should be included within its boundaries to any tribunal before which the property owners, whose lands were included in the petition might have a hearing.

[3] The rule laid down in *Fallbrook Irrigation District v. Bradley*, supra, which has been so constantly adhered to by this court in its application to assessment districts, formed for the purpose of assessing upon private lands the benefits to accrue from the particular public improvement for the construction of which the district was formed (*Miller & Lux v. Board of Supervisors*, 189 Cal. 254, 267, 208 P. 304), does not apply to every kind of public or quasi public corporation. There is an obvious distinction to be drawn between an act providing for the formation of an assessment district, and which practically authorizes property owners, without notice, to place burdens on the property of others for the sole purpose of improving their own property, and an act providing for the formation of a quasi municipal corporation or a municipality. *People v. Ontario*, 148 Cal. 625, 632, 84 P. 205; *Wilcox v. Engebretsen*, 160 Cal. 288, 293, 116 P. 750. That distinction, it was pointed out in the latter case, is to be made between the proceedings of a board, acting in pursuance of some delegated legislative authority in creating a political subdivision of the state, as a county or a city, a proceeding which does not directly affect private property, and proceedings which do directly charge or effect such property. The respondent takes the position that it is a public corporation, and that any burden, by way of taxation, to be laid on the inhabitants residing within its boundaries is but a tax for municipal purposes. In view of the distinction, pointed out by this court (supra), between the acts providing for the formation, on the one hand, of public or quasi public corporations, in the nature of taxing districts, and of municipal corporations, on the other, and in view of the contention of the respondent, the problem which confronts us lies in determining whether or not the act under which the respondent district was created provides for the organization of a district which is in its nature a public corporation, the inhabitants and property owners of which are subject to taxation for municipal purposes without any hearing as to the benefits to be derived from the creation and conduct of such a corporation, or is an assessment district created for the primary purpose of assessing upon private lands the benefits to be derived thereby from the public improvements for which purpose the district is formed. *Miller & Lux v. Board of Supervisors*, supra, p. 267 (208 P. 304).

[4, 5] The purposes for which the Orosi District was formed, the appellant contends,

are not municipal, and a district formed for such purposes does not possess the essential characteristics of a municipal corporation. If the authorities cited by him were strictly in point, there would be an end to the controversy; but they are not. They deal with questions arising in connection with districts formed for the purpose of draining, irrigating, reclaiming, or otherwise directly benefiting the lands affected thereby. *People v. Reclamation Dist. No. 551*, 117 Cal. 114, 121, 48 P. 1016; *People v. Levee Dist. No. 6*, 131 Cal. 30, 34, 63 P. 676; *People v. Sacramento Drainage Dist.*, 155 Cal. 373, 382, 103 P. 207; *Pixley v. Saunders*, 168 Cal. 152, 160, 141 P. 815; *In re Werner*, 129 Cal. 567, 572, 62 P. 97. When related to that class of districts, the cases cited are clearly in point. The improvements contemplated by the acts under which they were formed cannot be considered "municipal purposes." *In re Madera Irrigation Dist.*, 92 Cal. 344, 28 P. 675, 14 L. R. A. 755, 27 Am. St. Rep. 106 (on rehearing). One of the distinguishing features of such districts is that they are created for the purpose, generally, of some special local improvement, and may exercise only such powers as may be conferred by the Legislature in the line of the object of their creation. They are merely special state organizations for state purposes, created to perform certain work which the policy of the state requires or permits to be done, and to which the state has given a certain degree of discretion in making the improvements contemplated. The other distinguishing feature is that the exactions which such districts may enforce in order to carry out their purposes are in the nature of assessments or taxes for local benefits, to be spread on the property in the districts in proportion to the peculiar advantage accruing to each parcel from the improvement. *Pasadena Park Imp. Co. v. Leland*, 175 Cal. 511, 512, 166 P. 341. Such an exaction is generally in the form of a special assessment, but, even if it is in the form of a tax, it is nevertheless an assessment for local benefits. *City of San Diego v. Linda Vista Irr. Dist.*, 108 Cal. 189, 193, 41 P. 291.

[6, 7] Districts of the nature just discussed are not municipal corporations in the contemplation of the Constitution. *People v. Sacramento Drainage Dist.*, supra, p. 382 (103 P. 207); *Reclamation Dist. No. 551 v. County of Sacramento*, 134 Cal. 477, 478, 66 P. 668. But the provision in article 11, § 6, that "corporations for municipal purposes shall not be created by special laws," does not imply that the Legislature must, by any general law, provide a plan in which shall be prescribed the mode under which all municipal corporations must be organized and the powers they can exercise. Of interest in this connection is the language of the court in *Re Madera Irrigation Dist.*, 92 Cal. 296, where, at page 317, 28 P. 272, 276 (14 L. R. A. [N. S.] 755, 27 Am. St. Rep. 106), the court says:

"Such corporations are but the agents or representatives of the state in the particular locality in which they exist. They are organized for the purpose of carrying out the purposes of the Legislature in its desire to provide for the general welfare of the state, and in the accomplishment of which legislative convenience or constitutional requirements have made them essential. Although in this state the Legislature is required to provide such agencies under general laws, it is authorized, under its general power of legislation, to invest such corporations, when created, with the same powers which, without such restriction, it could itself have exercised; and in providing for such organizations it need confer upon them only such powers as, in its judgment, are proper to be exercised by them in the discharge of the particular functions of government which may be conferred upon them. Being the representatives of the Legislature in the various localities of the state, the requirements for organization, as well as the powers to be exercised, vary with the character of the purpose for which they may be created. Hence the general laws which the Legislature may enact for the organization of public corporations may be as numerous as the objects for which such corporations may be created. For each of these objects the law is the same, but there would be a manifest impropriety in requiring that the organization of a levee district or an irrigation district should be conducted in the same manner as the organization of a corporation for the management of a public park or the control of the school department. Whether the districts to which such general laws are applicable, or in which the people thereof may avail themselves of the privilege conferred, be many or few, is immaterial. Even if there be but a single district to which the law is applicable, at the time of its enactment, the Legislature would be justified, under its legislative power, to pass general laws in making such provision for that district. Whenever a special district of the state requires special legislation therefor, it is competent for the Legislature, by general law, to authorize the organization of such district into a public corporation, with such powers of government as it may choose to confer upon it. It is not necessary that such public corporation should be vested with all governmental powers, but the Legislature may clothe it with such as, in its judgment, are proper to be exercised within and for the benefit of such district. Being created for the purpose of discharging only one public purpose, it is not requisite that it have power not necessary therefor, or which would be appropriate to a corporation organized for some other purpose. Neither is it requisite that such corporation should have legislative or judicial powers conferred upon it. It may be organized for the mere purpose of exercising executive and administrative functions, with the added power of making such prudential rules and regulations as may be necessary for the exercise of the particular functions intrusted to its charge."

[3, 9] With this power of the Legislature understood, the nature of the districts contemplated by the act under which the Orosi public utility district was created is more clearly discerned. In 1911 the Constitution of California was amended to provide that:

"Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both." Const. art. 11, § 19.

The amended section is radically different from the one it replaced. In the statement of legislative reasons for the adoption of the amendment, printed and transmitted to the voters by the secretary of state, it is stated that the conditions which prevailed in this state with regard to the operation of public utilities in cities at the time of the adoption of the new Constitution in 1879 had materially changed, and an entirely new situation existed regarding the subject to which the section related. "The proposed amendment," the statement continues, "is designed to provide for conditions as they now are, and as they will doubtless continue to be in the future." After a discussion of the situation arising during the period following 1879, and a declaration that the result "has been a distinct disappointment, like many other attempts to remedy economic conditions by force of statutes, * * * the true remedy, so far as any substantial benefit to the people is concerned," the statement declares, "is to encourage the furnishing of these public necessities by municipal corporations themselves." The adoption of the amendment definitely settled and removed all doubt from the question of the right of cities and towns to own and operate the kind of public utilities designated by the Constitution. In enacting the statute here in question, the Legislature has made provision whereby the inhabitants of the state living outside the limits of cities and towns may serve their own purposes through the operation of the same kind of utilities, when organized for that purpose.

That such was the intention of the Legislature may be gleaned from a reading of the provisions declaring the purposes for which public utility districts may be created in unincorporated territory. They are the acquisition, construction, and use of works for supplying the inhabitants of the district with light, water, power, heat, transportation, telephone service, or other means of communication or means for the disposition of garbage, sewage, or refuse matter. It has the power to do all things necessary or convenient to the full exercise of the powers granted by the act. It is significant that, when the Legislature came to pass the act extending to the inhabitants outside of incorporated cities and towns, the privileges in regard to the acquisition and use of their own public utilities that are granted by the state Constitution to municipalities, it should have followed so closely the language of the constitutional amendment of 1911 in the statement of the

purposes for which the districts may be created. We are convinced that it was its intention to provide for the creation of public corporations of a quasi municipal character, with power to carry on the particular functions committed to them.

[10] "A city or purely municipal corporation is perhaps the highest type of corporation created for municipal purposes, because it is a miniature government, having legislative, executive, and judicial powers, but there is another class of corporation, such as counties, school districts, road districts, etc., which, though varying in application and peculiar features, are but so many agencies or instrumentalities of the state to promote the convenience of the public at large, and are, in the broadest use of the term, for municipal purposes." *Cook v. Port of Portland*, 20 Or. 580, 583, 27 P. 263, 264 (13 L. R. A. 533). It is not necessary, therefore, that a district like the Orosi Public Utility District shall exercise all the powers of local self-government which usually pertain to municipal corporations. All that was required was that the Legislature should vest them, when properly organized, with such governmental powers as in its judgment were necessary to be exercised and appropriate to carry out the purposes for which the districts may have been organized. In *re Madera Irrigation Dist.*, *supra*. It may enlarge or restrict their powers, direct the mode and manner of their exercise, and define what acts they may or may not perform. *San Francisco v. Canavan*, 42 Cal. 541, 552.

[11, 12] The creation of municipal corporations does not have for its sole object the formation of political subdivisions of the state for governmental purposes, but there is also the association of the members of the particular community for the administration of their local business and affairs in matters largely outside of the sphere of government as such. *Union Stone Co. v. Bd. of Freeholders of Hudson Co.*, 71 N. J. Eq. 657, 664, 65 A. 466, 469; see, also, *Wilson v. Bd. of Trustees*, 133 Ill. 443, 464, 27 N. E. 203. It is quite apparent to us that the Legislature had in view such association of the people living in the outlying districts, when it enacted the statute providing for the formation of public utility districts in the unincorporated territory of the state. It thereby provided for the creation of public agencies or quasi municipal corporations, the declared purpose of the act being to extend to the inhabitants of such districts, when properly organized, advantages in the use and benefit of certain utilities which they might not be able to obtain in any other way, and which, from common experience, we know tend to promote the general welfare of the people of the state. That it had the power to do so cannot be denied. While the proposed constitutional amendment was pending in 1911, this court held that there was no

provision in the state Constitution which either expressly or by implication forbade the acquisition, ownership, or operation of public utilities by a municipality, or which prohibited the Legislature from granting a municipality the power to acquire, own, and operate them. *Clark v. Los Angeles*, 160 Cal. 30, 46, 116 P. 722.

[13] Activities, once regarded as being of a strictly private nature, are now considered municipal affairs, e. g., the sale and distribution of electrical energy manufactured by a city, the supplying of water to its own inhabitants or to outside territory, the construction of a reservoir by a city on its own land and to be used for the benefit of its inhabitants, and the establishment and operation of transportation service. *Los Angeles G. & E. Corp. v. Los Angeles*, 188 Cal. 307, 317, 205 P. 125; *Heilbron v. Sumner*, 186 Cal. 648, 651, 200 P. 409; *South Pasadena v. Pasadena Land & Water Co.*, 152 Cal. 579, 594, 93 P. 490; *Williams v. City of Vallejo*, 36 Cal. App. 133, 139, 171 P. 834; *United Railroads v. San Francisco*, 249 U. S. 517, 520, 39 S. Ct. 361, 63 L. Ed. 739. The people of the state, by the amendment to the Constitution, placed other public utilities in the same category.

[14] We take it to be now a generally accepted proposition that, while a municipality, which undertakes to supply those of its inhabitants who will pay therefor with utilities and facilities of urban life, is performing a function not governmental, but more often committed to private corporations or persons with whom it may come into competition, it is, in fact, engaging in business upon municipal capital, and for municipal purposes. 28 Cyc. 125. Any tax, therefore, levied and collected for the purpose of supplying such municipal capital is not a tax or assessment on property directly benefited by the construction of some local improvement, but is a general tax levied just as, and for the same purpose that, any general municipal tax is imposed for carrying on the governmental functions and utilitarian objects of duly incorporated cities or towns.

[15] The conclusion we have reached, on the general consideration of the act under which the respondent district was formed, is confirmed by an examination of the provisions of the statute relating to the necessary revenue for conducting the affairs of such public corporations. It is provided (section 38) that only revenue-producing utilities shall be acquired, owned, or operated, the intention being " * * * that each public utility owned and operated by the district shall be self-sustaining." To that end, it is provided that, so far as possible, the board of directors shall fix such charges for commodities or service furnished by its revenue-producing utilities as will pay the administrative expenses of the government of the district, the operating cost of the utilities,

the interest on any bonded indebtedness, and, in addition, provide a sinking fund for the retirement of the principal of the debt, and an appropriate fund for repairs, replacements, and betterments. These provisions clearly establish the contention that the essential purpose of the act is to form a quasi municipal corporation which may acquire and operate public utilities and pay for their operation from rates to be paid by those enjoying the service. When the cost of any public utility to be acquired, completed, or constructed can be paid out of the revenues of the district derived from the operation of its public utilities, in addition to the other necessary expenses of the district, the board of directors must determine the cost of such utility, the method and manner of payment therefor, and submit the question of its acquisition upon such terms to the electors. If the cost cannot be met in that way, a district bonded indebtedness may be incurred in the manner provided by the act. It is only when the revenues of the district shall be inadequate to pay the principal or interest of any bonded debt, as it becomes due, that the board of directors must, or, when funds are needed to carry out the objects and purposes of the district which cannot be provided for out of its revenues, that the board of directors may levy a tax for such purposes. Section 39. These provisions make it clear that the "primary purpose" of the act (*Miller & Lux v. Board of Supervisors*, supra) was not that of assessing upon private lands the benefits to be derived from the acquisition of public utilities.

[16, 17] From our conclusion that the act, under which the respondent district was created, provides for the formation of a public or quasi municipal corporation, the inhabitants and property owners of which are subject to tax by the district for municipal purposes only, it follows that the attack here made on the constitutionality of the act must fail. The public utility districts provided for by its terms have as their sole purpose the welfare and prosperity of the people of the state—matters which rest within the will of the people themselves. In *People v. Town of Ontario*, 148 Cal. 625, 84 P. 205, this court considered the constitutionality of the act providing for the annexation of territory to incorporated towns and cities. Stats. 1889, p. 358. By the terms of the act, upon receipt of a proper petition, signed by the requisite number of electors of the municipality and exactly describing the territory desired to be annexed, the legislative body of the municipality is compelled to submit the question of annexation to the electors of the town, and also to those of the outside territory. No notice, or opportunity to be heard on the question, is afforded residents or property owners of either the town or the territory which it is proposed to annex, and the legislative body has no power to change

or fix the boundaries. The sole question whether or not the exact territory described in the petition shall be annexed and thereby subjected to the burden of taxation for municipal purposes is made to depend entirely upon an affirmative vote of the electors at the election called for the purpose. That is the exact situation as to the boundaries of public utility districts in unincorporated territory, created under the act as it was when the respondent district was formed. The court pointed out the "obvious distinction" between those acts practically authorizing property owners, without notice, to place burdens upon the property of others for the sole purpose of improving their own property, and one providing for the formation of municipalities. It held that, as the Legislature cannot itself declare the precise boundaries of a municipality, for it can act in such matter only by general laws, it might, in the absence of any constitutional inhibition, confer that power on the electors of the district to be affected, such declaration to be made at an election held after due notice.

See, also, *People ex rel. Rhodes v. Fleming*, 10 Colo. 553, 16 P. 298; *Ford v. North Des Moines*, 80 Iowa, 626, 45 N. W. 1031. The Constitution does not attempt to limit the power of the Legislature in providing for the determination of the question as to what shall constitute municipal territory. Consequently, in the matter of forming cities or towns, questions as to population, extent, and character of territory to be included are matters left entirely with the legislative department. *People ex rel. Russell v. Town of Loy-alton*, 147 Cal. 774, 778, 82 P. 620.

In the instant case the district has been formed within the strict letter of the law, and in the manner provided by the legislative enactment. We have been cited to no authorities which hold that the requirement as to due process of law gives a property owner an absolute right to notice and hearing before his property may be included within the limits of a municipality or a quasi municipal corporation, by reason of the creation of which his property will be subjected only to the burden of a general tax for the purposes for which the district was formed, in contradistinction to a tax or assessment for some local benefit. Appellant was not therefore entitled to notice and opportunity to be heard on the question of benefits to his land before it could be included within the boundaries of the respondent district. The act under which it was formed directs that, in the event it becomes necessary to levy a tax for carrying out the objects and purposes of the district, the board of directors may, by ordinance, provide the manner and mode of assessing and of correcting and equalizing assessments upon the taxable property situated within the district, and may provide for the collection of delinquent taxes by actions or legal proceedings, provided that the provi-

sions of such ordinance shall be conformable to general law, or it may accept the assessment for district purposes made by the county assessor. Section 39. Whatever may be the method of assessment that shall be adopted, if provision be made for the correction of errors committed by the assessor, through a board of revision or equalization, with power to hear, after notice, complaints respecting the justice of the assessment, the proceeding by which the valuation is determined, though it may be followed, if the tax is not paid, by a sale of the delinquent's property, is due process of law. *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 710, 4 S. Ct. 663, 28 L. Ed. 569; *Fallbrook Irr. Dist. v. Bradley*, supra, at p. 175 (17 S. Ct. 56); *People v. Town of Ontario*, supra, at p. 633 (84 P. 205).

We deem it unnecessary to further discuss the decisions of this court and those of other jurisdictions so strongly relied on by appellant. Many of them have already been referred to and their distinguishing features pointed out. We have carefully examined every one of them, and many others, and have not found one that is exactly in point. The reason for the dearth of precise judicial decision on the important question we have been called on to decide in this case is that public utility districts are new to the law of California, and the furnishing of what may be called public utility service is an extension of municipal functions of comparatively recent times. After a critical study of the authorities, we have found nothing that destroys our confidence in the conclusion we have reached in this case. The case cited by appellant, and which, on first reading, seems nearest in point to the question here involved (*People ex rel. Amestoy Estate Co. v. Van Nuys Lighting Dist.*, 173 Cal. 792, 162 P. 97, Ann. Cas. 1918D, 255) is readily distinguishable on the facts given by the court as the foundation for its decision.

The judgment of the lower court is affirmed.

We concur: MYERS, C. J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.; LAWLOR, J.; LENNON, J.

195 Cal. 711

In re **HOLLOWAY'S ESTATE**. (L. A. 7932.)
(Supreme Court of California. April 4, 1925.)

1. Wills ⚡384—Evidence interpreted in light of presumptions in favor of lower court's action.

On appeal from judgment denying petition to revoke probate of will, evidence will be interpreted in light of rule that all presumptions and intendments are in favor of lower court's action.

2. Wills ⚡111(3, 4)—Signature at testator's request, or guiding of his hand, by another, complies with statute.

Signing of testator's name at his request, or guiding of his hand, by another, because he was physically weak, is compliance with Civ. Code, § 1276, and raises no presumption against due execution of will.

3. Wills ⚡302(1)—Evidence held to show due execution and attestation of will as matter of law.

In will contest, uncontradicted evidence held to show, that testator signed will in presence of attesting witnesses, as required by Civ. Code, § 1276, subs. 1, 2, and that they signed it in his presence.

4. Wills ⚡55(1)—That testator did not formulate words of request that others witness execution of will not evidence of testamentary incapacity.

That testator himself did not formulate words of request that others witness execution of will does not tend to prove testamentary incapacity.

5. Wills ⚡163(1)—Activity in preparation and participation in execution of will by beneficiary, necessary to raise presumption of undue influence.

Presumption of undue influence by beneficiary is not raised by proof of interest and opportunity or confidential relation alone, but arises only when beneficiary has been active in preparation or participated in execution of will.

6. Wills ⚡159—Undue influence must destroy testator's free agency.

Undue influence, to invalidate will, must have destroyed testator's free agency and overpowered his volition at time of making will, and general influence, not brought to bear directly on testamentary act, however strong or controlling, will not warrant setting aside will of person of sound mind.

7. Wills ⚡155(1)—Mere opportunity to exercise undue influence insufficient to invalidate will.

Mere opportunity to exercise undue influence is insufficient to invalidate will.

8. Wills ⚡324(3)—Undue influence by beneficiary and others held not shown.

Evidence held insufficient as matter of law to show such undue influence by beneficiary, nurse, attorney, and Christian Science practitioner as would invalidate will.

9. Wills ⚡166(1)—That new attorney drew will does not warrant inference of undue influence.

That new attorney was called in to prepare will, in absence of other circumstances, will not sustain inference of undue influence.

10. Wills ⚡166(11)—Testator's declarations before making will evidence that will probated coincided with intentions.

Testator's declarations before making will held evidence that will probated coincided with intentions concerning wife, who was sole bene-

fiary, though not evidence of his testamentary act.

11. Wills ⚡55(1)—Will probated held not invalidated by dissimilarity to former will.

That deceased had gone to his attorney's office to make prior will, which provided for contestants of as well as sole beneficiary under will probated, and did not name latter as executrix, as did later will, which was executed while he was too ill to leave home, did not invalidate later will.

12. Wills ⚡55(1)—Form of will immaterial, where it sufficiently expressed intent and no undue influence was shown.

Where testator's intent was sufficiently indicated by his last will, and there was no evidence of undue influence, fact that it was not formally prepared by him, as was his habit in respect to other documents, including former will, was immaterial.

13. Wills ⚡386—Verdict of mental capacity not disturbed, where evidence is not insufficient as matter of law to support finding either way.

Where testimony is not insufficient, as matter of law, to support finding either way, verdict that testator had mental capacity to make will cannot be disturbed.

14. Wills ⚡31—Testator need not be able to transact business generally or make contracts to make valid will.

Testator may have capacity to make valid will, though not able to make contracts, manage his estate, or transact business generally.

15. Evidence ⚡568(2)—Subscribing witness' opinion as to testator's mental capacity entitled to more weight than that of merely passive witness.

Presumption being that subscribing witness had attention directed to and noted testator's mental capacity, his opinion is entitled to more weight than that of one who was merely passive, but weight thereof is for jury.

16. Wills ⚡55(5)—Evidence held not to show physical or mental incapacity to make will.

Evidence held not to show incompetency to make will because of physical condition or mental irresponsibility.

17. Wills ⚡324(2)—Directed verdict for proponents on issue of due execution held not error as precluding consideration of certain evidence.

In will contest, where there was no substantial evidence that will was not duly executed, nor any indication that evidence as to whether testator declared will to be his, and whether it was signed by him or at his request, and in his presence by two subscribing witnesses, was not considered on issue of unsound mind, direction of verdict for proponents on issue of due execution was not error as precluding consideration of handwriting expert's testimony as to discrepancies in writing, erasures, alteration of signatures, etc., and evidence as to day on which will was drawn.

18. Wills ⚡384—Contention that prior will was not revoked by subsequent will held unnecessary to consider.

Where evidence showed, as matter of law, that will was duly executed, and that no undue influence was exercised, and jury found that testator was mentally competent, contention that prior will, containing inconsistent provisions, was not revoked need not be considered, in view of Civ. Code, § 1296, especially where last will expressly revoked all former wills.

19. Wills ⚡329(3)—Instruction held not error as declaring that admission of will to probate creates presumption of validity.

Instruction that admission of document to probate prima facie established it as testator's will and his competency to make it, and that "on this contest the law presumes" that testator was competent to make will, and that burden of proving otherwise was on contestants, held not error as declaring that mere fact that will had been admitted to probate created presumption of validity, thereby increasing burden of proof on contestants.

20. Wills ⚡427—Recognized as valid while probate stands uncontested.

As long as probate stands without contest will must be recognized and admitted in all courts as valid, unrevoked decree, being absolute conclusive proof of its genuineness.

21. Wills ⚡52(1)—Burden of proving testator's incompetency on contestants.

Burden of proving testator's incompetency is contestants' whether law presumes his competency, or because party having affirmative of issue must prove it under Code Civ. Proc. § 1981.

In Bank.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Petition by Frances Ellen Parker and another to revoke the probate of the will of Andrew Holloway, deceased. From a judgment denying petition, contestants appeal. Affirmed.

Davis, Rush & MacDonald and Wm. B. Beirne, all of Los Angeles, for appellants.

Waldo & Hinds, of Pasadena, and Lawler & Degnan, of Los Angeles, for respondent.

LAWLOR, J. On November 20, 1917, Andrew Holloway died at his home in Pasadena at the age of 45 years, leaving a last will and testament as follows:

"I, Andrew Holloway, of the city of Pasadena, county of Los Angeles, state of California, being of sound and disposing mind and memory do make, publish and declare this my last will and testament. I direct that after my business is settled and my debts paid that all my property, both real and personal, of which I may be possessed shall go to my wife, Annie. I hereby revoke all former wills by me made, and appoint my said wife to be the executrix of this my last will and testament without bond.

In witness whereof I have hereunto set my hand and seal this 4th day of November, 1917. Andrew Holloway. Subscribed, sealed, published and declared by the above-named Andrew Holloway as and for his last will and testament in our presence and in the presence of each other have subscribed our names as witnesses thereto at the request of the said testator this 4th day of November, 1917. Nita J. Wright, address, 276 North Lake avenue, Pasadena. Mineita E. Binkley, address, 350 North Pasadena avenue, Pasadena, Cal."

Indorsed on the back:

"No. 37,223, will of Andrew Holloway, filed November 27, 1917. H. J. Leland, Clerk, by H. H. Doyle, Deputy."

On December 11, 1917, this will was admitted to probate and letters testamentary were issued to Annie M. Holloway, the executrix therein named, who duly qualified as such executrix. On April 18, 1918, Frances Ellen Parker and Emma Jane Holloway, as contestants, filed a petition wherein the validity of the will is contested on several grounds and praying the revocation of the probate thereof. The petition is based first, on the ground that the "said instrument purporting to be the last will and testament of the said Andrew Holloway deceased was not executed in the manner or form required by law in this: That the said purported will was not signed by the said Andrew Holloway in the presence of the purported subscribing witnesses thereto; that the names of said purported subscribing witnesses to said last will were not signed; nor were either of them signed thereto by the said witnesses respectively at the request of the said Andrew Holloway, or in his presence; that the said Andrew Holloway did not declare the same to be his will in the presence of said witnesses, or either of them, or at all;" and, second, that the testator was not at the time and long prior thereto of sound and disposing mind; and, third, that he was not acting of his own free will or volition, but was unduly influenced at the time by his wife, Annie M. Holloway, and Nita J. Wright.

Six questions were submitted to the jury with instructions to answer the first four in the affirmative and the fifth in the negative. The questions are as follows:

"(1) Did Andrew Holloway, by words or conduct, indicate to Mineita Binkley his desire that the latter sign his name to the will which has been admitted to probate? (2) Were Nita J. Wright and Mineita Binkley present at the time Andrew Holloway's name was subscribed to said will? (3) Did Andrew Holloway, by words or conduct, indicate to Nita J. Wright and Mineita Binkley that said instrument was his will, and that he wished them to sign the same as witnesses? (4) Did Nita J. Wright and Mineita Binkley sign said will in the presence of said Andrew Holloway, and in the presence of each other? (5) Was Andrew Holloway procured to make said will by undue influence of Annie M. Holloway and Nita J.

Wright or either of them? (6) Was Andrew Holloway, at the time said will was made, of sound mind (as the same is defined in the instructions of the court)?"

Upon the last question the jury also found in the affirmative, and judgment against the contestants and plaintiffs for costs of the suit was ordered to be entered. A motion for a new trial was denied.

[1] The contestants in taking this appeal specify eight grounds as error, which we will discuss in the order of their presentation, and in reviewing the evidence under each of the eight specifications we will interpret it in the light of the rule that all presumptions and intendments are in favor of the action of the court below.

1. The first assignment of error is that the purported will was not signed by the deceased and that the subscribing witnesses were not present at the time the deceased's name was subscribed to the will. The evidence on this question is uncontradicted. Testimony was given by Annie M. Holloway, the widow, by Mineita E. Binkley, the nurse, by Mrs. Nita J. Wright, the Christian Science practitioner, and by the attorney, Samuel S. Hinds.

It was testified by the nurse that on the morning of November 4 the deceased appeared to want some one, and his wife finally decided it was Mrs. Wright, who was called on the telephone, and came between 11 and 12 o'clock that morning; that Mrs. Wright told the nurse to get a piece of paper and take down what the deceased had to say; that the nurse got the paper and pencil and knelt beside the bed and asked him if he had something he wanted her to write down, and he said, "Yes"; that he said, "After the business is settled, all that is left is to go to my little Annie"; that after she wrote it down she read it to him and asked if that was all, and he answered "Yes"; that his hands were not capable of holding the pen, and she put the pencil in his hand and helped him write his name; that Samuel S. Hinds, the attorney, was called; he came shortly afterwards, and read the words she had written; that he asked about the reference to "my little Annie," and suggested that the word "little" be erased and the word "wife" inserted instead; that she did as he suggested, and later changed the word back to "little"; that Mr. Hinds took the "pencil will" and went to his office; that he returned; in the presence of the witness and Mrs. Wright he read it to deceased and asked him if that was what he wanted, and deceased answered, "Most assuredly"; and that "Mr. Hinds asked Mr. Holloway if he would like to sign this, and he said he would, and I remember we raised him up in the bed and he was held up with pillows; I don't know whether Mrs. Holloway held the pillow at his back, while I took the pen that Mr.

Hinds took from his pocket, his fountain pen, I think, and put it in Mr. Holloway's hand and helped him the same as I had at the former signing. I think I explained to Mr. Hinds that Mr. Holloway could not hold anything in his hands, and that I would have to help him. We put this paper on a book or magazine or something and put it in front of him, and I held his hand with the pen in it while the name was signed." She also testified that while the attorney read the will to deceased she stood on one side of him and Mrs. Wright on the other.

Mrs. Nita J. Wright testified that—

"When Mr. Hinds returned he came into the room and he again spoke to Mr. Holloway; Mr. Holloway recognized him, and he said, 'Now, Andy, I am going to read this paper to you. You understand that this is your will?' and he asked Miss Binkley and I to look over, each one of us, over each shoulder, and to read with him as he read this aloud. After he read this paper he said to Mr. Holloway, 'Now, Andy, you understand this is your last will, and is this what you want done?' Mr. Holloway said, 'Most assuredly, it is what I have always wanted,' or, 'What I have wanted.' * * * Mr. Hinds, after the reading of the paper at that time, asked Mr. Holloway again if he wished Miss Binkley and I to witness, which we did. We had to raise him slightly somewhat in the bed; then, instead of putting the pillow back, we raised him up, and then Miss Binkley, as I remember, Mr. Hinds offered him a pen or pencil, and Miss Binkley said, 'He can't hold it in his hand, I will have to guide his hand,' and then * * * she put her fingers around his hand and guided his hand while he wrote his name. To my recollection the name 'Andrew Holloway' as it appears in the instrument was written at that time. * * * Mr. Hinds asked if he wished Miss Binkley and I to witness, which we did; we went over to this same table and again signed. * * * We then signed it in the room."

Samuel S. Hinds testified that on November 3, 1917, he received a telephone call from Mrs. Holloway, and in response thereto went to her home; that he received another call the next day at about noon, and went to the house and into the room of deceased; that Mrs. Nita J. Wright and Miss Binkley and Mrs. Holloway were also present; that the deceased was sitting on the side of the bed; that Miss Binkley handed him "the so-called pencil will," and said, "Mr. Holloway has just dictated these words"; that he took the paper and asked who is "Little Annie" and Miss Binkley said "Mrs. Holloway"; that he advised the nurse to erase the word "little" and write in the word "wife," and immediately afterwards changed his mind and told her to rewrite the word "little"; that he wrote in the date, "November 4, 1917," at the top; and "I said 'Andy, this will that you have just made you understand what it is?' and he nodded his head, and I said 'This will leaves all your property to

your wife; is that what you want to do?' And he nodded his head and spoke the word 'Yes,' he answered in the affirmative, in either one of those ways—I don't know which it was—and I said, 'It will be necessary to have two witnesses on this will. Do you want Mrs. Wright and Miss Binkley to act as witnesses?' and he answered in the affirmative. I then wrote out the attestation clause, pen and ink, and Mrs. Wright and Miss Binkley signed as witnesses in the presence of Mr. Holloway and in the presence of each other"; that he took the paper and went to his office and wrote it out on the typewriter after asking an attorney whose offices adjoined his own the exact wording of the witness clause; that he returned to the Holloway residence immediately and greeted the deceased and said:

"'Now, Andy, I have rewritten this will.' I said, 'I am going to read it to you and see if it expresses your wishes'—words to that effect. I explained to him that I had named his wife as executrix of the will; I told him I was going to read it to him, and for him to listen; I asked Mrs. Wright and Miss Binkley to watch as I read; I then read it over slowly, clearly, looking up occasionally, and Mr. Holloway nodded his head several times. After doing that I asked Mr. Holloway if he wanted to sign the will, and he said, 'Yes.' To the best of my recollection, I took my fountain pen out of my pocket, held it toward him, his hand was lying on the covers; he moved it slightly; Miss Binkley then said 'Mr. Holloway is unable to use his hands; I will have to help him in signing.' That circumstance is very clearly impressed on my mind, because it was the first intimation I had that Mr. Holloway hadn't signed the other instrument. * * * Miss Binkley took the pen, placed it between his fingers—I think a book was brought or something to afford a flat writing surface—and the name of Andrew Holloway was written. After that had been done—I neglected to mention one thing, after reading this over I said, 'Now Andy, you understand this is—you understand what this is, this is a will in which you leave all your property to your wife?' and he spoke these words, 'Most assuredly I do; that is what I have always wanted to do.' He spoke them slowly, but distinctly. I didn't have to ask him to repeat them, they were unmistakable. After the signature had been affixed, I said to him, 'It will be necessary to have witnesses to this will.' I said, 'Is it your desire that Mrs. Wright and Miss Binkley should sign as witnesses?' and he answered in the affirmative. * * * The witnesses, Mrs. Wright and Miss Binkley, then signed in the presence of Mr. Holloway, * * * and in the presence of each other."

This evidence is corroborated even as to minor details by the widow of deceased and the Christian Science practitioner.

The contestants argue that "at its best the so-called signature was an attempt to have the writing appear to be the signature of the deceased. * * * There is no evidence that he requested any one to sign the purported will for him,"

Section 1276, Civil Code, subd. 1, concerning the execution of a will, declares that—

"It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto."

Subdivision 2 is as follows:

"The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority."

[2] It is clearly shown by the testimony above recited that the will was properly subscribed in the presence of the attesting witnesses and at the request of the testator. The fact that another person did the writing or guided the testator's hand because he was physically weak comes within the provisions of section 1276, Civil Code, and raises no presumption against the due execution of the will. *Estate of Guilfoyle*, 96 Cal. 598, 31 P. 553, 22 L. R. A. 370. In the case of *Estate of Latour*, 140 Cal. 414, 73 P. 1070, 74 P. 441, the testator was so enfeebled by sickness at the time of the execution of the will that he was unable to communicate except by signs in answer to questions, and the court held that this fact was not sufficient to shift to the proponent of the will the burden of proof as to the mental capacity of the testator. The question is not whether the testator himself, or another person at his request, signed the will at the end thereof, but whether the testator has sufficient understanding to direct the disposition of his property. This question, we assume, has particular reference to the physical capacity of the testator, and under another head we will discuss his mental capacity.

[3] Evidence was introduced bearing on all the elements of a due execution of the will, and was sufficient to squarely present that issue of fact to the jury, and, the contestants offering no affirmative evidence, there was no conflict; and, the evidence being sufficient as matter of law, it cannot be said the court erred in directing the jury to find for the proponent on the issue we are considering.

[4] 2. The second assignment of error is that there is not sufficient evidence that the subscribing witnesses signed the purported will in the presence of the deceased. Contestants did not offer any testimony that at the time the deceased's name was subscribed to the will the subscribing witnesses were not present. As shown under the first assignment of error, the evidence was uncontradicted that both subscribing witnesses were present at the time the testator's name was subscribed to the will; that his conduct indicated he desired them to witness the execution; and that they then officiated accordingly. The question whether the testator at the time of the execution of the

will had testamentary capacity, whether his physical condition so affected his mind that he was not aware of anything that passed between himself, the attorney and the witnesses, and did not comprehend what was being done, will be discussed under the fourth assignment of error.

From the authorities cited under the first assignment of error, and others, the mere circumstance that the testator himself did not formulate the words of request does not tend to prove that he was so lacking in testamentary capacity that he could not execute a will. It was held in *Estate of Mullin*, 110 Cal. 252, 42 P. 645, that, if the attorney asks a question as to whether the testator wishes certain persons, in whose presence he has signed his will, to witness the execution, and the testator in response thereto answers, "Yes," this is a sufficient request for such persons to witness the will. See, also, *Estate of Johnson*, 152 Cal. 778, 93 P. 1015.

3. This assignment of error is that, even if it be concluded that the will admitted to probate was duly executed, nevertheless the deceased was procured to make the will by the undue influence of his wife, the nurse, the Christian Scientist, and the attorney, Samuel S. Hinds.

The contestants urge that the evidence shows that undue influence was brought to bear upon the testator on November 4, 1917, at the time the will was executed; that in February, 1913, the deceased made a will without suggestion from any one, and in June, 1916, after his attitude changed toward his brother Arthur, he went to the office of his attorney, Victor L. Ward, and told him he wanted to change his will; that in both the prior wills he did not name his wife as executrix, but named his attorney, Victor L. Ward; that the will of 1916 is a "formidable document," containing many clauses and worded in a formal and business-like manner as contrasted with the purported will admitted to probate; that he at no time mentioned the other attorney, Samuel S. Hinds; that in 1917 he told his sister, Mrs. Ethel Parker, that he had remembered her in his will; that she had befriended him when he arrived here from England; that he had an aged mother and a sister who cared for her in England for whom he had made provision in the prior wills; that the wife, Nita J. Wright, and Samuel S. Hinds were affiliated with the Christian Science Church, "and no doubt each shared in the teaching of the church as described by Mrs. Wright in her cross-examination, and therefore could not admit that the deceased was unconscious from the standpoint of their faith"; that "it can be fairly inferred from the evidence that the defendant and Mrs. Wright planned this will some time before the deceased's last illness; that the wife called Samuel S. Hinds before the will was

made and talked with him, and that he did not see the deceased before the will was made."

It is true that the deceased had previously made a will in which the contestants were mentioned, but the evidence is ample to sustain an inference that between the time that will was made and his last illness he had suffered financial reverses and was planning some change in the disposition of his estate.

William C. Baker, who knew the deceased for a number of years, testified that he met him at a club to which they both belonged; that he had a brief conversation with him during the month of August, 1917, two or three months before he died; that he spoke of his illness; and that he worried about his contracts and losses, and then told him he had made enough money to take care of his wife, "and that is sufficient. * * * It is a great comfort to me."

Miss Floy Burdick, the stenographer and bookkeeper in the office of deceased, testified that he had suffered heavy losses and worried a great deal; that she talked to him in October or November, 1916, when he said he must change his will and have everything go to his wife; that about six weeks before his death he told her if he should die suddenly she was to take certain books to the office of Victor L. Ward, who had drawn his previous wills, and say to him: "I know that these papers are in your hands because I want Annie well provided for."

Mrs. Rose Bryant, whose husband was associated with deceased in business, testified that deceased, who was worried about his business, asked her how her husband, before his death, had arranged his affairs. She told him that everything was left in her name, and the deceased "expressed himself as desiring to do something of that kind. * * * He repeated it a good many times. Just a few days after that he went back to Pasadena just before his death."

A. E. Austin, a general contractor, who did business with deceased, testified that deceased, in his presence, asked Mrs. Rose Bryant how Mr. Bryant had left his affairs, and remarked that he wished he could do the same.

This evidence is sufficient, as we have indicated, to support an inference that the deceased had formed an intention to make a change in the disposition of his estate.

With respect to the contention that the change of attorneys tended to support the claim of undue influence, Victor L. Ward, who was his general attorney, testified that he had drawn a will for him on June 2, 1916; that he did not know that Mrs. Holloway had tried to get in touch with him during deceased's last illness; that he had a telephone at his office in Pasadena and one at his residence; that the only time he was away was when he went to Bakersfield and returned November 14, after having been

away a little over 24 hours; that he was in and about his office during office hours on business days from October 20 to November 13, except that he may have been in Los Angeles at court.

The wife of the deceased testified that before Samuel S. Hinds came she "several times endeavored to communicate with Mr. Ward. * * * I saw Mr. Ward on Monday following October 25. * * * I told Mr. Ward I had been trying to get him for some time and was unable, and he said, 'I just returned from Bakersfield, and I heard Mr. Holloway was ill and came out.' I said I had tried several times to get him, and he said, 'I can't be in a dozen places at once.'"

T. H. Parker, the husband of Ellen Parker, a sister of deceased, testified that after the death of deceased he went to visit Mrs. Holloway and asked her why Victor L. Ward as attorney did not draw up the will, and Mrs. Holloway said she tried to get him but could not, so she got Samuel S. Hinds.

It also appeared that Samuel S. Hinds was a friend of the deceased and belonged to the same club and church. Mrs. Holloway further testified that she "called him because I felt I would like to have some one to speak to that I could trust"; that Mrs. Wright did not suggest that she call him, but that they went over the list of attorneys, and finally decided upon him, and that at the meeting with him prior to November 4 she did not discuss the subject of the will of deceased.

Concerning the question of undue influence claimed to have been exercised by the Christian Science practitioner the testimony is that she had known deceased about four years and treated both him and his wife; also that she had treated him at his request during the last six months of his life; that on November 4 there had been some conversation with the nurse about the deceased wanting to see a Mr. "Rice," but as the sequel showed he meant Mrs. "Wright," who was called by Mrs. Holloway and asked to come and she came in half an hour, the deceased greeting her; she sat by the side of the bed and finally asked him what was troubling him; that he answered it was not his business or the work in Ventura, but that he was worrying about "little Annie," and that he wanted to make a will—Mrs. Wright called the nurse, the pencil will above mentioned was written; that she advised Mrs. Holloway to call a lawyer, and Samuel S. Hinds was summoned; he came shortly afterwards. Mrs. Holloway testified that she never had any conversation with Mrs. Wright in reference to enlisting the services of Samuel S. Hinds to make a will, and that no word was spoken to Mrs. Wright either before she arrived or before the nurse spoke about the deceased wanting to see some one about a will.

[5] There is no evidence that the beneficiary, the widow of deceased, was active in

any way in the preparation of the will. Mrs. Wright was the first to ascertain that the deceased desired to make his will. She thereupon advised the widow to call an attorney, and the nurse got paper and wrote the pencil will. It is only when the beneficiary has been active in the preparation or participated in the execution of a will that a presumption of undue influence arises. The presumption of such influence is not raised by proof of interest and opportunity or a confidential relation alone. *Estate of Relph*, 192 Cal. 451, 221 P. 361.

There is no evidence to show that the nurse influenced the deceased in the making of the will. Miss Binkley arrived on October 30, and prior to that time had never seen deceased, nor did she have any acquaintance with Mrs. Holloway before the last illness of deceased. The only attempt made by contestants to impeach the testimony of proponent's witnesses is found in the testimony of N. P. Moerdyke that Miss Binkley had told him after the death of deceased he was in a state of torpor prior to November 4; that he tried to make her understand he wanted to make a will; that she was alone with him when he dictated the notes from which Samuel S. Hinds drafted the will and that but one document was signed on that date. Miss Binkley denied this conversation.

There is nothing in the record to show undue influence on the part of any of the persons named by the contestants as would destroy the validity of the will.

[6] The kind of undue influence that will invalidate a will must be such as in effect destroyed the testator's free agency and overpowered his volition at the time of the making of the will. *Estate of Motz*, 136 Cal. 558, 69 P. 294; *Estate of De Laveaga*, 165 Cal. 607, 133 P. 307; *Estate of Ingram*, 1 Cof. Prob. Dec. 222.

General influence not brought to bear directly upon the testamentary act, however strong or controlling, is not undue influence such as will afford ground for the setting aside of a will of a person of sound mind. There must be evidence, either direct or circumstantial, that pressure was brought to bear directly upon the testamentary act. *Estate of McDevitt*, 95 Cal. 17, 30 P. 101.

[7] In order to invalidate a will on the ground of undue influence, mere evidence that the persons alleged to have exercised such influence had the opportunity to do so and might have done so if they had been so disposed and had possessed such influence, is insufficient. "The undue influence must actually exist, it must be actually exerted, and it must be so exerted as to affect the terms of the will." *Estate of Purcell*, 164 Cal. 300, 128 P. 932.

In *Estate of Bryson*, 191 Cal. 521, at p. 541, 217 P. 525, 533, it was said:

"In order to establish that a will has been executed under undue influence, it is necessary

to show, not only that such influence has been exercised, but also that it has produced an effect upon the mind of the testator by which the will which he executes is not the expression of his own desires.' *Estate of Calkins*, 112 Cal. 296 (44 P. 577). 'The presumption of undue influence is not raised by proof of interest and opportunity alone. In order to set aside a will for undue influence, there must be substantial proof of a pressure which overpowered the volition of the testator at the time the will was made.' *Estate of Langford*, 108 Cal. 608 (41 P. 701). It may be stated that so far as opportunity is concerned, any one of the heirs of the testatrix had equal opportunity to visit with, consult, and advise with testatrix. We entertain no doubt that Isaac H. Bryson advised with his mother fully on both business and personal matters and on subjects affecting the present and future welfare of the family. This was not only his privilege but his duty. Unpleasant as well as pleasant matters were no doubt the subject of consideration. Proof to establish undue influence must be had of a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made. *Estate of Carithers*, 156 Cal. 422 (105 P. 127). It consists in the exercise of acts or conduct by which the mind of the testator is subjugated to the will of the person operating upon it, some means taken or employed which have the effect of overcoming the free agency of the testator and constraining him to make a disposition of his property contrary to and different from what he would have done had he been permitted to follow his own inclination or judgment. *Estate of Kilborn*, 162 Cal. 11 (120 P. 762)."

[8-12] We do not think that the evidence we have summarized is sufficient to justify an inference of undue influence which would invalidate the will. The fact that a new attorney was called in to prepare the will, in the absence of other circumstances, would not sustain an inference of undue influence; the presumption that the widow, who occupied a confidential relation with deceased, exercised undue influence upon him to induce a will in her favor does not arise because she is not shown to have been active in the actual preparation of the will other than by summoning Mrs. Wright and Samuel S. Hinds; the evidence further shows that the deceased's sister and her daughters were at his home during his last illness and had an equal opportunity to visit with, consult and advise with, the testator; the two subscribing witnesses, the nurse and the Christian Science practitioner, are not beneficiaries under the will, and no reason is suggested as to why they would aid the wife in obtaining a will in her favor; the nurse was a stranger to both the deceased and his wife, and the practitioner, while an old acquaintance of the family and a member of the same church, was engaged in professional services for which she received compensation; the testimony that deceased had suffered financial reverses and upon several occasions indicated his desire to make a will in

favor of his wife without any other showing precludes an inference that the testamentary act did not comport with his intentions and the exercise of his free will. By this we do not mean that his declarations prior to making the will are evidence of his testamentary act, but such declarations do tend to show that the will which was admitted to probate coincided with his declared intentions concerning his wife. The deceased and his wife were shown to have been unusually attentive to and considerate of each other, and, while it is not shown that deceased was on unfriendly terms with his sisters, the contestants, there is evidence that the deceased, in discussing with Mrs. Edna Simons the circumstance that he did not want it known he was going to build a home, said: "I don't want my sister to know * * * because she is jealous of what Annie has." In view of his financial losses it was natural that he should have desired to make provision for his wife in preference to his relatives. The circumstances that the deceased had gone to the office of his attorney in order to make his will in 1916, that the document then drawn up provided for the contestants as well as his wife, and that the wife was not named executrix therein, do not, in face of all the evidence, tend to support an inference that the dissimilarity in the two wills rendered the will admitted to probate invalid. With reference to the point that the deceased went to his office to execute his former will, it is sufficient to suggest that when the last will was executed he was unable to leave his home, for at that time he was very ill and was under the care of physicians and a nurse; every effort was made to keep business affairs from engaging his attention because of the effect of worry upon his physical condition. We perceive no warrant for the inference sought be drawn by contestants from the circumstance that the last will failed to reflect the deceased's habitual method of formally preparing a document as shown, for instance, by his former will. The intent of the testator being sufficiently indicated by his last will, and there being no evidence of undue influence, the form it assumed is without significance. We therefore conclude that the will admitted to probate represented the testamentary act of the deceased.

The jury, therefore, was properly instructed to answer the fifth question in the negative. Even if the jury believed all the evidence of the witnesses for the contestants, they must have found for the proponent on this question, for it was insufficient as matter of law to establish undue influence.

4. This specification of error is that the deceased was not of sound and disposing mind at the time the will was executed.

It appears that Andrew Holloway was engaged in the street contracting business,

and for a year prior to his death he spent one-third of his time at Oxnard, where he was engaged on a road contract. During the summer of 1917 he was ill much of the time, and for ten days prior to October 24 he and his wife had been at Oxnard; he was ill about half the time. He suffered from stomach trouble and hiccoughs, and the doctors testified that the disease was cirrhosis of the liver, caused by overindulgence in alcoholic drink. On October 24, 1917, accompanied by his wife and Miss Floy Burdick, his secretary, the deceased drove from Oxnard to Pasadena, where he had his home. The automobile had a leaking radiator, and a part of the distance he drove in the dark, as the automobile was not equipped with lights. Before getting out of the automobile upon reaching Pasadena the deceased was exhausted and fatigued, and he cried. On the next day he had recovered sufficiently to go to town about 4 or 5 in the afternoon, and on the following day he stayed home all day on account of illness. This condition continued for several days, and finally, on October 29, a doctor was called, who diagnosed the case as acute indigestion. A prescription was given, and the deceased "went into a drowsy stupor" after an opiate was given him. On October 30 another doctor was called, and a nurse came to assist in caring for the deceased. On November 1 he signed a check for the payroll in his business, and on the next day his wife and Miss Floy Burdick went to Oxnard to pay the help. Various persons came in to see him, and several doctors were in attendance. The first physician called was Dr. Holcomb, who came before daylight on October 29 and gave the patient opiates. On October 29 Dr. E. S. Rosenberger, a friend of the family and a druggist, brought some medicine; Dr. Holcomb called again. Something was said about calling in another doctor and a nurse, and on October 30 Dr. G. E. Campbell came, and the nurse, Miss Binkley, appeared the same evening. Dr. Campbell called at least once a day and sometimes twice a day, and the nurse remained until the death of deceased. The deceased's wife testified that on October 31 she thought he was still under the influence of the opiate that Dr. Holcomb gave him; that he was not unconscious on the day Dr. Campbell came; that he spoke to the nurse; that he was so ill he was disinclined to talk; that about two weeks later a consultation was held, and Dr. A. J. Crance was called in; that the patient drank water and liquids out of a glass tube because it was hard work for those present to lift him up every time he wanted a drink; that he never lost the use of his hands entirely, and could raise them; that he knew what was going on, although he did not give any sign; that there never was a time when he could not speak; that he was so

ill he did not want to; that she did not notice that he had any difficulty in articulating because it was habitual for him to hesitate before speaking; that he only asked for what he needed; that he kept his eyes closed because of the strong light; that he sang hymns; that the phonograph was brought to his room, and that he occasionally sang hymns up to within a week before his death; that on November 3 he talked about the work in Ventura and asked the nurse when she thought he would be able to attend to things.

Mrs. Nita J. Wright testified that on the day the will was signed the deceased was rational; that when the nurse gave him a drink he thanked her, and that "it was a normal attitude"; that after the will was made she called again; he indicated some flowers that Mr. Hinds had sent; he said he had not seen anything more beautiful, and remarked that Mr. Hinds had sent them; that he was always of slow speech; that he was a reticent man; that physically he was abnormal, but mentally he was normal.

Mineita E. Binkley, the nurse who was called during the last illness of deceased, testified that he suffered from pain; that she had no special conversation with him, but asked him to take his medicine, and he complied; that he asked for a drink of water; that there were times when he was apparently sleeping, and then there were times each day when he was quite bright; the light troubled his eyes, and he kept them closed most of the time; that he asked her to telephone for some one on November 2, but she could not find the right one; that he called Margery Lisco by name and talked naturally to her and her mother, Mary Lisco; that he would ask her if he was getting better; that upon one occasion he said he did not want to see his brother, George Holloway; that he spoke to Mr. Hinds, and said "Hello, Sam!" That when Mr. Simons came to see him an evening paper was in the room, and the deceased said "Hello, Walter! What is the latest war news?"

H. F. Messer, a druggist and brother-in-law of deceased, testified that the deceased and his wife were very affectionate and pleasant with each other; that he called to see deceased and tried to cheer him up; that he would answer "No" by shaking his head; that he knew him and knew what he was doing, and when he did converse he was rational; that he did not talk much at any time—"He was always a quiet man and not given much to talk."

Mrs. H. F. Messer, the wife of the above witness, corroborated his testimony about the conversations with deceased; that he sang with his wife, and appeared to enjoy the phonograph music when it was played, and he accompanied the music; that he did not talk very much at any time, either when he was well or sick.

Walter Simons, who was intimately connected with deceased for a great number of years, testified that when he visited and greeted him he roused up and said, "Hello, boy!" and that he appeared to be in the exhausted condition that sick people usually are; that he saw deceased on the evening Dr. Campbell and Dr. Crance held the consultation; that he was propped up in bed, and that his eyes were fixed partly open; that he thought he heard the death rattle in his throat, and told Mrs. Holloway that he was dying.

Mrs. Mary Lisco testified that when she occasionally saw him he was very ill and nauseated, and suffered intensely; that several days after the nurse came she visited him, and when Mrs. Holloway asked deceased if he knew Mrs. Lisco he said, "Most assuredly I do"; that the deceased did not speak to any one, the nurse, the doctors, or to her, and that she thought he was resting because he was very ill; and that she did not try to talk to him, thinking it best not to talk in a sick room; and that deceased repeated the Ninety-First Psalm as his wife read it.

Samuel S. Hinds testified that at the time the will was made and executed he thought the deceased was a very sick man and probably very near the end; that he did not know from what disease he was suffering, and that he acted upon the assumption that the deceased was rational at all times. He stated:

"I did not ask him whether he remembered what property he owned. I made no inquiry as to whether he remembered his relatives, or friends, or whether he had any children or whether he had been married before. I made no investigation at all with express purpose to ascertain whether or not his illness had progressed to that point where it affected his mind. * * * I don't think his mind at that time was in such a condition to have comprehended all the intricacies of a contract for street improvements understandingly. The will, it seemed to me, was a very simple proposition, and I think he was able to comprehend that. There were no complications."

He also testified that on November 13 he prepared a power of attorney in favor of his wife and explained to the deceased the necessity of it; asked him if it was his desire to sign it, and he said, "Yes"; that Miss Binkley again guided his hand in signing it; that the deceased at the time repeatedly attempted to tell him about something, but was interrupted by a fit of hiccoughing, and that he told him he must keep quiet.

Contestants called the following witnesses:

Mrs. Ellen Parker, a sister of deceased, testified that on November 6, when she came to see deceased, Mrs. Holloway told her not to try to talk to him; that he would not know her; that he drank out of a straw and made bubbles in the glass; that his eyes were partly opened; that he did not answer and took no notice of her; that the nurse

said his system was poisoned and it had affected his brain; that she went again on November 14 and the nurse was feeding him with a spoon; that he took no notice of her, and repeated just what she said to him; that on November 17 she came again, but he did not speak to her, and that Mrs. Holloway told her he was sleeping; that she saw him at various times up to his death and he did not recognize her; that he had no use of his arms or limbs and only moved one leg.

Ethel Parker and Christobel Parker, two nieces of the deceased, both testified that when they saw him they could not tell whether he was sleeping or resting.

Dr. E. S. Rosenberger, an intimate friend of the deceased, testified that he was ill about a year before he died, and that during the last two months of his life he was quite sick; that on October 29, when he saw him, he did not recognize him; that he was in a stupor, and, although he tried, he did not have any conversation with him; that on November 1, when William Rogers and he went to the room of deceased to get the check signed, the deceased was not of sound mind, could not take care of his business, was "practically unconscious," and could not write, and gave no sign that he understood the purpose of the check when it was explained to him.

William Rogers, an intimate friend of the deceased for 20 years, testified that Mrs. Holloway told him the deceased was ill; that he went to see him, and, upon greeting him, the deceased said he was a very sick man; that on November 1, when the check for the payroll was signed, the deceased was not in such a mental condition that he could take care of himself or of his property; "that he was in a sleepy condition and his eyes were closed, and he did not appear to be—he appeared to be asleep, showed no signs of intelligence, and I should say that he was not conscious of what was going on."

George Holloway, a senior brother, testified that he was always on friendly terms with deceased; that deceased drank alcoholic liquor to excess, and was very ill the last year of his life; that on November 2 he went to see deceased and was not allowed to see him because deceased would not recognize him; that he returned on the 6th or 7th of November and that the deceased did not recognize him; that he mumbled something and his eyes were closed; that he moved his head a little when Mrs. Holloway put her hands on his head; that he saw him again on November 19, and deceased did not at that time know anything, he was breathing hard and his eyes, partly open, were set on the ceiling; that he was not of sound mind because he did not talk.

Dr. H. C. Brainard, who qualified as an expert mental and nervous disease specialist, in an answer to a hypothetical question

relating to the life history of deceased and the facts concerning his last illness as testified to by the witnesses, declared that in his opinion the deceased was not of sound mind during the period from November 1 to the date of his death, November 20; that "it was evidently a case of cirrhosis, a history of chronic liver disease in its terminal stage, in which stupor is a very common and usual accompaniment, and that stupor apparently began the 1st of November, or that by a few days, and continued to his death."

Dr. William M. Lewis, another expert, gave a similar opinion as to deceased's mental condition.

[13, 14] When all the testimony bearing on the issue of mental capacity is considered and weighed together it cannot be held it is not sufficient as matter of law to support a finding either way, and hence the verdict of the jury that decedent at the time of the execution of the will admitted to probate had mental capacity to make it cannot be disturbed. There is no pretense that the testator was delirious, irrational, or insane or under any delusions, but merely that he was in such a state of bodily weakness as to be peculiarly susceptible to suggestion, and that the nature of the disease from which he was suffering affected his mind to such a degree that he was incapable of an intelligent disposition of his property. It is not claimed that he was subject to mental aberrations. More particularly, the contestants contend that "the slowness of speech was due to the condition of his brain," but all the testimony shows that the deceased was a reticent man and habitually very quiet. It is true the expert physicians who answered hypothetical questions said the fact that deceased repeated the Lord's Prayer and sang songs and hymns was mere mechanical repetition, and the contestants contend from this that the deceased's brain was affected by the poison in his system. However, the attorney, Samuel S. Hinds, testified he thought the deceased was able to comprehend the will at the time it was executed, but that he did not think he could have comprehended all the intricacies of a contract for street improvement. The law does not require the same degree of capacity as is required to execute any other legal instrument. "A testator may have capacity to make a valid will, although not able to make contracts or manage his estate. He may not have sufficient mind and vigor of intellect to transact business generally, or to make and digest all the parts of a contract and yet be competent to direct the distribution of his property by will." Alexander, Commentaries on Wills, vol. 1, p. 444.

[15] There is no claim that the testimony of the various witnesses, subscribing, lay, or expert, was improperly admitted, or that it is not sufficient as matter of law to sustain

the verdict on that issue. It is contended, however, that the opinion of lay witnesses as to the condition of mind of the deceased is a mere conclusion and not supported by their statements as to his condition. *Estate of Russell*, 189 Cal. 759, 210 P. 249. The testimony of the subscribing witnesses is unequivocal. "The law presumes that a subscribing witness had his attention directed to and noted the mental capacity of the testator, therefore his opinion should be entitled to more weight than that of one who was merely passive." *Alexander, Id.*, p. 515. Of course, the weight of such testimony is for the jury to determine.

It was said in *Estate of Casarotti*, 184 Cal. 73, 192 P. 1085:

"It must be borne in mind that it is not every weakness and impairment of the faculties of the testator that will invalidate a will. Even where a testator is feeble in health, suffering under disease and aged and infirm, yet if he was of sufficiently sound mind to be capable of understanding the nature and situation of his property, and of disposing thereof intelligently, without any delusions affecting his action, he had sufficient capacity to make a will. * * * [Citing authorities.] It was held that the fact of the testator being unable to speak articulately and was compelled to communicate by signs did not raise a legal presumption of incompetency to make a will. *Estate of Latour*, 140 Cal. 415 (73 P. 1070, 74 P. 441)."

Here the issue of undue influence having been eliminated, there is no evidence of influence or suggestion of any kind tending to direct the deceased's testamentary acts. The evidence is wholly to the effect that he personally and voluntarily suggested the making of his will and the beneficiary thereunder, and his conduct previous to his last illness tends to show that the will as executed and admitted to probate accorded with his desires. Under the circumstances, for instance, that he had suffered serious financial reverses, that his sister was jealous of what his wife had, and that he had a pronounced feeling of affection for his wife, the failure to provide for his brothers and sisters does not seem unusual. In the *Estate of Casarotti*, supra, the disposition was made to strangers by blood with whom the testator was living, to the exclusion of several brothers and sisters, and it was held that it was not an unnatural disposition to make.

[16] In our opinion the state of the evidence does not tend to show incompetency to make a will either because of his physical condition or mental irresponsibility.

[17] 5. From the treatment of the foregoing points it is abundantly clear that the court did not err in instructing the jury to answer the first four questions in the affirmative and the fifth in the negative. In fact, it would have been error to refuse to direct a verdict, as there was no substantial evi-

dence whatsoever tending to support any of the contentions made by the contestants.

The contestants contend, however, that the direction of the court precluded the jury from considering the following:

That the testimony of the handwriting expert shows that the signature of "Andrew Holloway" and the word "little" were written by the same pencil and different from the balance of the writing; that the paper upon which the will was written by the nurse was not a clean sheet of paper, and shows erasures and unrelated commas and periods; that the signature of deceased on the will and the power of attorney were not made with the same ink, and shows that the letter "d" in the Christian name "Andrew" was placed on the will after November 13, 1917; that the signatures of the subscribing witnesses were "doctored"; all of which should have been considered by the jury in determining whether the documents were authentic. That there is testimony corroborating that of Mrs. Ellen Parker to the effect that she was told the deceased made his will on November 16; that on November 18 the wife of deceased left about 9 o'clock without saying anything, returned about 1 in the afternoon with a legal document extending out of the ends of her pocketbook, and that the jury should have been allowed to consider whether or not the purported will was not fixed up on that day.

There is other testimony of a similar nature that the contestants contend was excluded from the consideration of the jury by the directed verdict; and that the question of whether or not the deceased was of sound and disposing mind could not have been considered by the jury without at the same time considering whether or not he declared the will to be his, or that it was signed by him, or at his request, or that said will was signed in his presence by two subscribing witnesses. "All these circumstances were necessary to determine whether or not he was of sound mind."

But, as we have shown, the evidence addressed to the execution of the will would not support findings that it was not duly executed, and that the court therefore properly directed the jury to find for proponent on those five issues. In respect to the claim "that all these circumstances were necessary to determine whether or not he was of sound mind," it is sufficient to say that there is no indication in the record that such evidence was not considered and weighed in determining the sixth issue—the mental unsoundness of deceased.

[18] Under this specification of error it is claimed that the will duly executed by deceased on June 2, 1916, has not been revoked. The disposition of the questions as to the due execution of the will, the lack of undue influence, and the mental soundness of the testator render it unnecessary to discuss this

point, since section 1296 of the Civil Code provides that a prior will is revoked by a subsequent will if such subsequent will contains provisions wholly inconsistent with the terms of the former will, and, furthermore, the will executed and admitted to probate contains a provision expressly revoking all former wills.

7. By this specification of error the contestants contend that—

"This was the third trial in the superior court of this action. The jury, in the first trial, decided the man was of unsound mind; the second trial the jury disagreed, and we believe the jury rendered their verdict in this trial because of an error in instructing them, as before discussed. The jury rendered their verdict under the influence of passion and prejudice, and the verdict is contrary to the evidence, and contrary to law."

There was no error in refusing to grant a new trial for the same reason that it was not error to direct the verdict; and, further, the record does not in any way show that the verdict rendered by the jury is the result of passion and prejudice.

[19-21] 8. The final point is that the court erred in instructing the jury that the offering and admitting to probate of the purported will established prima facie that the document was valid. It is contended that the instruction erroneously states that the admission of the purported will to probate created a presumption in favor of the validity of the said will, thus erroneously placing upon the contestants a greater burden of proof to overcome the presumption that the deceased was competent to make a will.

The instruction follows:

"Prior to the commencement of this action defendant herein had offered for probate as the last will of Andrew Holloway the document as to which the present controversy arises. This document was admitted to probate at that time. This prima facie established such document as the will of Andrew Holloway and the competency of Andrew Holloway to make a will. On this contest the law presumes that Andrew Holloway was competent to make said will, and the burden of proving that at the time of the execution of said will Andrew Holloway was incompetent to execute a will, is upon the plaintiffs and unless plaintiffs sustain such burden by proving by a preponderance of evidence that said Andrew Holloway was not at the very time said will was made competent to make the same your verdict must be for the widow, Annie Holloway."

It is said in *Estate of Relph*, 192 Cal. 451, 459, 221 P. 361, 364:

"The contest of a will, on the other hand, while a proceeding in rem, is at the same time an adversary proceeding, the parties to which consist, on the one hand, of those persons interested in the estate who have appeared and filed written grounds of opposition to the probate of the will (commonly referred to as the contest), and, on the other hand, those persons

interested in the will who have appeared and filed written answer thereto. The only issues of fact involved therein are those which are framed by the allegations of the contest and the denials of the answer. * * * As to those issues the burden of proof rests upon the contestants * * * and the proponents are not called upon to submit any evidence until the contestants shall have produced some evidence legally sufficient to support their allegations upon one or more of those issues. If the contestants fail to produce such evidence, the decision of the contest must be against them, even though the proponents produce no evidence therein whatsoever."

We do not think the instruction can be understood to declare that in a will contest the mere fact that the will had been previously admitted to probate would increase the burden of proof of the contestants. Reading the third sentence separately, it states the rule correctly as applied to the admission of a will to probate where there is no contest. "Under this rule, as long as the probate stands the will must be recognized and admitted in all courts to be valid, the unrevoked decree * * * standing as absolute and conclusive proof of its genuineness." *Tracy v. Muir*, 151 Cal. 363, 370, 90 P. 832, 834 (121 Am. St. Rep. 117). The conclusion that the third sentence is entirely independent of and not to be read into the succeeding or fourth sentence finds support in sentences 1 and 2, for they refer to a point of time anterior to the contest. "On this contest" is the opening phrase in sentence 4. This sentence is confined to a contest of a will, and is substantially correct, for it states the burden of proof is on the contestants, and, of course, this is so whether the law "presumes" the testator was competent to make a will as suggested by the instruction, or because of the rule that the party having the affirmative of an issue must prove it. Section 1981, Code Civ. Proc. The instruction does not purport to state any change in the rule of the burden of proof merely because the will had been admitted to probate.

The contestants cite *Estate of Nelson*, 191 Cal. 280, 286, 216 P. 368, in support of the asserted error in the instruction. In that case the olographic will was admitted to probate, and, on the ground the will was not entirely in the handwriting of the testator, it was sought to revoke the probate thereof. It was claimed that the dispositive clause of the will was written by the proponent, who was named the sole beneficiary. Judgment went for the contestant. The proponent appealed and based her claim for reversal upon certain asserted errors in the giving and refusing of instructions. She contended the court erred in refusing an instruction to the effect that under the presumption of innocence it is presumed the will was not written by her or by any one

other than the testator. The court in disposing of the point stated that another instruction, given at the request of the proponent, was more favorable to her than the one refused; the court holding that the instruction given was erroneous in declaring that after the purported will was admitted to probate all presumptions are in favor of its validity. Assuming that this conclusion was necessary to the decision, we fail to perceive how, as contestants contend, it conflicts with the instruction given herein. The court merely states that "on this contest the law presumes that Andrew Holloway was competent to make said will. * * *". This does no more than state the disputable presumption of law. The language does not purport to imply that this presumption of competency arose from the fact of the admission of the will to probate, but rather to the disputable presumption referred to. Furthermore, the language above quoted is restricted to the competency of the testator, and does not involve the validity or invalidity of the will on the ground of its due execution; in no sense is it susceptible of the interpretation urged by contestants that the admission of a will to probate creates a presumption in favor of its validity.

The judgment is affirmed.

We concur: WASTE, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; LENNON, J. MYERS, C. J., does not participate in the foregoing decision.

196 Cal. 100

CHAMBERS, Controller, v. LARRONDE et al.
(L. A. 7965.)

(Supreme Court of California. April 28, 1925.)

1. Taxation ⚡860—Phrase, "in contemplation of death," as used in Inheritance Tax Acts 1905 and 1911, held intended to cover identical cases.

Inheritance Tax Act 1911, § 27, defining the words, "in contemplation of death," is equivalent in meaning with that phrase under St. 1905, p. 341, and served the purpose of elucidating, without changing the law, by giving fuller expression to legislative intent and meaning, and such acts, in so far as the phrase, "in contemplation of death," is concerned, were intended by the Legislature to cover identical cases.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contemplation of Death.]

2. Taxation ⚡879(1)—"In contemplation of death" does not mean in fear of immediate death from existing malady.

For a transfer to be "in contemplation of death," it need not be in fear of immediate

death from an existing malady, as in gift causa mortis, but, on the contrary, a person of comparative youth, enjoying perfect health and vigor, may nevertheless make a transfer of his property in contemplation of death within the meaning of Inheritance Tax Act 1905, which meaning was not changed by St. 1911, p. 713.

3. Taxation ⚡879(1)—Words, "in contemplation of death," held to include all transfers in lieu of testamentary disposition.

The words, "in contemplation of death," as used in Inheritance Tax Act 1905, cover all transfers of property, whether gifts causa mortis or inter vivos, from one person to another in anticipation of death or in lieu of testamentary disposition.

4. Taxation ⚡879(1)—Evidence held to sustain finding that transfers were made "in contemplation of death" and in lieu of testamentary disposition.

Evidence that, when mother transferred property to children, she destroyed her will, that she retained no property and made no provisions for her own support, and that she distributed her property in identical manner as had been provided in her will, held to support finding that transfers were made "in contemplation of death" and in lieu of testamentary disposition, within meaning of Inheritance Tax Act 1905.

In Bank.

Appeal from Superior Court, Los Angeles County; Victor R. McClucas, Judge.

Suit by John S. Chambers (Ray L. Riley), as Controller of the State, against John M. Larronde and others, to determine inheritance tax on certain transfers. From a judgment sustaining the report of tax appraisers, defendants appeal. Affirmed.

Ward Chapman and L. M. Chapman, both of Los Angeles, for appellants.

Erwin P. Werner, of Los Angeles, Adrian C. Stanton, of Sacramento, Ida V. Wells, of Los Angeles, Ralph W. Smith, Inheritance Tax Atty., of Sacramento (Wesley E. Martin, of counsel), for respondent.

LAWLOR, J. The State Controller brought this action to determine the inheritance tax on certain transfers alleged to have been made during her lifetime in contemplation of death by Juana Larronde, the decedent herein.

It appears that Juana Larronde died July 27, 1920, in her eighty-fifth year. She was survived by two sons, John M. Larronde and P. D. Larronde, and four daughters, Antoinette Larronde Watson, Madeleine Etchemendy, Marianne T. Etchemendy, and Carrie Etchemendy. For some time before her death she had been possessed of considerable property, both real and personal. Prior to the year 1909, the exact date of which is now unknown, she had executed a will, under the terms of which all her property was

to be distributed equally amongst her said six children. On two different occasions during the months of August and September of the year 1909 the said decedent, accompanied by her six children, visited the offices of her attorney, at which times she, by a series of transfers and conveyances, disposed of her entire property to her several children, or by deed of trust for their benefit. At the times these dispositions were made the decedent was 74 years of age and apparently in good health. The devolution of the property was accomplished by the execution of the following deeds and declaration of trust: On August 13, 1909, she conveyed by deed to her four daughters, above named, an undivided two-thirds of several tracts of real property in Los Angeles county, share and share alike, and on the same day transferred to said four daughters certain corporate stock, share and share alike; on September 8, 1909, she conveyed to three of her daughters, omitting Antoinette Larronde Watson, and to John M. Larronde, one of her sons, the title to her home place in the Mott tract, in the city of Los Angeles, share and share alike. On September 8, 1909, she conveyed to Madeleine Etchemendy and Carrie Etchemendy her remaining undivided one-third interest in the real property as to which the two-thirds interest had been conveyed to her daughters as above indicated, together with certain corporate stock, in trust, however, for the benefit of her two sons, John M. Larronde and P. D. Larronde, share and share alike. Under said instruments the properties were divided in the same manner and in the same amounts as they were by the will above referred to. It was also upon the occasion of one of these visits to her attorney that the decedent destroyed the will theretofore executed by her. At a later date, to wit, July 2, 1914, decedent being then 79 years of age, the trust agreement of 1909 was revoked, presumably with the consent of all the parties thereto, and a new declaration of trust was executed by her. No change in the provisions thereof was made other than by the substitution of the Title Insurance & Trust Company as trustee in the place and stead of the two children Madeleine Etchemendy and Carrie Etchemendy, named as such under the former declaration of trust. The personal property covered by said former declaration of trust was not included, but transferred directly to Madeleine Etchemendy, one of the children. The recordation of the 1909 deed was deferred until July 2, 1914. All of the transfers took immediate effect in possession and enjoyment, the decedent neither reserving a life estate nor insuring to herself, in writing, support and maintenance. Notwithstanding this, however, Madeleine Etchemendy testified, and the testimony was not controverted, that it was understood by the entire family, including

the decedent, that she was to be cared for by them during the remainder of her life.

The court referred the matter to an inheritance tax appraiser, before whom a hearing was had, at which the testimony of the grantees and beneficiaries was taken. At the conclusion of the hearing the inheritance tax appraiser reported the value of the property and computed the total tax to be \$5,064.58. The appellants thereupon filed objections and exceptions to the report and, by stipulation of the parties, the issue was submitted to the superior court upon the stenographic report of the evidence taken at the hearing before the referee. The court, after an introductory statement, found from such evidence as follows:

"(1) That Juana Larronde died on or about the 27th day of July, 1920, and was at the time of her death a resident of the county of Los Angeles, state of California.

"(2) That on or about the 13th day of August, 1909, decedent above named, made, executed, and delivered to Antoinette Larronde Watson, Madeleine Etchemendy, Marianne T. Etchemendy, and Carrie Etchemendy, respondents herein, deeds to real property described as follows: [It will serve no purpose to set out said descriptions, which are given at great length in the transcript, folios 106-112.] Said transfer having been made to said respondents share and share alike; wherein and whereby said decedent transferred and conveyed all of her legal right, title, and interest in and to said property to said respondents. Said real property, as of August 13, 1909, was of the value of \$137,628."

"That on or about the 13th day of August, 1909, said decedent transferred and assigned all of her legal title in and to the personal property described as follows, to said respondents last above named, share and share alike: [Enumeration omitted as not necessary.] Which said personal property, as of August 13, 1909, was of the value of \$67,560.

"(3) That on or about the 8th day of September, 1909, decedent above named made, executed, and delivered to John M. Larronde, Madeleine Etchemendy, Marianne T. Etchemendy, and Carrie Etchemendy, respondents herein, deeds to certain real property, wherein and whereby said decedent transferred and conveyed all of her legal interest in and to said property to said respondents, share and share alike, and which said property is described as follows: [Description unnecessary.] Which said real property, as of September 8, 1909, was of the value of \$6,000.

"(4) The court further finds that all of the transfers of the real and personal property hereinabove mentioned were made without valuable or adequate consideration and in contemplation of death and in lieu of a testamentary disposition.

"(5) That on or about the 2d day of July, 1914, decedent herein made, executed, and delivered to the Title Insurance & Trust Company, one of the respondents herein named, a deed wherein and whereby said decedent transferred and conveyed and assigned all of her legal title in and to that real and personal property, described as follows: [Description omitted.] Which said real property, as of July

2, 1914, was of the value of \$77,460.01; subject, however, to the terms of a certain trust agreement known as declaration of trust No. 3215 of trusts of the said Title Insurance & Trust Company to the said Title Insurance & Trust Company to hold for the use and benefit of John M. Larronde and P. D. Larronde, respondents herein, share and share alike.

"(6) That each and all of the above-described transfers were made without valuable or adequate consideration and in contemplation of death and in lieu of a testamentary disposition."

As its conclusions of law from the foregoing facts the court stated:

"(1) That each and all of the transfers herein described were made without valuable or adequate consideration and in contemplation of death and in lieu of testamentary disposition.

"(2) That the clear market value of the transfers, made by this decedent, both real and personal, was \$329,114.08.

"(3) That said property passed to the following named persons, whose relationship to decedent, the character and clear market value of whose respective interests at the time of the death of said decedent, and the inheritance or transfer tax due thereon are as hereinafter shown: [Then follows a table setting forth the figures enumerated.]

"(3) That the amount of inheritance tax due the state of California in this estate is the sum of \$5,064.58.

"(4) That the objections and exceptions to the report of the inheritance tax appraiser as referee, on file herein, are overruled and the said report is hereby sustained and confirmed in each and every respect."

Respondents (appellants here) thereupon appealed to this court, basing the appeal "exclusively on the following points":

"(1) That the finding that said conveyances were made in 'contemplation of death' is in direct contradiction of the direct and unqualified evidence presented in the record, and not disputed or questioned in any manner.

"(2) That the finding that said transfers were made 'in lieu of testamentary disposition' is contrary to the uncontradicted evidence and not warranted by any reasonable inference that might be drawn from the uncontradicted testimony.

"(3) But, even if there were a justifiable inference from the testimony that the transfers were made 'in lieu of testamentary disposition,' yet such transfers were not made taxable until the enactment of the statute of 1911, and, as all the transfers in this case were made prior to that time, they were not subject to taxation.

"(4) The finding of the court that the properties transferred in trust to the Title Insurance & Trust Company for the benefit of the two sons was not made until July 2, 1914, is not supported by the evidence, for it is undisputed that the same properties had been transferred in 1909 to two of the daughters in trust for the sons, and the transfers to the Title Company in 1914 were but the substitution of a new trustee and a continuation of the trust previously created."

By way of answer to the foregoing contentions, the respondent controller advances the following:

"(1) The transfers are taxable because every presumption is in favor of the judgment.

"(2) The transfers are also taxable because the definition of 'contemplation of death' written into the 1911 'Inheritance Tax Act' by the Legislature clarified this phrase, indicating the ever and continuing intent of the Legislature to make it applicable to transactions of this character.

"(3) The transfers are also taxable because they were made in contemplation of the death of Juana Larronde.

"(4) The transfers are also taxable because the decedent in destroying her will, simultaneously with the execution of the gift deed and declaration of trust in 1909, substituted the said deed and declaration of trust as a means of testamentary disposition in lieu of her said will."

Madeleine Etchemendy testified in part as follows, which testimony was accepted by her brothers and sisters as a true statement of the facts contained therein, and upon which respondent relies to sustain the claim that the transfers were made "in contemplation of death":

"Q. Did she leave a will? A. No.

"Q. Had she made one that you know of, which had nothing to operate upon, or which she destroyed prior to her death? A. She destroyed her first will many years ago, probably at the time she made this trust, that would be.

"Q. In 1909? A. That was the first will she had made. She had made it a few years before.

"Q. Had she made any will after that? A. No. * * *

"Q. I believe you stated that she destroyed her only will about 1909? A. Yes.

"Q. At about the time these deeds were made? A. Yes.

"Q. Have you ever seen that will? A. I think I heard it read when she signed it.

"Q. Was the distribution under that will to six children equally? A. Yes; just the same.

"Q. Is the general effect of the trust and the outright deeds to convey all of Juana Larronde's property to the six children as nearly equally as in the nature of things could be done? A. I think so.

"Q. Probably not penny for penny, but that was the general intent? A. I believe it is penny for penny; it could not have been more equally.

"Q. And the will would also have conveyed it equally to the six children? A. Yes; to the six children. * * *

"Q. In her discussions with you or any of the children concerning the transfer of this property, did she ever make any remarks in regard to what would be done with it when she passed away? A. No; only at the time she made it.

"Miss Norton: She made a will, though? Had she had a will for many years? A. I don't remember that; I think she had; she must have made the will after Mr. Larronde died."

"Mr. Pennock: Were you present when she destroyed it? A. Yes.

"Q. Who else was present? A. I think my sister.

"Q. What did she say at that time? A. She said these papers took the place of the will and she did not need the will any more.

"Q. And she never made another? A. No.

"Q. Had nothing to operate on? A. No.

"Miss Norton: She always intended the children to have the property anyway? A. Yes.

* * *

"Q. At the time of her death did Juana Larronde own an interest in any property whatsoever? A. None whatever; she was disposed of everything.

"Q. Neither real nor personal? A. Neither.

* * *

"Q. After this property was transferred in 1914—I might ask, after the property was transferred in 1909, Juana Larronde had practically transferred all her property, both real and personal? A. Yes.

"Q. Did she have any property whatsoever left after that time? A. No. * * *

"Q. Then the same properties placed in trust in 1914 had been placed in trust prior to that, in 1909? A. Yes.

"Q. With what company? A. Naming myself and my sister Carrie as trustees.

"Q. Oh, individual trustees? A. Yes.

"Q. Then that trust was revoked? A. Yes.

"Q. By Juana Larronde? A. Yes; and with the consent of the two brothers.

"Q. Were they beneficiaries? A. Yes.

"Q. All the parties to the trust agreed to have it revoked? A. Yes.

"Q. When? A. 1914. * * *

"Mr. Pennock: The terms are practically the same as this other trust, you say? Now, the personal property mentioned, the stocks, did not go into this trust of 1914? A. No.

"Q. And when this trust was revoked, with the consent of all parties, what was done with regard to the stocks mentioned in there? A. [Madeleine Etchemendy] It was transferred to me; I hold the bank stock.

"Q. That is all the stock which was mentioned in there, and which I read off, was transferred to you by Juana Larronde? A. Yes.

"Q. About what year was that, 1914? A. 1914, I think.

"Q. At the time the change was made in the trustees? A. Yes.

"Q. And were those stocks transferred to you along with any instrument in writing? A. No; I am just holding them in my name as owner, and I divide the dividends. It is a family affair; I divide the dividends with my brothers. * * *

"Q. Had any one of you, the daughters and sons of Juana Larronde, ever entered into any agreement with Juana Larronde whereby you were to return to her, or account to her for, or render to her any part of, the income from any of these properties? A. No; we made no agreement with her at all; she gave it outright to us; she said she trusted us; had confidence she would be cared for by her children. * * *

"Q. Did she for some time prior to the transfers discuss her intentions with you and the children? A. Yes; she spoke of it.

"Q. What did she say? A. That it was to

be ours; we were her children and it was to be our property.

"Q. But what did she say bearing upon her reasons, as near as you can remember? A. You mean deeding the property? As I said before, she wished to make us a gift of the property and free herself of the care and responsibility of keeping the property. She did not wish to have any cares whatever.

"Q. Did she say anything regarding what her expectations of support and maintenance would be after deeding the property? A. No; she always said she was to be taken care of by us; she knew we would take care of her. * * *

"Mr. Pennock: You were designated, were you not, Miss Etchemendy, in the trust of 1914, as the agent for your brothers and sisters? A. Yes.

"Q. Were you also acting in the capacity of agent for your mother? A. Yes.

"Q. And had been for a number of years, more or less her agent? A. Yes; and was with my stepfather, too.

"Q. Of the six children you were the one she looked to to take care of the details? A. Yes; and my brother John was also an agent with me; he used to collect the rents.

"Q. Did your mother ever have any other agent acting for her, in regard to any of these properties, than yourself and your brother John? A. No. * * *

"Mr. Pennock: Did she ever talk over business with you at all after 1909? A. Oh, she gave us a talk, but nothing she took part in.

"Q. She did not display any interest in it? A. No.

"Q. Just trusted you to take care of it? A. Yes.

"Q. You actually had looked after it for a good many years? A. Since I was 16 years old, I think.

"Q. Making the trust did not change the actual arrangement? A. No; not at all; the trust was created at the request of my two brothers.

"Q. Of your mother? A. Yes.

"Q. Who suggested making the trust in the first place? A. My mother, but it was with their consent; that is what I meant.

"Q. Miss Norton: The general consent of all concerned? A. Yes."

We are satisfied that the foregoing evidence is ample as a matter of law to support an inference that the transfers were made "in contemplation of death" and "in lieu of testamentary disposition," and hence that the findings of the court on those issues of fact cannot be disturbed.

[1] We have already quoted appellants' third contention, that these transfers were not taxable under the 1905 act, which in point in time should govern; it being conceded they would be taxable, if made subsequent to the enactment of the 1911 act. It is true as appellants assert, "it is the law in force at the time the transfers were made that determines the question of taxability." Estate of Brix, 181 Cal, 667, 186 P. 135. For the purpose of the decision it may be assumed that all the transfers come under the

1905 act. Section 1 thereof (Stats. 1905, p. 341) reads as follows:

"All property which shall pass, by will or by the intestate laws of this state, from any person who may die seized or possessed of the same while a resident of this state, or if such decedent was not a resident of this state at the time of death, which property, or any part thereof, shall be within this state, or any interest therein, or income therefrom, which shall be transferred by deed, grant, sale, or gift, made in contemplation of the death of the grantor, vendor or bargainor, or intended to take effect in possession or enjoyment after such death, to any person or persons, or to any body politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled, in possession or expectancy, to any property, or to the income thereof, shall be and is subject to a tax hereinafter provided for, to be paid to the treasurer of the proper county, as hereinafter directed, for the use of the state.
* * *

Section 27 of the 1911 act (Stats. 1911, p. 726), referring to the phrase, "in contemplation of death," used in the taxing part of that act (Stats. 1911, § 1, p. 713), provides in part:

"* * * The words 'contemplation of death,' as used in this act, shall be taken to include that expectancy of death which actuates the mind of a person on the execution of his will, and in nowise shall said words be limited and restricted to that expectancy of death which actuates the mind of a person in making a gift *causa mortis*; and it is hereby declared to be the intent and purpose of this act to tax any and all transfers which are made in lieu of or to avoid the passing of the property transferred by testate or intestate laws."

In our view of 1905 and 1911 acts, so far as the phrase, "in contemplation of death," is concerned, was intended by the Legislature to cover identical cases. In other words, the phrase, "in contemplation of death," as defined in the act of 1911, is merely the equivalent in meaning with that under the act of 1905, which does not purport to define the phrase, for the phrase must necessarily be construed as the language of the act of 1911 imports—a transfer of property; the transferor having in mind the general expectancy of death which ordinarily actuates one in the execution of his will. Appellants contend, however, that the amendment found in the 1911 act had in view a broadening of the scope of said phrase. The following authorities bear on this point:

In *Conway's Estate v. State*, 72 Ind. App. 303, 120 N. E. 717, the court, in discussing an inheritance tax statute similar to our 1905 act, and construing the undefined phrase, "in contemplation of death," found therein, said:

"The words, 'in contemplation of death,' as used in inheritance tax statutes, do not refer

to that general expectation of death entertained by all persons, but they do refer to that expectation of death which arises from such bodily or *mental conditions*, irrespective of the cause in any particular case, which prompts persons to dispose of their property to those they deem entitled to their bounty.

"Those words, when employed in taxation statutes, are not restricted to the technical meaning of such phrases when applied to gifts *causa mortis*, but are given a reasonable and liberal interpretation, which tends to make effectual such taxation laws without destroying the right of the owner of the property to make an absolute gift of the same.

"Gifts, *causa mortis*, come within the provisions of the statute, and likewise gifts *inter vivos* made in contemplation of death. * * *

"Several states preceded Indiana in the enactment of inheritance tax laws, and our statute in its general provisions, is similar to most of such statutes, particularly those of the states of Illinois, New York, Wisconsin and *California*." (Italics added.)

Also, in the *Estate of Reynolds*, 169 Cal. 600, 147 P. 268, Mr. Justice Henshaw writing the opinion, said, in referring to the amendment of section 27 of the 1911 act:

"This amendment also served the purpose of elucidating without changing the law, by giving fuller expression to the legislative intent and meaning."

It was pointed out in the *Estate of Pausion*, 186 Cal. 358, 199 P. 331, that the above statement was *obiter dictum*, although not criticized; yet we are prepared to adopt it, for we are of opinion that the definition in the 1911 act did not change the meaning of the phrase.

It may be argued that, as the act of 1905 did not contain a definition of the phrase, the amendment of 1911 would be unnecessary and superfluous if our conclusion is correct. But this was a matter entirely resting in the discretion of the Legislature, for what an enactment shall contain presents a legislative and not a judicial question.

We will now consider the contentions of appellants touching the question of the sufficiency of the evidence to support the findings. It is pointed out that the decedent lived 11 years after the transfers were made; that she was always in satisfactory health, and that "the only basis for an inference of contemplated death is the advanced age of the decedent; and yet, considering the well-preserved state of her health, her simple habits and clean mode of living, her 74 years still left the event of death far in the future."

[2] For a transfer to be "in contemplation of death" it is not, as stated, necessary that the transferor be in fear of immediate death from an existing malady, as in a gift *causa mortis*, but, on the contrary, it is conceivable that a person of comparative youth, enjoying perfect health and vigor, may, nevertheless, make a transfer of his property "in contem-

plation of death" within the meaning of the act. It was declared in *Spreckels v. State of California*, 30 Cal. App. 363, 158 P. 549, involving the 1905 act:

"* * * A reasonable and just view of the law in question is that it is only where the transfer of property by gift is immediately and directly prompted by the expectation of death that the property so transferred becomes amenable to the burden. Or, as counsel for respondents with singular aptness states the proposition: 'It is only when contemplation of death is the motive without which the conveyance would not be made that a transfer may be subjected to the tax.' That is, the expectation of death may be the direct, specific, and immediate animating cause of the transfer."

The evidence, stressed by the appellants, that the decedent had for many years before the transfers were made little to do with the management of her property, leaving this to her eldest daughter, is not necessarily opposed to the findings that the transfers were made in contemplation of death; this is also true of the evidence that she led a simple life and was inactive, socially and otherwise, and that she had little or no occasion for the use of money or property. Assuming that the evidence might be sufficient to support appellants' contentions in regard to the motive which actuated decedent in making these transfers, namely, that the decedent had no use for money or property because of her advanced age and mode of living; that her children were in dire need; that the family relations were not only cordial but affectionate, and that the transfers were therefore made for the sole purpose of assisting them, the trial court having reached a contrary conclusion, it cannot be maintained on appeal that the finding should have been that the transfers were not made in contemplation of death.

[3] Conceding, as contended by appellants, "there was no discussion or mention of death in connection with these transactions," this, however, would not necessarily be opposed to a conclusion that decedent acted under an undisclosed intent to secure to her children the entire, undiminished fruits of her life's work while, at the same time, attempting to avoid the imposition of an inheritance tax and the expenses of probate incident to a testamentary disposition of her property. Such considerations would tend to support the findings that the transfers were made "in contemplation of death" and "in lieu of testamentary disposition." Again, conceding, "that the deeds were delivered, the transfers vested a present title, and there were no reservations or retention of any control over the properties in any degree whatsoever," still this would not, of itself, preclude the conclusion that the conveyances had, in fact, been made "in contem-

plation of death." These words, "in contemplation of death," are not narrowed or restricted in any manner by other language in the 1905 act, but are, in fact, sufficiently broad to cover any and all transfers of property, whether gifts *inter vivos* or *causa mortis*, from one person to another in anticipation of death or in lieu of testamentary disposition.

[4] In our opinion the evidence in the case, from which the trial court evidently concluded that the transfers were inconsistent with any purpose save that of testamentary disposition, that the decedent retained no property and made no provision for her support, that she distributed all her property equally among her children, and that she died intestate having at the time the transfers were made destroyed her will, is sufficient to support the findings of the court below that the transfers were made in contemplation of death and in lieu of testamentary disposition. We also think it clear that the statutory definition of the phrase, "in contemplation of death" in the act of 1911 "served the purpose of elucidating without changing the law, by giving fuller expression to the legislative intent and meaning."

The judgment is affirmed.

We concur: RICHARDS, J.; WASTE, J.; SHENK, J.; SEAWELL, J.; LENNON, J.

71 Cal. App. 522

Ex parte SIMMONS. (Cr. 1163.)

(District Court of Appeal, Second District, Division 2, California. March 4, 1925.)

1. Intoxicating liquors $\S$ 11—Statute held to cover entire field of prohibitory legislation as applied to intoxicating liquors.

The Wright Act covers the entire field of prohibitory legislation in matters relating to liquor actually intoxicating, so as to leave no vacant field for municipal legislation on that subject.

2. Intoxicating liquors $\S$ 11—Ordinance imposing a greater punishment for possessing intoxicating liquor than state law held unreasonable and void.

An ordinance, which imposes a fine of not less than \$200 and not more than \$500 or imprisonment for 180 days, or both fine and imprisonment, for possessing intoxicating liquor containing one-third of 1 per cent. of alcohol by volume, is unreasonable and void, in view of the punishment prescribed by Wright Act.

3. Habeas corpus $\S$ 30(2)—Petitioner not discharged if complaint based on a void ordinance charges an offense under state laws.

A petitioner in habeas corpus will not be discharged, notwithstanding the invalidity of the ordinance under which conviction was had, if the complaint, purporting to charge an of-

fense under the void ordinance, does in fact charge an offense under the state law.

4. Habeas corpus ⇨30(2)—**Indictment and information** ⇨120—**Allegation as to alcoholic content of liquor held surplusage; complaint under void ordinance after omitting surplusage held to charge offense under state law.**

An allegation, in a complaint based on a void ordinance, that liquor contained "more than one-third of 1 per cent of alcohol," is surplusage, and the complaint on collateral attack in a habeas corpus proceeding is sufficient to charge offense of possessing liquors containing more than one-half of 1 per cent. alcohol under Wright Act.

5. Habeas corpus ⇨4—**Writ of habeas corpus may not be used as a writ of error.**

A writ of habeas corpus may not serve the purpose of a writ of error.

Application for writ of habeas corpus by D. S. Simmons. Writ discharged, and petitioner remanded.

Dorsey & Campbell, of Bakersfield, for petitioner.

Brittan & Brittan, of Bakersfield, for respondent.

FINLAYSON, P. J. A complaint was filed in the police court of Bakersfield charging petitioner with the possession of intoxicating liquor containing more than one-third of 1 per cent. of alcohol by volume, contrary to the provisions of section 4 of Ordinance No. 165 of that city. Petitioner pleaded guilty to the charge and was sentenced to pay a fine of \$250. The judgment provides that if the fine be not paid petitioner shall be imprisoned in the county jail of Kern county until it be satisfied, in the proportion of one day's imprisonment for every dollar of the fine. The fine not having been paid, petitioner was committed to jail pursuant to the terms of the judgment; whereupon he applied to this court for his discharge on habeas corpus. The principal points urged by petitioner are: (1) That the ordinance is unconstitutional; and (2) that the complaint does not state any offense known to the law.

Section 4 of the ordinance reads:

"It shall be unlawful for any person to have, keep or store any intoxicating liquor in any public place in said city except as provided herein."

Section 1 defines intoxicating liquor as including "any distilled, malt, spirituous, vinous, fermented or alcoholic liquor which contains more than one-third of one per cent. by volume of alcohol, and all alcoholic liquids and compounds whether proprietary, patented or not, which are potable or capable of being used as a beverage, and which contain more than one-third of one per cent. by volume of alcohol." It is provided in section

13 that any person who shall violate any of the provisions of the ordinance "shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than two hundred and fifty (\$250.00) dollars, nor more than five hundred (\$500.00) dollars or by imprisonment in the county jail for a period not to exceed one hundred and eighty (180) days, or by both such fine and imprisonment."

The municipality derives its police powers from section 11 of article 11 of the Constitution, which declares that any city may make and enforce within its limits all such local, police, sanitary, and other regulations "as are not in conflict with general laws." Petitioner claims that the ordinance is in conflict with a general law of this state, namely, the Wright Act (St. 1921, p. 79), within the rule announced in such cases as *Ex parte Sic*, 73 Cal. 142, 14 P. 405; *Ex parte Stephen*, 114 Cal. 278, 46 P. 86; *Ex parte Daniels*, 183 Cal. 636, 192 P. 442, 21 A. L. R. 1172; and *In re Mingo*, 190 Cal. 769, 214 P. 850—cases which hold that a local ordinance punishing exactly the same act denounced by a state law is in conflict therewith and to that extent void. It also is claimed that the ordinance is unreasonable and void under the doctrine of such cases as *In re Ah You*, 88 Cal. 99, 25 P. 974, 11 L. R. A. 408, 22 Am. St. Rep. 280, and *Ex parte Solomon*, 91 Cal. 440, 27 P. 757. It is contended by the sheriff, on the other hand, that the ordinance is not in conflict with the Wright Act, and that it is not unreasonable. That officer claims that because the ordinance makes one-third of 1 per cent. of alcohol by volume the test of an intoxicating liquor, it is not in conflict with the state law. In support of this contention he cites *In re Hoffman*, 155 Cal. 114, 99 P. 517, 132 Am. St. Rep. 75, and *Mann v. Scott*, 180 Cal. 550, 182 P. 281—cases which recognize the principle that there is no conflict between an ordinance and a general law where the former makes new and additional regulations for the sale of an article of commerce which are in keeping with the provisions of the general law and are at the same time appropriate to the necessities of the particular locality.

In *Olivieri v. Police Court*, 62 Cal. App. 91, 216 P. 44, the court, construing a similar ordinance of the city of Bakersfield, assumed, and we think correctly assumed, that the inhibition of the ordinance against having, keeping, or storing intoxicating liquor is substantially the same as the inhibition of the Wright Act against the possession of intoxicating liquor. The fact that the ordinance declares it to be unlawful to have, keep, or store the intoxicating liquor in "any public place" does not cause it to cover ground not covered by the state law. The prohibition of the state law is aimed against the illegal

possession of intoxicating liquors in all places—public as well as private. The principal difference between the present ordinance and the one which was held to be unconstitutional in the Olivieri Case is that here the city, in its definition of intoxicating liquor, has made an alcoholic content of one-third of 1 per cent. by volume the test; whereas, the ordinance under consideration in the Olivieri Case, adopting the criterion furnished by the state law, made one-half of 1 per cent. of alcohol by volume the test of an intoxicating liquor. The city attorney naively informs us that it was for the purpose of avoiding the nullifying effect of the decision in the Olivieri Case that the city council, in passing the present ordinance, made the test of intoxicating liquor the presence of one-third of 1 per cent. of alcohol by volume, instead of one-half of 1 per cent. as formerly.

[1] Does the part of the ordinance under which petitioner was charged conflict with the Wright Act? Broadly speaking, the question whether such conflict exists depends upon whether the state has occupied the whole field of prohibitory legislation with respect to the possession of intoxicating liquor for use as a beverage. There are two distinct domains of prohibitory legislation which the lawmakers, in their wisdom, may see fit to invade by appropriate legislation. One of these realms embraces all laws which seek directly to prohibit traffic in the evil sought to be suppressed. This realm includes those prohibitory laws which are aimed directly at the mischief intended to be eradicated. It is invaded by any enactment which is designed to prohibit an act that is intrinsically evil, such, for example, as an enactment which makes it unlawful to traffic in liquors which are in fact intoxicating. But there is another realm of prohibitory legislation which may be described as the zone of expediency. It includes those laws which prohibit acts that are not in themselves of an evil nature, but whose prohibition is deemed essential in order to facilitate the suppression of the actual evil. For example, experience has shown that it is well-nigh impossible effectively to enforce laws prohibiting traffic in intoxicants if liability or inclusion within the prohibition is made to depend upon the issuable fact whether or not a particular liquor is or is not intoxicating. Therefore, in order to make enforcement of the prohibition effective, the Legislature may prohibit traffic in beverages which are near to intoxicants, even though they are not in themselves intoxicating. Whether it will do so or not is a matter of legislative expediency. When this twilight zone of expediency is invaded by the Legislature, it does so only for the purpose of facilitating the enforcement of its prohibitory legislation. *State v. Brothers*, 144 Minn. 337, 175 N. W. 685; *State v. Walder*, 83 Ohio St. 68, 93 N. E. 531; *Purity Ex-*

tract, etc., *Co. v. Lynch*, 226 U. S. 192, 33 S. Ct. 44, 57 L. Ed. 184; *Ruppert v. Caffey*, 251 U. S. 264, 40 S. Ct. 141, 64 L. Ed. 260; *In re Hixson*, 61 Cal. App. 200, 205, 214 P. 677; *State v. Gauthier*, 121 Me. 522, 118 A. 380, 26 A. L. R. 652.

An analysis of the Wright Act and of the Eighteenth Amendment, which the act is intended to enforce, will, we think, lead to the conclusion that the state law was intended to occupy the whole field of actual prohibitory legislation, i. e., that it was intended to occupy all of that domain of prohibitory legislation which embraces such laws as are intended to suppress the evil itself. That is to say, though we probably cannot take judicial notice that a beverage containing less than one-half of 1 per cent. of alcohol by volume is not intoxicating, we think it can plainly be seen that it was the intention of the state lawmakers in passing the Wright Act to prohibit the possession of any alcoholic beverage which is in fact intoxicating. The Eighteenth Amendment declares that traffic in "intoxicating liquors * * * for beverage purposes is hereby prohibited." This language is unquestionably broad enough to embrace within its prohibition any liquor which, when used as a beverage, can and does actually produce intoxication if imbibed in such quantities as it is practically possible for a man to drink. The Volstead Act (U. S. Comp. St. Ann. Supp. 1923, § 10138½ et seq.), the penal provisions whereof are adopted by our Wright Act, declares in its title that it is an act "to prohibit intoxicating beverages"; and in section 3 of title 2 (section 10138½aa), it declares that its provisions shall be liberally construed "to the end that the use of intoxicating liquor as a beverage may be prevented." Here is manifested an unmistakable intention on the part of Congress adequately to enforce the Eighteenth Amendment by completely prohibiting traffic in any and all beverages which, by reason of the presence of alcohol, are in fact intoxicating. This it does by defining intoxicating liquor as including certain specified liquors, such as brandy, whisky, gin, beer, ale, wine, etc., and in addition thereto "any spirituous, vinous, malt, or fermented liquor, liquids and compounds, whether medicated, proprietary, patented, or not, or by whatever name called, containing one-half of one per cent. or more of alcohol by volume, which are fit for use for beverage purposes." Title 2, § 1 (section 10138½). In the enactment of the Wright Act the Legislature of this state has exhibited a similar intention to prohibit traffic in all alcoholic beverages which are in fact intoxicating. This it does by adopting all of the penal provisions of the Volstead Act and by expressly recognizing the requirement of the Eighteenth Amendment for its concurrent enforcement by Congress and by the several states.

Congress or the state Legislature could, of course, have defined an intoxicating liquor as a beverage containing any percentage of alcohol whatever. Both the national and the state lawmaking bodies have seen fit to declare that any beverage containing as much as one-half of 1 per cent. of alcohol shall be deemed to be an intoxicating liquor. In this legislation, designed as it is to enforce the absolute prohibition of the Eighteenth Amendment, we can plainly discern an unmistakable intention to prohibit traffic in any and all alcoholic beverages which are in fact intoxicating. We therefore feel warranted in concluding that the Legislature of this state has occupied the whole domain of actual prohibitory legislation, i. e., prohibitory legislation in the sense that it is sought thereby to prohibit traffic in all alcoholic beverages which are actually intoxicating.

It is, of course, conceded by us that if the Legislature had not manifested an intention to prohibit traffic in all alcoholic beverages which are in fact intoxicating, a partially vacant field of legislation would have been left for the city to fill by appropriate local legislation, as was the case in *Ex parte Hoffman*, supra. But where, as here, the state legislation discloses an unmistakable intention completely to prohibit the evil thing itself, we seriously doubt whether a municipality may adopt a prohibitory ordinance merely for the purpose of securing additional effectiveness for the plenary prohibition which is already in force under the state law. Where the language of the state enactment clearly evidences an intention to prohibit in toto the evil which is to be suppressed, the determination of how much of what we have referred to as the zone of expediency should be occupied by further legislation would seem to be a matter of state policy to be determined by the state Legislature, and that a city ordinance which is designed simply to invade a zone which can be occupied only for the purpose of facilitating the enforcement of the total actual prohibition already in existence is not in keeping with the spirit or policy of the state law, but is in conflict therewith.

[2] But if there be room to doubt whether a conflict exists between the ordinance and the state law within the meaning of section 11 of article II of the Constitution, there can be no room to doubt the unreasonableness of the ordinance, within the principle of such cases as *In re Ah you* and *Ex parte Solomon*, supra, both of which hold that the punishment prescribed by an ordinance for its violation must not only be reasonable in itself but must be in harmony with the state legislative enactments on kindred subjects.

"Municipal by-laws must harmonize with the general laws of the state, with the municipal charter, and with the principles of the common law. (14 Barb. 478; 4 Hill, 209.) They must

also be reasonable, and whenever they appear not to be, the courts will, as matter of law, declare them void." *Ex parte Kearny*, 55 Cal. 225.

See, also, *South Pasadena v. Terminal Ry. Co.*, 109 Cal. 321, 41 P. 1093. In *Ex parte Ah You*, supra, it is said that "it was incumbent upon the city to frame the ordinance, so far as practicable, in harmony with the general laws of the state." In that case an ordinance was held unreasonable and invalid because it authorized a fine of \$1,000 for an offense, when the statute of the state limited the punishment of a grosser offense in the same category to a fine of \$500. In *Ex parte Solomon*, supra, it was held that an ordinance prescribing a minimum fine of \$250 and a minimum imprisonment of three months for having lottery tickets in one's possession, when under the general law of the state such misdemeanors as conducting the drawing of a lottery, selling lottery tickets, etc., were punishable by fine not exceeding \$500 or imprisonment not exceeding six months, without any prescribed minimum, providing, as it did, a greater penalty than that provided by statute for kindred offenses, was not in harmony with the general laws of the state and was therefore unreasonable and void.

In the *Wright Act* the legislation has prohibited everything which is sought to be prohibited by section 4 of this ordinance, excepting only the possession of liquor of an alcoholic content between one-third of 1 per cent. and one-half of 1 per cent. by volume. The ordinance provides that for having, keeping, or storing in a public place in the city of Bakersfield any alcoholic beverage containing more than one-third of 1 per cent. of alcohol by volume the offender, even though it be his first offense, shall be punished by a fine of not less than \$250 nor more than \$500 or by imprisonment not exceeding 180 days, or by both such fine and imprisonment; whereas, the state law, for the illegal possession of intoxicating liquor containing one-half of 1 per cent. or more of alcohol by volume, authorizes for the first offense a fine of not more than \$500. It is possible that upon a conviction for a first offense under the state law the court, in the exercise of a wise discretion, may impose only a nominal fine, even though the accused may have had such possession in a public place; whereas, for the comparatively trifling offense of having in one's possession in the same place a beverage containing less than one-half of 1 per cent. but more than one-third of 1 per cent. of alcohol by volume the discretion to impose a fine of less than \$250 is taken away from the court by this ordinance. Moreover, under the ordinance the court, even for a first offense, may impose imprisonment for a term which may be twice as long as that which the state law authorizes for second offenders. In other words, the state law, which is aimed at the

prohibition of traffic in all alcoholic liquors which actually intoxicate, imposes a penalty far less than that imposed by the ordinance for the trifling offense of doing something which the city authorities may deem it necessary to prohibit in order to facilitate the effective prohibition of traffic in actual intoxicants. Such an ordinance is not in harmony with the general laws of the state, and is unreasonable and void within the rule announced in *Ex parte Ah You* and *Ex parte Solomon*, supra.

[3, 4] Notwithstanding the invalidity of the ordinance, petitioner will not be entitled to his discharge if the complaint, though purporting to state an offense under the ordinance, does in fact state an offense under the state law. *Olivieri v. Police Court*, supra; *In re Murphy*, 190 Cal. 286, 212 P. 30. The complaint charges petitioner with unlawfully having in his possession "intoxicating liquor containing more than one-third of 1 per cent. alcohol by volume." It is claimed that the pleading states no offense known to the law, because it fails to allege that the liquor contained one-half of 1 per cent. or more of alcohol by volume, or that it was fit for use for beverage purposes. There is nothing in the complaint which tends to negative the idea that the liquor in petitioner's possession contained at least as much as one-half of 1 per cent. of alcohol. The allegation that it contained "more than one-third of 1 per cent. alcohol by volume" is entirely consistent with the fact that its alcoholic content was as much as or more than one-half of 1 per cent. In other words, the allegation that the liquor contained "more than one-third of 1 per cent. alcohol by volume" neither adds to nor detracts from the pleading as a complaint under the state law, and those words of the pleading may be ignored as surplusage.

With the elimination of these surplus words, the charge in the complaint is that petitioner unlawfully had in his possession "intoxicating liquor." We have recently held that a complaint in which the liquor is described simply as "intoxicating liquor" is not so fatally defective as to warrant a reversal of a judgment of conviction on an appeal therefrom. *People v. Norcross* (Cal. App.) 234 P. 438. A fortiori must it be held that a judgment of conviction upon such a complaint is not vulnerable to a collateral attack in a habeas corpus proceeding.

[5] The writ of habeas corpus may not be made to serve the purpose of a writ of error. It has been said that if the facts alleged "squit at a substantive statement of the offense," habeas corpus will not lie. *Ex parte Williams*, 121 Cal. 328, 53 P. 706. See, also, *In re Avdalas*, 10 Cal. App. 507, 102 P. 674. A complaint similar to the one here under consideration was before the court in the

Matter of Hayward, 62 Cal. App. 177, 216 P. 414, and was held to be sufficient to withstand an attack in a habeas corpus proceeding. Shortly after the decision of the District Court of Appeal in that case, a similar petition for the writ of habeas corpus was presented to the Supreme Court by the same petitioners. In *re Hayward* (Crim. No. 2579). That court, on May 28, 1923, without filing an opinion, denied the petition. That decision would seem to conclude all question as to the ability of this complaint to withstand collateral attack in a habeas corpus proceeding.

The most that can be said in criticism of the complaint is that it is not sufficiently specific, and that its allegation that the liquor was intoxicating is the mere statement of a conclusion. But it certainly attempts to charge an offense; it at least "squints" at the statement of an offense—to employ the language of *Ex parte Williams*, supra. We have no hesitancy in saying that it does not wholly fail to state a public offense, and that any defect therein might have been remedied by demurrer or by motion in arrest of judgment.

The writ is discharged, and petitioner is remanded.

I concur: WORKS, J.

CRAIG, J. I concur, except in that part of the opinion having to do with petitioner's claim that the ordinance of the city of Bakersfield is in conflict with the general laws. Concerning that point I prefer to express no opinion.

71 Cal. App. 632

Ex parte CARMIGNANI. (Cr. 1203.)

(District Court of Appeal, Second District, Division 2, California. March 10, 1925.)

Habeas corpus  30(3)—Prisoner will be discharged where sentence to imprisonment for first offense against liquor laws is void.

Where ordinance, under which petitioner was sentenced for possession of liquor as a first offense, is void because the penalties therein prescribed are unreasonable, there being no authority under the state law for imprisonment for a first offense, sentence to imprisonment is void, and prisoner, having paid maximum fine prescribed by state law, will be discharged on habeas corpus.

Application by A. Carmignani for writ of habeas corpus. Petitioner discharged.

Dorsey & Campbell, of Bakersfield, for petitioner.

Brittan & Brittan, of Bakersfield, for respondent.

FINLAYSON, P. J. Petitioner pleaded guilty in the police court of the city of Bak-

ersfield to a charge of having in his possession, in a public place in that city, intoxicating liquor containing more than one-third of 1 per cent. of alcohol by volume, contrary to section 4 of Ordinance No. 165 of that city. He was sentenced to pay a fine of \$500 and also to imprisonment in the county jail for a period of 180 days. He paid the fine, but nevertheless was committed to jail pursuant to the terms of his sentence to imprisonment. It seems to be conceded that this is petitioner's first offense against the liquor laws. If therefore the ordinance, in so far as it attempts to prescribe penalties for its infraction, is unreasonable and void, petitioner is entitled to his discharge even though the complaint in the police court be sufficient to state an offense under the state law. This is so for the reason that the maximum penalty provided by the statute for the illegal possession of intoxicating liquor is a fine of \$500, if it be the first offense. *In re Adams*, 61 Cal. App. 239, 214 P. 467.

We have recently held that the punitive provisions of this ordinance are unreasonable and void for the reason that the penalties prescribed thereby greatly exceed those provided by the Wright Act (St. 1921, p. 79) for kindred offenses. *In re Simmons* (Cal. App.) 235 P. 1029. This leaves no authority for the sentence save such as may be found in the state law; and as that law only authorizes a fine in such a case as this, it follows that the part of the judgment under which petitioner was committed to jail is invalid and void, and that he must be discharged from custody.

Petitioner is discharged.

We concur: WORKS, J.; CRAIG, J.

CALIFORNIA REPORTER

236 PACIFIC REPORTER

196 Cal. 148

MOHAWK OIL CO. v. HOPKINS, Los Angeles County Assessor. (L. A. 8535.)

(Supreme Court of California. May 4, 1925.)

1. Taxation ☞42(1)—Differences between oil leases and land held to justify classification for purposes of taxation.

Differences existing between land itself as subject of taxation, and possessory rights under oil leases, *held* to justify classification under Pol. Code, § 3820 (as amended Laws 1921, p. 370) et seq., providing a different and more drastic method for collection of taxes on possessory rights under oil leases.

2. Constitutional law ☞229(3)—Statutes ☞95(1)—Taxation ☞49—Statute providing for more drastic method for collection of taxes on possessory rights under oil leases held not unconstitutional.

Pol. Code, § 3820 (as amended Laws 1921, p. 370) et seq., providing a different and more drastic method for collection of taxes on possessory rights under oil leases, *held* not violative of Const. art. 13, § 1, requiring property to be taxed in proportion to its value, or article 4, § 25, prohibiting special legislation for assessment and collection of taxes, or federal Constitution, Amend. 14.

3. Taxation ☞42(1)—Statute held not unconstitutional because owners of possessory rights under oil leases taxed more oppressively than owners of the land.

Pol. Code, § 3820 (as amended Laws 1921, p. 370) et seq., providing a different and more drastic method for collection of taxes on possessory rights under oil leases, *held* not unconstitutional because owners of such rights are more oppressively subjected to taxation than owners of lands to which such rights relate.

In Bank.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Suit by the Mohawk Oil Company, a corporation, against Ed. W. Hopkins, County Assessor of the County of Los Angeles. Decree for defendant, and plaintiff appeals. Affirmed.

A. L. Weil and Forrest A. Cobb, both of San Francisco, for appellant.

Edward T. Bishop and J. A. Tucker, both of Los Angeles, for respondent.

RICHARDS, J. [1-3] This appeal is from a judgment in favor of the defendant as county assessor of the county of Los Angeles, after an order sustaining a general demurrer to the plaintiff's amended complaint without leave to further amend. The action was one brought by the plaintiff to enjoin the defendant as such county assessor from the collection of certain taxes upon the plaintiff's property. The facts as they appear upon the face of the complaint may be briefly stated as follows: The plaintiff, a Cali-

fornia corporation, is the grantee and holder of certain oil and gas leases granted to it by the owners of certain parcels of land described in its complaint, by the terms and conditions of which leases the plaintiff has been granted the right to drill for and extract oil, gas, and other hydrocarbon substances from said lands, and to have the possession of the same for such purposes, the terms of said leases to be 20 years and as long thereafter as said substances can be extracted from said lands in paying quantities, the consideration for such leases being certain royalties to be paid by plaintiff to the owners of such lands, respectively, in proportion to the amount of such substances so to be extracted from their respective tracts of land. The defendant is county assessor of said county, and is claiming and attempting to exercise the right to demand and collect county taxes upon the plaintiff's possessory rights and oil and gas leases in and upon said lands, and to have the same paid in conformity with section 3820 of the Political Code, or, in default of said payment as provided in said section, to have the plaintiff's said possessory and leasehold rights seized and sold under the provisions of sections 3821 and 3822 of said Code. It is the plaintiff's contention that its said possessory rights and leasehold interests in said real estate are themselves real estate, and that whatever taxes are or are to be imposed thereon should be assessed, levied, and collected in the same manner as taxes upon other real estate are assessed, levied, and collected, and that the foregoing provisions of the Political Code, in so far as they attempt or purport to authorize the defendant as county assessor to assess, levy, collect, or enforce the collection of taxes upon the plaintiff's said properties, in any other manner than that provided by law for the assessment and collection of taxes upon real estate, are violative of the provisions of section 1 of article 13 and section 25 of article 4 of the state Constitution, and are also violative of the Fourteenth Amendment of the federal Constitution; wherefore it sought the relief prayed for in its amended complaint, and, being denied such relief by the trial court, has prosecuted this appeal. Section 3820 of the Political Code reads as follows:

"The assessor must collect the taxes on all property when, in his opinion, said taxes are not a lien upon real property sufficient to secure the payment of the taxes. The taxes on all assessments of possession of, claim to, or right to the possession of land and the taxes on taxable improvements located upon land exempt from taxation, shall be immediately due and payable upon assessment and shall be collected by the assessor as provided in this chapter."

This section of the Political Code was amended in 1921 (Laws 1921, p. 370) by add-

ing thereto the clause therein reading "and the taxes on taxable improvements located on land exempt from taxation," but otherwise the wording of the section has remained unchanged since 1895.

The first case before this court interpreting this section in its relation to leases for the extraction of oil from land was the case of *Bakersfield & Fresno Oil Co. v. Kern County*, 144 Cal. 148, 77 P. 892. In that case the plaintiff's property was subjected to taxes and to the immediate payment thereof under the terms of section 3820 of the Political Code. It paid such taxes under protest, and thereafter brought suit to recover such taxes so paid. This court held, upon the appeal in that case, that interests in mining claims and oil leases were real estate under the definition of section 3617 of the Political Code, and were properly assessable as such under the provisions of section 3820 of the Political Code, and, having been so assessed, the taxes thereon were properly collectible under the terms of said last-named section, and that, the taxes of the plaintiff in that action having thus been properly assessed and paid thereunder, were not recoverable.

The next case before this court upon appeal touching the assessment and collection of taxes upon oil leases was the case of *Graciosa Oil Co. v. County of Santa Barbara*, 155 Cal. 140, 99 P. 483, 20 L. R. A. (N. S.) 211. In that case also the action was one for the recovery of taxes paid under protest upon certain oil leases, and the possessory rights thereunder in lands owned by certain lessors, and the question presented was whether such possessory rights and the privileges to extract oil from the leased premises were assessable separately from the assessment of the lands themselves, or whether such attempted assessment thereof was not double taxation. The court held that the possessory right to lands for a term of years, embracing the privilege to bore for and extract oil therefrom differed materially from ordinary leases for usufructuary purposes, and that the right vested in a lessee in lands for the purpose of taking oil therefrom during a prescribed term was in the nature of a servitude on the land and a chattel real at common law, and as such was separately assessable from the land itself, and that its assessment and the collection of the taxes thereon under the provisions of sections 3820, 3821, and 3822 of the Political Code were proper and legal, and should have been upheld by the trial court. It is true that, while in each of these cases the assessment and compulsory payment of taxes upon oil leases under the foregoing sections of the Political Code were upheld, the precise constitutional question urged in the instant case was not urged. It is also, however, to be noted as a conceded fact herein that during the 20 or more years which have elapsed since the decision of the case of

Bakersfield, etc., Oil Co. v. Kern Co., supra, taxes upon oil leases have been uniformly assessed and collected in accordance with the three last-named sections of the Political Code. These sections of said Code have remained unchanged except in the single respect above referred to, whereby section 3820 has been broadened so as to permit the assessment and collection of taxes upon possessory rights in, and taxable improvements upon, lands which are themselves exempt from taxation.

The present contention of the plaintiff and appellant herein is that, since possessory rights and leasehold interests in lands are real estate under section 3617 of the Political Code, as interpreted in the foregoing cases, no reason exists for the application to these forms of real estate of a different principle and method of assessment and of the payment of taxes than that which, under the general laws relating to taxation of real property, is provided for the assessment and collection of the taxes upon the land out of which these lesser interests therein have been carved. This contention was answered in part by this court in the case of *Graciosa Oil Co. v. Santa Barbara*, supra, wherein Mr. Justice Shaw pointed out certain essential differences between possessory rights under leases for the extraction of oil and like substances from the land and ordinary possessory interests under leases for the purpose of usufructuary production which import to the former a character resembling that of a servitude or chattel real. There are yet other differences easily to be discerned. The operations of lessees under oil leases contemplate the erection of derricks and other structures of an impermanent character and the sinking of deep wells at large expense, but which derive their main value, not from the expenditure necessary to their creation, but from the oil content of the land into which they penetrate. If oil or other mineral substance or essence is found and extracted, these immediately become personal property upon their severance from the soil, the value of which is to be realized only by their removal from the place of their extraction to near or distant markets. The failure to find the oil or other mineral content of the soil strata, or the failure of the well to hold up to its original outflow, may render the lease and the structures used in the operation of the well or wells under its terms practically valueless, either for use, or for security for the taxes which have been rightfully assessed against this form of property. In the case of the land itself, it remains and is subject to the lien of taxes assessed against it during the year or more within which the two installments of such taxes are made payable; but in the case of the oil lease, not only is that which constituted its main value converted into personal property and removed or removable from the land, and hence from

subjection to any lien for taxes, but the very value of the lease itself, either for use or for security, is liable at any time to be entirely lost through the failure of the well to find the land content sought for, or to continue to be operated profitably in its extraction. In the foregoing respects and in others not necessary to enumerate a very essential difference exists between the land itself as the subject of taxation and those possessory rights therein which obtain under oil leases, a difference which would fully suffice to justify the classification which the Legislature has seen fit to make in the enactment of section 3820 et seq. of the Political Code, providing a different and more drastic method for the collection of taxes upon possessory rights under oil leases such as those presented in the instant case. We can perceive no constitutional objection to the subjection of these latter classes of property, considered as real estate, but in many respects resembling personal property, to the same principles and methods for the assessment and collection of the taxes thereon which are given application to personal property, the taxes upon which are unsecured by any lien other than that which would be created by their summary seizure and sale under the provisions of the statute relative to the collection of taxes upon such forms of property.

The argument that the owners and holders of possessory rights under oil leases are more oppressively subjected to taxation than are the owners of the lands to which such possessory rights and oil leases relate is answered by the fact that they are no more oppressively borne upon in that regard than are the owners of personal property who constitute a large part of our taxpaying population, and who are subject to the same compulsions in the absence of realty holdings upon which the lien of their personal property taxes could be imposed. In the case of *Rode v. Siebe*, 119 Cal. 518, 51 P. 869, 39 L. R. A. 342, this court held that the provisions of the statutes relating to the assessment and collection of taxes upon personal property, where such taxes were not secured by a lien upon real estate, were neither in conflict with article 13 of the state Constitution, requiring property to be taxed in proportion to its value, nor with subdivision 10 of section 25 of article 4 thereof, which prohibits special legislation for the assessment or collection of taxes. We regard that decision as authority for the conclusion which we have reached in this case, that no constitutional rights of the plaintiff and appellant herein have been violated by the application of the provisions of sections 3820 et seq. of the Political Code to the possessory rights and privileges which it asserts under the oil leases set forth in its amended complaint, the de-

murrer to which we think was properly sustained.

Judgment affirmed.

We concur: SHENK, J.; LENNON, J.; WASTE, J.; LAWLOR, J.; and SEAWELL, J.

196 Cal. 154

PEOPLE v. MORANI. (Cr. 2759.)

(Supreme Court of California. May 9, 1925.
Rehearing Denied June 8, 1925.)

1. Criminal law $\S$ 365(1), 369(2), 370, 371 (1, 12), 372(1)—When evidence of other crimes is admissible.

Evidence of other crimes than that charged is admissible when it tends to establish intent, guilty knowledge, motive, or common scheme, plan, or system, or to connect defendant with crime charged, or when other crimes are part of *res gestæ*.

2. Criminal law $\S$ 370, 371(4)—Evidence of similar offense three and one-half years before held admissible.

In prosecution for second degree murder by performing operation to produce abortion, in violation of Penal Code, $\S$ 274, where defendant claimed that his sole purpose was to determine whether deceased had a tumor, evidence that he had performed similar operations on another woman three and one-half years before, and that miscarriage resulted therefrom, was admissible to prove guilty knowledge and intent to produce miscarriage; remoteness in time being immaterial.

3. Criminal law $\S$ 370, 371(1)—Remoteness in time of another offense, relevant to show knowledge and intent, does not affect admissibility.

Remoteness in time of another offense, relevant to show knowledge as essential element of criminal intent, may go to weight of evidence thereof, but not to its admissibility, as where it is admissible solely as tending to prove common scheme, plan, or system.

In Bank.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Pasqual Morani was convicted of second degree murder, and he appeals. Affirmed.

J. P. Lacey and Milton E. D'Askquith, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

MYERS, C. J. The defendant appeals from a judgment of conviction of murder in the second degree, growing out of the performance of a criminal operation upon a pregnant woman for the purpose of producing an abortion, in violation of Penal Code, $\S$ 274, and which resulted in her death. It is not claimed herein that the evidence is insufficient to support the verdict. As is usual in such cases, it was sharply conflicting upon various

points, but the evidence produced by the prosecution was, if believed by the jury, ample to support the following statement of facts:

The defendant, who was following the occupation of a barber in San Francisco, was known as "Doctor Morani," and claimed to have studied medicine eight years, but admittedly he had never been licensed to practice medicine, surgery, or any other method of treating the sick. He had told Mr. Dahl, the husband of the deceased herein, that he knew how to successfully perform abortions, and an arrangement was made between them for the performance of an abortion by him upon Dahl's wife, who was then pregnant. By appointment Dahl brought his wife to the defendant's home in San Francisco, where the defendant made an examination of her, and an appointment was made for the defendant to come to Dahl's house in Fruitvale the following Saturday evening and there to perform the operation. This appointment was kept; the defendant bringing with him a small satchel containing surgical instruments. Upon arrival at the house defendant said "he had to do some work on her that evening," and used the term, "I have to dilate the womb." Defendant then went into the bedroom with Mrs. Dahl, where they remained about 15 minutes and upon coming out the defendant said to her, "I did not hurt you much, did I?" and she said, "No; that was quite easy. I hope the last of it will be as easy as that."

Defendant remained in the house that night, and the following morning asked Mrs. Dahl if she had any bearing down pains, to which she replied in the negative, and he seemed somewhat surprised and disappointed that she had no pains. Then Dahl took the children out of the house, with the understanding that an operation was going to be performed by the defendant during his absence. Upon his return at 1 o'clock in the afternoon defendant said to Dahl that he had performed or attempted to perform the abortion; that it was more of a job than he thought it would be; that he pulled a piece out of her that was a piece of a hand, showing indications of fingers, and that evidently she had gone four months instead of three, and if he had known that she was gone four months instead of three he would not have taken the case for a million dollars. During the remainder of the day defendant repeatedly urged Mrs. Dahl to permit him to finish the operation, at which she demurred; but, finally consenting thereto, in the evening, she was placed upon the bed and defendant inserted a speculum and expanded it, and through it inserted an instrument about a foot long, which opened up something like a pair of scissors, and defendant inserted this and worked it like a pair of scissors, at which the woman gave a terrible scream, and

defendant desisted, saying, "She won't let me work; it is no use." When the instrument was withdrawn it was covered with blood, and Dahl noticed a chunk or clot of blood in the chamber underneath where the defendant was working. The woman was then in terrible pain and Dahl went in search of a physician, finally procuring one about midnight, who called, examined her, gave her an opiate, and who the next morning had her taken to a hospital and there performed a curettage, in the course of which he discovered that the uterus had been opened by some instrument or foreign body and had been punctured and there was a cut or tear about an inch and a half long in the walls thereof, resulting in a hemorrhage into the abdominal cavity and consequent peritonitis, from which the woman died.

Defendant denied that he had examined the woman at his home in San Francisco, and testified that he went with Dahl to the latter's home in Fruitvale on Saturday evening for the sole purpose of examining the woman for a suspected tumor. He denied that he used a speculum or curette or any other instrument upon her person, and insisted that he did no more than to make a digital examination of her uterus; that by this means he found that she was or had recently been pregnant; that she had been attempting to produce a miscarriage upon herself and that the water had broken, and he thereupon urged Dahl to call a physician to treat her. He admitted that he remained at the Dahl home from Saturday evening until the following Monday morning; that he took with him upon that visit a speculum and "a few other instruments," and that he threw the speculum away out of the car window upon leaving the Dahl house Monday morning. He was unable to give any reason for so doing. The prosecution also produced witnesses who testified that three and one-half years previously this defendant had agreed to perform an abortion upon another pregnant woman, and that in carrying out his agreement he had proceeded in the same manner and had done the same things which he is shown by the evidence to have done in the present case; that the result thereof in the former case was a miscarriage, which nearly caused the death of the woman. The contention of the appellant herein is that the trial court committed prejudicial and reversible error in admitting the evidence of the previous offense because of the remoteness thereof in point of time, with the result that the defendant was, in effect, convicted upon this trial of the previous offense as to which the statute of limitations had run.

[1] It is well settled that a defendant in a criminal cause can be tried for no other offense than that charged in the indictment or information, and therefore it is not competent for the prosecution to prove the commis-

sion of independent crimes by the defendant, the evidence of which has no tendency to prove some material fact in connection with the particular crime charged. But this rule does not exclude such evidence when it logically tends to prove any fact necessary or pertinent to the proof of the crime for which the defendant is being tried. Such evidence is not to be rejected, because it also tends to prove the commission of other crimes or because it may prejudice the defendant in the minds of the jurors. Generally speaking, such evidence is admissible when it tends to establish intent, guilty knowledge, motive, a common scheme, plan, or system, or when it tends to connect the defendant with the crime charged, or when the other crimes are part of the *res gestæ*. 8 Cal. Juris. p. 60 et seq.

[2] The evidence here complained of was admitted for the sole purpose of proving guilty knowledge and intent, and it was so limited by the court in its instructions to the jury. It seems to us that it was fairly admissible for this purpose. Defendant herein claimed that his sole purpose was an innocent and proper one, namely, to make an examination for the purpose of determining whether or not the woman was afflicted with a tumor. The jurors may have believed that he did the things above related, and yet they may have reasonably doubted that he did those things with the intent of producing a miscarriage. They may reasonably have doubted that the defendant even knew that the doing of those things would be likely to produce a miscarriage. He was not a physician or surgeon, and his examination upon the witness stand indicated that his knowledge of medicine and surgery was extremely limited and fragmentary. Under these circumstances it was not only proper but necessary for the prosecution to prove that the defendant in performing the acts testified to did so with the intent of producing a criminal miscarriage. When the prosecution showed that the defendant had previously performed precisely similar operations upon the body of another pregnant woman, and that a miscarriage resulted therefrom, this evidence tended to show that the defendant, when he thereafter performed the same acts upon the person of Mrs. Dahl, did so with the knowledge that those acts would be likely to produce a miscarriage, from which it could be justly inferred that he did so with the express intent of producing such miscarriage. The evidence was therefore relevant for the purpose of showing knowledge as an element of criminal intent. In this view of the case, the remoteness in point of time of the previous offense is of no material consequence. If the defendant acquired such knowledge three and one-half years previously under the circumstances here shown in evidence, it is not at all likely that he had forgotten it in the interim.

[3] Where the evidence of another offense is admissible and relevant for the purpose of showing knowledge as an essential element of criminal intent, the remoteness in point of time of such other offense may go to the weight of the evidence, but not to its admissibility. The rule in this respect is different from that applicable where the evidence of other offenses is admissible solely upon the ground that it tends to prove a common scheme, plan, or system embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, in which case the evidence of such other offenses must be closely related, both as to time and character. The case of *People v. Northcott*, 45 Cal. App. 706, 189 P. 704, is similar in many respects to the case at bar. In that case the defendant was charged with murder growing out of the performance of a criminal abortion, and evidence was received of other abortion operations performed by him previous to the offense charged. The District Court of Appeal held, upon the authority of cases cited from other states, that such evidence was admissible, and this court in denying an application for transfer withheld any expression of opinion as to its admissibility under the circumstances of that case. In that case, however, the defendant denied, not merely that he had performed the operation with criminal intent, but denied that he had performed any operation whatsoever upon the person of the decedent, and denied that he had ever seen her. Under those circumstances it was argued that such denials on his part negated any possible contention that he had performed the acts with an innocent purpose, and that for this reason the evidence was irrelevant and immaterial. The case of *People v. Hickok*, 56 Cal. App. 13, 204 P. 555, more closely approximates the present case. The defendant there was charged with a violation of Penal Code, § 274, and, while he did not himself take the stand, produced a medical witness whose testimony tended to indicate that the operation performed by the defendant was performed for an innocent purpose. The court held that under these circumstances evidence of other abortions previously performed by the defendant was admissible in order to rebut this implied contention of the defendant; that the circumstance that it would have been proper only in rebuttal goes merely to the order of proof, and that the defendant was not prejudiced by the fact that such evidence was received as part of the prosecution's case in chief. The court said:

"As a rule, upon the trial for a particular crime evidence which tends to show the commission of another and distinct offense by the defendant is inadmissible. To this rule there are, however, several exceptions. According to one line of authorities the state would have the right to introduce such testimony as a part

of its case in chief in order to negative the possibility that the operation was necessitated by the condition of health of the patient. *People v. Hagenow*, 236 Ill. 514 (86 N. E. 370); *People v. Northcott*, 45 Cal. App. 706 (189 P. 704); *People v. Sindici*, 54 Cal. App. 193 (201 P. 975). In two California cases the Supreme Court, in denying petitions for their transfer to that court, withheld its approval of this doctrine; the exigencies of those cases not requiring its application. However, it is settled that such evidence is admissible whenever it appears that the defendant claims that the operation was innocently performed and for a lawful purpose. *People v. King*, 23 Cal. App. 259 (137 Pac. 1076). * * *

"In the case of *People v. Seaman*, 107 Mich. 348 (61 Am. St. Rep. 326, 65 N. W. 203), it is said: 'Upon principle and authority it is clear that where a felonious intent is an essential ingredient of the crime charged, and the act done is claimed to have been innocently or accidentally done, or by mistake, or when the result is claimed to have followed an act lawfully done for a legitimate purpose, or where there is room for such an inference, it is proper to characterize the act by proof of other like acts producing the same result as tending to show guilty knowledge, and the intent or purpose with which the particular act was done, and to rebut the presumption that might otherwise obtain.'"

We conclude that the evidence here complained of was relevant to prove knowledge of the defendant as an ingredient of the criminal intent which was an essential element of the crime charged. This conclusion disposes of the point made that the district attorney was guilty of misconduct in making reference to the previous offense in his opening statement to the jury.

The judgment of conviction and the order denying defendant's motion for a new trial are affirmed.

We concur: SHENK, J.; SEAWELL, J.; RICHARDS, J.; WASTE, J.; LAWLOR, J.; LENNON, J.

196 Cal. 86

JARVIS v. WEBBER, Sheriff. (Sac. 3504.)

(Supreme Court of California. April 27, 1925.
Rehearing Denied May 25, 1925.)

1. Assignments for benefit of creditors — 53, 81, 170—Conveyance to trustee, not complying with statutes, void as to nonconsenting creditor.

Where trust agreement, whereby property of insolvent debtors was transferred to a trustee, did not contain list of creditors of grantors, was not made to sheriff, and was not recorded as required by Civ. Code, §§ 3449, 3458, 3459, such trust agreement, considered as a general statutory assignment for benefit of creditors, was void as against a nonconsenting creditor.

2. Assignments for benefit of creditors — 44—Assignment for benefit of creditors complying with statute binding on nonconsenting creditor.

If an insolvent debtor makes an assignment for benefit of creditors in compliance with Civ. Code, § 3449 et seq., such assignment is binding on nonconsenting as well as consenting creditors.

3. Assignments for benefit of creditors — 45—Transfer of property of insolvent debtor in trust to secure certain obligations valid, if made for benefit of creditors generally.

A transfer of property of an insolvent debtor in trust to pay and secure certain obligations of debtor is not invalid in view of Civ. Code, §§ 3432, 3451, because it does not conform to provisions of code relating to general assignments for benefit of creditors, and if such transfer is made for benefit of creditors generally, it is protected, as to delivery and continued change of possession by exception contained in section 3440, as amended by St. 1917, p. 255, § 1.

4. Assignments for benefit of creditors — 4—Trust agreement held not an "assignment for benefit of creditors generally" and not binding on nonconsenting creditor or free from presumption of fraud.

Deed and trust agreement, whereby insolvent debtors transferred property to trustee, for benefit of named creditor, and all other creditors consenting thereto, was not an assignment for benefit of creditors generally, within Civ. Code, §§ 3449-3473, and was not binding on nonconsenting creditors, nor within section 3440, excepting general assignments from presumption that all transfers not accompanied by change of possession are fraudulent.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assignment for Benefit of Creditors.]

5. Appeal and error — 1010(1)—Whether delivery and change of possession accompanied transfer of property, question of fact and decision conclusive when supported by substantial evidence.

Whether there was delivery and change of possession of property under trust agreement for benefit of certain creditors so as to prevent presumption, under Civ. Code, § 3440, that such transfer was fraudulent, is question of fact to be determined by trial court, and where trial court's finding is not without substantial support, its decision on such question is conclusive on appeal.

6. Assignments for benefit of creditors — 45—Transfer of property by insolvent debtor conclusively presumed fraudulent and void against nonconsenting creditors, where not accompanied by delivery and change of possession.

A trust agreement whereby insolvent debtors transferred property to trustee for benefit of particular creditors, is conclusively presumed fraudulent and therefor void as against nonconsenting creditors, under Civ. Code, § 3440, where there was no delivery and change

of possession, and such property was not exempt from attachment under section 3431, at instance of a nonconsenting creditor.

In Bank.

Appeal from Superior Court, Butte County; J. O. Moncur, Judge.

Action by O. W. Jarvis against J. B. Webber, as Sheriff of Butte County. Judgment for defendant, and plaintiff appeals. Affirmed.

Archibald M. Johnson and A. A. DeLigne, both of San Francisco, and Duard F. Geis, of Willow, for appellant.

Bond & Deirup, of Chico, for respondent.

WASTE, J. The appellant brought an action against the respondent as sheriff of Butte county for the recovery of personal property seized under attachment and sold on execution. Judgment was entered for the defendant and the plaintiff has appealed.

The action in which the attachment was issued was brought by the Commercial Bank of Durham against W. A. D'Egilbert and the Western Rice Growers, Inc. It appears that D'Egilbert, the Western Rice Growers, Inc., and Western Warehouses, Inc., were associated in rice culture in Northern California in the year 1920, D'Egilbert owning a controlling interest in both corporations. On account of continuous rains, starting early in the fall of that year, they were unable to harvest their crops, and were in such financial difficulties that they were unable to pay their employees and their other creditors. D'Egilbert, his wife, and his associate corporations executed a document, purporting to be a bill of sale and a deed absolute, whereby a number of tracts of land and a large amount of personal property, including the property subsequently attached by the sheriff, were transferred to O. W. Jarvis, the appellant herein. This document, hereafter referred to as the deed, was dated January 24, 1921, and was acknowledged by the several grantors, their officers and agents on February 5 following. It was recorded in the office of the county recorder of Butte county, at the request of D'Egilbert, on February 19. At the same time there was executed another instrument, purporting to be a trust agreement, which was also dated January 24, 1921. It was never acknowledged, but bears the notation that on the 11th day of March it was "subscribed and sworn to" by D'Egilbert and the officers of the two corporations. In this instrument, hereafter referred to as the trust agreement, the parties named as grantors in the deed, D'Egilbert, the Western Rice Growers, Inc., and the Western Warehouses, Inc., are designated parties of the first part. Appellant, O. W. Jarvis, party of the second part, is designated and referred to as "the trustee." The "Sacramento-San Joaquin

Bank and all other creditors of the parties of the first part, or either of them, who shall consent to the agreement" are the parties of the third part; but the instrument did not contain, nor was there at any time attached thereto, a list of the names of the creditors of the parties of the first part, their places of residence, the amount of their demands, or the amount or nature of any security therefor.

By this instrument the parties of the first part "grant, bargain, sell, convey, assign, transfer, deliver, and set over unto said O. W. Jarvis, the second party, * * * designated as said trustee, all the real property owned by them, or either of them, or in which they or either of them has any interest, and situated * * * in the state of California, and also all the personal property of every kind, nature, and description owned by them, or either of them, * * * wheresoever situated, except the household goods and furniture of said D'Egilbert." The holders of more than two-thirds of the issued capital stock of both corporations, parties of the first part, in writing attached to the instrument, approved and consented to the transfer. The evidence indicates that this instrument was delivered to Jarvis on the 7th or 8th day of February, 1921, but it was never recorded.

At the time of the execution and delivery of the deed and trust agreement, D'Egilbert and the Western Rice Growers, Inc., were indebted to the Commercial Bank of Durham in the sum of \$2,500 and interest. The bank at no time assented to the trust agreement or to any assignment or transfer of the property. It brought the action heretofore referred to, and on the 16th day of February, three days before the deed to appellant was recorded, Webber, as sheriff, acting under a writ of attachment issued in the cause, attached personal property of the defendant which is the subject of the present controversy. Judgment in the action was entered in favor of the Commercial Bank of Durham against D'Egilbert and the Western Rice Growers, Inc., for the sum of \$3,068.13. A writ of execution was thereupon issued and placed in the hands of the sheriff with instructions to sell all of the personal property held by him under the attachment, or a sufficient amount thereof to satisfy the execution and judgment. Three days before the sale, appellant Jarvis demanded of the sheriff possession of the property about to be sold, asserting a right to the possession thereof under the provisions of section 689 of the Civil Code, which provides that a present interest entitles the owner to the immediate possession of property. In the claim he alleged himself to be the owner of the attached personal property, and that he had deraigned title thereto through "an assignment and transfer of title to said personal property" on or subsequent to the 24th day of January, the date of the

deed of trust agreement hereinbefore referred to, "accompanied by an immediate and continuous change of possession." Disregarding the claim of appellant, the sheriff sold the property at public auction for the sum of \$2,824.90. After paying costs of sale, and a preferred laborer's claim amounting to \$100, he paid the remainder of the amount received at the sale to the bank in partial satisfaction of its judgment. Thereafter Jarvis brought this action against the sheriff for the recovery of possession of the property sold, or the value thereof in case delivery could not be had.

The trial court found the facts we have heretofore set out, and, in addition thereto, that at the time of the execution of the so-called trust agreement D'Egilbert and the two corporations were insolvent, which fact was known to all of the parties to the transaction. It also found that, at the time of the execution and delivery of the instrument, D'Egilbert and the Western Rice Growers, Inc., were in the actual possession and control of the property, and the purported transfer was not accompanied with immediate or any delivery to Jarvis, and was not followed by an actual, or continued, or any change of possession. On these facts the court concluded that the purported transfer to Jarvis was an assignment for the benefit of creditors, and that, as to the Commercial Bank of Durham and the attaching sheriff, it was void and of no effect. It therefore held that the sheriff had not unlawfully converted the goods and chattels and rendered judgment for the defendant, from which the plaintiff has appealed, presenting for our determination two main questions: (1) Whether or not the deed and the trust agreement, upon which appellant relies as vesting title in him, constitute an assignment for the benefit of creditors within the meaning of sections 3449-3473 of the Civil Code; (2) if the instruments did amount to an assignment, whether or not they were sufficient to vest title in appellant as against the attaching bank, notwithstanding the fact that they were not intended to, and did not, conform to the code sections. There is also presented the question whether or not immediate and continued change of possession was essential to the validity of appellant's claim of title as against the attaching creditor.

The appellant contends that the instrument denominated a trust agreement was not a statutory assignment for the benefit of creditors, and that the transfer to Jarvis was not therefore in violation of any of the provisions of the sections of the code relating to such transactions, *supra*, but that it was in fact a valid, nonstatutory transfer and assignment for the benefit of creditors generally, within one of the exceptions expressed in section 3440, *supra*, making immediate and continued

change of possession of personal property unnecessary in such cases. It is his contention that the conveyance was for the purpose merely of conserving and protecting the interests of the grantors in their business and properties, and for that purpose it was intended to give to the Sacramento-San Joaquin Bank, and all their creditors who should assent to the transaction, the security of having the affairs of the grantors managed and controlled by a trustee, and to have the payment of their claims made or provided for to the satisfaction of the trustee, which being accomplished, the property should be returned to the grantors. It was not therefore, according to the appellant, the usual assignment to convert properties of the grantors into money and apply the same to the claims of creditors generally.

Respondent concedes that it was within the power of D'Egilbert and his associated corporations to execute to the bank, or to particular creditors, or to a trustee for particular creditors, a deed of trust or a mortgage to secure specific debts, even though thereby a preference might be given, and such mortgage or deed of trust could carry with it the right of possession, and that, on the other hand, it was in their power to execute an assignment for the benefit of creditors in the hope or expectation that all the creditors would join, which assignment would be valid as to all creditors who did join.

The exact nature of the transaction can only be determined by a definite understanding of the legal effect of the purported transfer to appellant. Consequently, an intelligent consideration of the questions presented cannot be had without a more or less extensive statement of the terms of the so-called trust agreement. The instrument recites that D'Egilbert has a controlling interest in the two corporations, who are his cograntors, and that the parties of the first part have carried on their business in such manner that it would be extremely difficult, if not impossible, to separate their properties, liabilities, and obligations, by reason of which fact it would be for the benefit of all the parties of the first part to have their properties and obligations consolidated and handled as one business and property. Being in need of ready money, and deeming it for the best interests of themselves and their creditors and others interested in their affairs that their business and properties "be managed, directed, operated, and controlled by a trustee for the benefit of said parties of the first part, and for the benefit of all of their creditors," and desiring to transfer all their property to O. W. Jarvis, as trustee, for the purpose of having their property administered and disposed of "for the benefit of all the creditors of said parties of the first part," for and in consideration of the sum of \$10

paid by the trustee, "and for other divers good and valuable consideration moving to said parties of the first part from said trustee, and from the creditors of said parties of the first part," D'Egilbert and the two corporations granted, bargained, sold, conveyed, assigned, transferred, delivered, and set over to Jarvis, as said trustee, all their property heretofore mentioned, "the intent and purpose" of the parties "being that said trustee, upon the execution and delivery of this instrument, shall have and be vested with the same right, title, and interest in all the real and personal property belonging to the parties of the first part, or either of them * * * (with the exceptions noted), including the right to operate and carry on the business of said parties of the first part, or either of them, and control and dispose of the property of the parties of the first part, or either of them, to the same extent and with the same full power that said parties of the first part, or either of them, had before the execution and delivery of this instrument; but in trust, nevertheless, for the following uses and purposes, that is to say": (Then follow some 25 declarations of powers granted to Jarvis, as trustee). The substance of these is that the trustee shall take, hold, manage, and deal with all of the property transferred to him in such manner as in his judgment shall be for the best interests, primarily, of the creditors of the parties of the first part, and, secondly, for the best interests of the parties of the first part, who granted to the trustee full and absolute power and authority to sell and transfer, pledge, mortgage, hypothecate, and exchange the property; to borrow money, to pay, satisfy, adjust, compromise, and discharge debts; to declare dividends out of the funds in his hands as trustee to the creditors of the parties of the first part, the distribution of the dividends so declared by said trustee to be made in the same manner as is provided by law to be made by a trustee in bankruptcy, had each of the parties of the first part been adjudged bankrupt on the date of the trust agreement; to receive and collect moneys, interest, rent, issues, and profits; to invest and reinvest the proceeds of the trust property, and generally to have and exercise all other and additional powers, some special, others general, "necessary to carry on the business of said parties of the first part, or any of them, fully and to the same extent as said parties of the first part, or any of them, would carry on the same, and and to do and perform all and every act and thing necessary to carry on said business."

The assignment and transfer to the trustee is made absolute and irrevocable, and there is conferred upon him full and absolute power and authority "to deal with any and all of the trust properties and assets of the trust estate as fully as if the trustee were

the sole and exclusive owner thereof in his own right." There follows a provision that the trust "shall continue until all the claims and the entire indebtedness of the creditors of said parties of the first part for whose benefit this assignment is made shall have been fully paid, satisfied, and discharged." Upon request of the parties of the first part, and their delivering to the trustee a written request or consent of all persons who may be beneficiaries under it, or upon the parties of the first part depositing with the trustee the money to pay in full the obligations of their creditors, the trust shall terminate, upon which event the trustee shall convey the residue of the trust estate remaining in his hands to the parties of the first part. There are other provisions to the effect that the trustee shall not be under any personal liability by reason of the trust, providing what shall be done in the case of his resignation or death, and a final provision that all of the parties of the third part who shall consent to the trust in writing shall be entitled to an equal pro rata right, with all other creditors who consent to the trust in writing, in the benefits thereof. All claims of lien or preference in respect to the property of the trust, or in its benefits, are to be determined and governed upon the hypothesis that each of the parties of the first part had been adjudged a bankrupt on the date of the instrument.

[1] In order to determine the validity of a transaction purporting to be a statutory assignment for the benefit of the creditors of an assignor, we look to the provisions of the Civil Code, found in the title covering that subject. *Watkins v. Wilhoit*, 104 Cal. 395, 399, 38 P. 53. It is therein provided that an insolvent debtor may, in good faith, execute an assignment of property in trust for the satisfaction of his creditors (section 3449). Such assignment must conform to the provisions of the code sections. It must be in writing, must contain a list of the creditors of the assignor, their places of residence, the amount of their respective demands, and the amounts and nature of any security therefor. If the assignor is a resident of the state, the assignment must be made to the sheriff of the county wherein he resides, whose duty it is to forthwith take possession of all the property assigned to him, and keep the same until delivered by him to the assignee elected at a meeting of the creditors called for that purpose, by notice published and mailed by the sheriff. There is the further requirement (section 3458) that an assignment for the benefit of creditors must be acknowledged, approved, and certified in the mode prescribed by the chapter on recording transfers of real property, and must be recorded. Unless that be done, the assignment is void against every creditor of

the assignor not assenting thereto (section 3459). The trust agreement in this case did not contain a list of the creditors of the grantors, it was not made to a sheriff, and it was not recorded. Considered, therefore, as a general statutory assignment for the benefit of the creditors of D'Egilbert and the two corporations, it was void against the Commercial Bank of Durham, which did not assent thereto. *Wilhoit v. Lyons*, 98 Cal. 409, 412, 33 P. 325; *Garn v. Thorwaldson*, 40 Cal. App. 62, 66, 180 P. 9, 11.

Certain transfers made by insolvent debtors are not affected by the provisions of the title of the Civil Code relating to assignments for the benefit of creditors, and appellant contends that the transaction between his grantors and himself is within the exception. The sections of the code relating to assignments for the benefit of creditors were made part of the Civil Code of 1872. At the same time another section of the code was enacted, which has not been changed. It provides that a debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another (section 3432). Section 3451 of the code, found in the title relating to assignments for the benefit of creditors, provided, as enacted in 1872, that the provisions of the title did not affect the power of a person, although insolvent, to transfer property to a particular creditor for the purpose of paying or securing the whole or a part of a debt owing to such creditor, whether in his own right or otherwise. The section bearing on the subject attempted no definition of assignments for the benefit of creditors, and the earlier decisions of the court were not always clear on the question. Matters stood in this situation when the case of *Sabichi v. Chase*, 108 Cal. 81, 41 P. 29, was decided. The court there said (page 86 [41 P. 30]) that there are qualities which, when appearing in an instrument of transfer, characterize it as among those required to conform to the statute, or else be treated as void as to creditors. It was contended in that case that a conveyance of property to trustees to be disposed of, converted into money, and distributed ratably among 10 designated creditors, was in the nature of a mortgage to secure the debts of certain creditors. The court held the transaction amounted to an assignment for the benefit of creditors. It said:

"The distinction between such an instrument and an assignment for the benefit of creditors has been thus stated: 'If the conveyance is to a trustee, and the debtor intends to divest himself, not only of the title to the property, but of all control over it; if it is intended as an absolute conveyance of all of his property, and is made for the purpose of securing a distribution of its proceeds among his creditors, or a portion of them, in legal effect it is an assignment for the benefit of creditors, no mat-

ter what name or designation the parties may have given it. On the other hand, if the intention of the debtor is merely to secure his debt to one or more of his creditors, and the conveyance is not intended as an absolute disposition of his property, but he reserves to himself a right therein, the conveyance will be treated as a mortgage, even though the debtor is insolvent at the time and it covers all his property and but a portion of his debts are secured by it.' *Cadwell's Bank v. Crittenden*, 66 Iowa, 240, 241. And this seems to be a fair statement of the result of the authorities upon this much-vexed question, though great diversity is found in the adjudged cases, due largely to the differences which obtain in the statutes of the several states which have sought to regulate or suppress the evils supposed to arise from the unrestricted right to make preferential assignments allowed by the common law. (See *May v. Tenney*, 148 U. S. 64.) 'The material and essential characteristic of a general assignment is the presence of a trust' (*Brown v. Guthrie*, 110 N. Y. 441; *Burrill on Assignments*, § 3); and while it cannot be said that every transfer of property to trustees for the benefit of creditors is an assignment within the statute (*Lawrence v. Neff*, 41 Cal. 566; *Handley v. Pfister*, 39 Cal. 283; 2 Am. Rep. 449; *Priest v. Brown*, 100 Cal. 626), yet, when a continuing trust is created presenting the features prominent in this case, we think it must be held that the transfer is such an assignment as the Legislature designed to regulate by the provisions of the code (Civ. Code, §§ 3449-73); if not, then those provisions would as well be repealed.

"It has been several times assumed in this court that such a trust indicates an assignment of that nature. *Dana v. Stanford*, 10 Cal. 269; *Wellington v. Sedgwick*, 12 Cal. 469; *Saunderson v. Broadwell*, 82 Cal. 132, 133. The provision that a surplus of proceeds remaining after satisfaction of the claims of the creditors named should be returned to the grantors does not, as supposed by appellants, distinguish the contract as one of security only. *Hall v. Denison*, 17 Vt. 318; *Lochte v. Blum*, Tex. Civ. App., April 10, 1895; 30 S. W. Rep. 925. The reservation of an interest in the possible surplus—not in the property itself—marks the transaction more clearly as an assignment for the benefit of creditors." *Kenefick v. Perry*, 61 N. H. 364.

See, also, 3 Cal. Jur. pp. 313, 314.

The court also held in the case (*Sabichi v. Chase*, supra, at page 85 [41 P. 29]) that the provision of the section of the code (supra), allowing a debtor to pay one creditor in preference to another, or to give one creditor security in payment of his demand in preference to another must be construed in connection with the other provision (supra), that an assignment for the benefit of creditors is void as against any creditor of the assignor not consenting thereto, if it gives a preference of one debt or class of debts over another, and that the law must be construed as virtually saying to the debtor that he may give a preference by paying or securing a creditor, but such preferred payment or security must not take the form of an

assignment for the benefit of creditors. The result of the decision in *Sabichi v. Chase* was to cast some doubt on the correctness of the rule laid down in the earlier cases cited by the court in the opinion relative to transfers for the purpose of paying or securing a particular creditor. Code Commissioner's note. In 1903 this court decided the case of *Heath v. Wilson*, reported in 139 Cal. at page 362, 73 P. 182. In that case a deed, absolute in form, was executed by the debtor. Contemporaneously with the execution of the deed, the grantor and grantee verbally agreed that the property thereby conveyed should be held in trust for certain uses and purposes, which were subsequently set forth in an instrument of even date with the deed. The purposes of the trust were in many material respects similar to those of the case at bar. It was attempted there, as here, to apply the rule laid down in *Sabichi v. Chase*, supra. The court again reviewed the earlier decisions, and decided (page 366 [73 P. 184]) that sections 3432 and 3451 of the Civil Code expressly authorized a conveyance for the purpose of paying or securing certain creditors, and that such transfer was not invalid because it did not conform to the provision of the code relating to assignments for the benefit of creditors generally.

While the case of *Heath v. Wilson* was pending, in fact only a few weeks before the decision was handed down, section 3440 of the Civil Code, providing that certain transfers of personal property are conclusively presumed to be fraudulent, if made by a person having at the time the possession or control of the property and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, was amended (Stats. 1903, p. 111) to provide that the provisions of the section should not apply or extend to any transfer or assignment made for the benefit of creditors generally. In 1905 (St. 1905, p. 622), section 3451 of the code was amended by providing that the provisions of the title relating to assignments for the benefit of creditors do not affect the power of a person, although insolvent, to transfer property in good faith to a particular creditor, or creditors, or to some other person or persons in trust for the purpose of paying or securing the whole or part of a debt owing to such creditor or creditors. Under a more recent amendment (Stats. 1917, p. 255), the provisions of section 3440, supra, relating to fraudulent transfers, are declared not to apply or extend to any transfer or assignment, "statutory or otherwise," made for the benefit of creditors generally.

[2, 3] We think it must be conceded, therefore, that two kinds of transfers or assignments for the benefit of creditors generally are recognized in the code sections we have enumerated. One is the statutory assignment for the benefit of creditors, enabling an

insolvent debtor, through his assignee, to provide for the immediate conversion of the assigned property, or the disposal thereof, and the distribution of the proceeds ratably among the creditors. Civ. Code, § 3449 et seq. If the debtor adopts this method of satisfying his creditors, it matters not whether the creditors give their consent to the transfer. If the provisions of the code are complied with, the assignment is binding on consenting and nonconsenting creditors alike. The other form of transfer is one which, while containing certain characteristics of an assignment for the benefit of creditors, is, in effect, only a conveyance in trust by way of paying or securing certain obligations of the debtor. These transfers are not invalid because they do not conform to the provisions of the sections of the code relating to assignments for the benefit of creditors. Civ. Code, §§ 3432 and 3451; *Heath v. Wilson*, supra. If made for the benefit of creditors generally, such conveyances are protected in their operation as to delivery, and continued change of possession of the property transferred, by the exception contained in section 3440 of the code as amended. But in the present case we are unable to agree with appellant that the transaction whereby D'Egilbert and his allied corporations transferred the property to Jarvis resulted in an assignment for the benefit of creditors generally. By its terms, it inures only to the benefit of one named creditor of the grantors, "and all other creditors * * * who shall consent to the agreement," the final provision being that the creditors "who shall consent to the trust in writing shall be entitled to an equal pro rata right, with all other creditors who consent to the trust in writing, in the benefits thereof."

[4] A nonconsenting creditor is not bound by such a transfer, and his consent thereto cannot be compelled by any act of the debtors, the trustee, or the other creditors. In order, therefore, that an attempted transfer by a debtor, for the purpose of paying or securing one or more creditors—which does not amount to an assignment for creditors generally—may be made effective as against nonconsenting creditors, the conveyance must be executed with due regard to the general principles of law applicable to such transactions. We are unable to construe the transfer in this case as an assignment for the benefit of creditors generally. It was, therefore, not within the exception provided by section 3440, supra. The question whether or not delivery and change of possession attended the transaction thus becomes a material consideration in the case.

[5, 6] The trial court found that the deed and trust agreement were executed at a time when D'Egilbert and the Western Rice Growers, Inc., were in possession and control of the property, and that the transfer was not accompanied by an immediate, or any,

delivery to the appellant, and was not followed by an actual and continued change of possession. Appellant challenges the sufficiency of the evidence to support the finding. The testimony tending to support it, he contends, was "too insubstantial, indirect, and immaterial to amount to a contradiction of the main facts established by direct and positive testimony." But, whether, under the tests necessary to determine the issue, there was a delivery and change of possession was a question of fact to be determined by the trial court upon a consideration of all the evidence in the case. *Hassell v. Bunge*, 167 Cal. 365, 367, 139 P. 800. Its decision upon that, as upon the other issues of fact, is conclusive on this court on appeal, for, reading the evidence in the light and with the inferences most favorable to the conclusion reached below, we cannot say that the finding is without substantial support in the record. It follows that the attempted transfer of the personal property to appellant in this case was conclusively presumed to be fraudulent, and therefore void against nonconsenting creditors. Civ. Code, § 3440. There was, therefore, nothing in the transaction which militated against the attachment levied by the Commercial Bank of Durham (Civ. Code, § 3431), or which prevented the respondent sheriff from selling the attached property under the execution placed in his hands.

The judgment is affirmed.

We concur: MYERS, C. J.; SHENK, J.; SEAWELL, J.; LAWLOR, J.; LENNON, J.; RICHARDS, J.

196 Cal. 114

In re BROWN'S ESTATE.

BROWN et al. v. RILEY, State Controller, et al.

(S. F. 10518.)

(Supreme Court of California. May 2, 1925.
Rehearing Denied June 1, 1925.)

1. Taxation ⚡904—Method to be pursued, when order fixing inheritance tax is attacked, stated.

Where any attack is made on an original order fixing inheritance tax, the complaining party must pursue either of alternative remedies specified in Inheritance Tax Acts of 1917 and 1921, § 11, subd. 3, for the modification or reversal of such order, within time specified for either remedy, but where the order is not questioned and it is merely sought to recover an amount erroneously paid, arising from error or inadvertence in paying under original order fixing tax, remedy is found in subdivision 4.

2. Taxation ⚡904—Statute referring to recovery of taxes erroneously paid refers to inheritance tax in general.

The term "said taxes" in Inheritance Tax Acts of 1917 and 1921, § 11, subd. 4, providing for recovery of tax erroneously paid, does not refer to excessive tax mentioned in section 11, subd. 3, but to inheritance tax in general as provided for in section 2.

3. Taxation ⚡904—Modification or reversal of original order fixing tax prerequisite to refund of amount alleged to have been erroneously paid.

One seeking refund of inheritance tax, alleged to have been erroneously paid, has not the alternative remedy of either applying for modification or reversal of order fixing tax, under Inheritance Tax Acts 1917 and 1921, § 11, subd. 3, or applying for amount erroneously paid, directly under section 11, subd. 4, but in view of section 18, to be entitled to refund, original order alleged to be erroneous must be modified or reversed, either by superior court having jurisdiction or on appeal, and section 11, subd. 4, is not within exceptions contemplated by section 18.

4. Taxation ⚡904—Application for refund of tax held to constitute an attack on validity of original order calling for adjudication of amount of tax fixed therein.

An application for refund of inheritance tax, alleging that order fixing tax was erroneous and illegal, and that payment of taxes was illegally exacted, and together with prayer for order requiring refund and "for such other relief as court may deem proper in the premises" held to constitute an attack on validity of original order calling for an adjudication of amount of tax fixed therein rather than an application for refund of amount "erroneously paid," thus bringing case exclusively within Inheritance Tax Acts 1917 and 1921, § 11, subd. 3, instead of section 11, subd. 4.

5. Taxation ⚡886½—Separate transfers cannot be joined into one but each entitled to separate exemption fixed by statute in force when transfer made and taxable at rate prescribed therein.

Transfers of property in 1909 and 1910, each being separate, distinct, and complete transaction, should be treated as independent transfer entitled to exemption fixed by statute in force when it was made, and taxable at rate prescribed therein, especially as both are governed by Inheritance Tax Act of 1905, and act of appraiser in joining such transfers into a single transfer and allowing but single exemption was erroneous.

6. Taxation ⚡886½—Transfer made prior to 1917 act cannot be joined with one made subsequent to such act for purpose of determining tax.

Inheritance Tax Act 1917, permitting joining of independent vested transfers, applies only when all of such transfers were made after act became effective, and does not permit the joining of transfers made in 1909 and 1910, to

one made in 1920, for purpose of determining tax thereon.

In Bank.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Application by Matilda E. Brown and others against Ray L. Riley, State Comptroller, and another, for refund of portion of inheritance tax paid by the estate of Matilda Brown, also known as Mathilda Brown and as Mathilda A. Brown, deceased. From a judgment denying application, applicants appeal. Reversed with directions.

Delger Trowbridge, of San Francisco, for appellants.

H. C. Lucas and W. H. H. Gentry, both of San Francisco (Ralph W. Smith, of Sacramento, of counsel), for respondents.

LAWLOR, J. The appellants herein have taken an appeal from a judgment based on an order sustaining the demurrer of respondents without leave to amend. Appellants filed a petition in the superior court for a refund of a portion of an inheritance tax paid by the estate of Matilda Brown, deceased, also known as Mathilda Brown and as Mathilda A. Brown. On June 1, 1909, the deceased made a deed of gift of an undivided one-fourth interest in two pieces of property, the Broadway property and the Fourteenth street property in the city of Oakland, county of Alameda, to her children, Matilda E. Brown, Annie F. Brown, David E. Brown, Everett J. Brown, and Elsie G. Hardin, the appellants herein, reserving in herself a life estate in these properties. On March 15, 1910, she executed another deed of gift to the same children, which deed of gift conveyed to them an additional one-twelfth interest in both pieces of property, again reserving a life estate in herself. Immediately afterwards the children conveyed back to decedent an undivided one-third interest in the Fourteenth street property. This left them with an undivided one-third remainder interest in the Broadway property. On April 16, 1920, decedent died intestate, leaving as her estate the one-third interest in the Fourteenth street property, and certain other property, both real and personal. The inheritance tax appraiser, in fixing the tax on this estate, found that on June 1, 1909, and March 15, 1910, decedent deeded to her children an undivided one-third interest in the Broadway property, with the intent that these transfers should not take effect in possession or enjoyment until her death. The two transfers of June 1, 1909, and March 15, 1910, and the transfer of all the property in her estate by intestacy were treated as one transfer, and only one exemption to each of the five children, appellants herein, was allowed on the two transfers inter vivos and the transfer by

succession. The following shows the method of computation:

"Matilda E. Brown (adult daughter).			
One-fifth prop-	erty deeded..	\$66,666 66	\$ 4,000 00 exempt.
			21,000 00 at 1%
			25,000 00 at 1½%
			16,666 66 at 2%
			66,666 66
One-fifth estate	9,842 77	9,842 77 at 4%	
			\$1,312 04
Less one per cent additional \$6,000 exemp-			
tion under 1905 [should be 1917] act.....			
			60 00
			\$1,252 04"

The inheritance tax was formally fixed by the inheritance tax appraiser and his report was duly made and filed on April 13, 1921. Notice was given by posting and mailing in the manner required by law, and thereafter, on April 22, 1921, the order of the court was made approving the report of the inheritance tax appraiser as filed. It is claimed by appellants that the order of the court approving the report was inadvertently made nine days after the posting and mailing of notice instead of ten days thereafter as required by the statute, but they "make no point of that on this appeal."

On April 22, 1922, the application for a refund was made to the superior court. A demurrer thereto was interposed on May 12, 1922. On October 31, 1922, the application was amended in certain particulars and it was stipulated on November 13, 1922, that the said demurrer may stand as a demurrer to the amended application. The demurrer was sustained on each cause of action on November 21, 1922, with leave to amend within five days, to which the appellants noted an exception and declared in open court their refusal to amend; the court thereupon ordered the demurrer sustained without leave to amend. Judgment denying the application for refund was made on November 21, filed on November 22, and entered on November 27, 1922. Appellants' notice of appeal was filed December 9, 1922.

The application was demurred to on the ground that where an inheritance tax is paid in pursuance of an order of the superior court having jurisdiction fixing such tax, the court has no jurisdiction of an application for refund of any part of said tax, unless and until said order is modified or reversed by the superior court having jurisdiction, or on an appeal taken therefrom. This ground, it has been insisted by respondents, is determinative of the appeal.

Appellants' position is, "First, that all three of the transfers in this case should have been treated as three independent transfers, each of which should have been allowed separate exemptions and should have been taxed at the primary rates; and, secondly, that even if the proposition just stated is not true that, in any event, to tax the

transfers of 1909 and 1910 as one transfer would result in an unconstitutional impairment of vested rights fully created in 1909 and 1910, so as to be beyond the reach of the amendment of 1917." Thirdly, " * * * that they were entitled to make this application under section 11, subd. 4, of the Inheritance Tax Acts of 1917 and 1921 * * * " as "it is clear that this provision of the statute is applicable to this case, because subdivision 3 of section 11 of the same acts gives relief to the heirs where the order fixing the inheritance tax is modified or reversed by the superior court or is modified or reversed on appeal. This being so, the following section (subdivision 4) must be applicable to a case where there has been no attempt made to have the order fixing the inheritance tax modified or reversed either by the trial court or on appeal." Or, as stated, " * * * that subdivision 4 is intended to cover all cases where there is some error in the order fixing the inheritance tax pertaining to matters other than the subsequent or erroneous allowance of debts, which other matters have not been litigated in the superior court or on appeal; in other words that this subdivision allows a review of any erroneous order fixing a tax that was made without any objection or contest. * * * " Their position, with regard to the necessity of having the order modified, is that " * * * under subdivision 4 of section 11 of our act * * * it is absolutely unnecessary, because of the sweeping terms in which the right to relief is given, to modify the order before ordering a refund of money paid under it."

After reiterating their contention that where an inheritance tax is paid in pursuance of an order of the superior court having jurisdiction, there can be no refund of said tax or of any portion thereof, unless and until said order has been modified or reversed by the superior court having jurisdiction, or on an appeal taken therefrom, as provided in subdivision 3 of section 11, respondents proceed to set forth their interpretation of subdivision 4 of said section as follows:

" * * * It seems to us that the only reasonable interpretation of the act is to hold that subdivision 3 provides for a refund of money paid in pursuance of a judgment, and subdivision 4 provides for a refund of any amount 'erroneously paid' and that no amount is 'erroneously paid' if paid in accordance with the judgment fixing the tax. * * * "

Respondents' construction of subdivision 4 is again set forth as follows:

"It seems to us that the only construction to be placed on said subdivision 4 to make it harmonize with subdivision 3, is to hold that it refers to errors of the taxpayer and not to errors of the court. Correction of errors of the court is covered by subdivision 3. Errors of the party are covered by subdivision 4.

Amounts 'erroneously paid' are amounts paid in excess of the amount fixed by the order. Instances of such payments were mentioned in our original brief herein. There may be others. These would be covered by said subdivision 4."

Subdivisions 3 and 4 of section 11, as they respectively appear in the acts of 1917 and 1921 (Stats. 1917, p. 880 at page 891; Stats. 1921, p. 1500 at page 1511), read as follows:

"(3) If, after the payment of any tax in pursuance of an order fixing such tax, made by the superior court having jurisdiction, such order be modified or reversed by the superior court having jurisdiction within two years from and after the date of entry of the order fixing the tax, or be modified or reversed at any time on an appeal taken therefrom within the time allowed by law on due notice to the state controller, the county treasurer shall refund to the executor, administrator, trustee, person or persons by whom such tax was paid, the amount of any moneys paid or deposited on account of such tax in excess of the amount of tax fixed by the order modified or reversed, out of any inheritance tax moneys in his hands or custody, and credit himself with the same in the account required to be rendered by him to the controller on his semiannual settlement; but no application for such refund shall be made after one year from such reversal or modification, unless an appeal shall be taken therefrom, in which case no such application shall be made after one year from the final determination on such appeal or of an appeal taken therefrom, and the representatives of the estate, legatees, devisees or distributees entitled to any refund under this section shall not be entitled to any interest upon such refund, and the state controller shall deduct from the fees allowed by this act to the county treasurer the amount theretofore allowed him upon such overpayment.

"(4) When any amount of said tax shall have been erroneously paid, the superior court having jurisdiction, on application after notice to the state controller, and on satisfactory proof to it, shall by order require the county treasurer to refund and pay to the executor, administrator, trustee, person or persons who had paid any such tax in error the amount of such tax so erroneously paid; provided, that all applications for such repayment of such tax so erroneously paid shall be made within one year of the date of the entry of the order fixing tax or of the decree of final distribution of the estate. Such refund shall be made by said treasurer out of any inheritance tax moneys in his hands or custody and he shall credit himself with the same in the account required to be rendered by him to the controller on semiannual settlement; and the state controller shall deduct from the fees allowed by this act to the county treasurer the amount theretofore allowed him upon such erroneous payment."

It is plain to us that the purpose of subdivision 3 is to provide for a modification or reversal of the original order by the superior court or on appeal and to require a refund, when so modified or reversed, by the county treasurer on an order of the superior court.

The party complaining has, under subdivision 3, an alternative remedy, one by appeal from the original order and the other by application to the superior court for a modification or reversal thereof. A party may take an appeal from the original order in the manner and within the time prescribed by the Code of Civil Procedure (part 2, tit. 13, c. 1, §§ 939-959), without applying to the superior court for a modification or reversal of the original order, or apply to the superior court for a modification or reversal thereof without taking an appeal; the court having continuing jurisdiction for two years after the making of the original order within which, either on its own motion or on the application of the complaining party, to modify or reverse it. With regard to the latter remedy, the subdivision does not provide, in terms, that a party complaining may apply to the superior court for a modification or reversal of the original order but, as that court is given power to modify or reverse within two years, it would follow that the party complaining would have the right to invoke its action. But an application for an order of refund, directed to the county treasurer, must be made to the superior court within one year after the original order has been modified or reversed, unless an appeal is taken from such modified or reversed order, in which event the application for the order of refund must be made within one year after the determination of the appeal. When such order of refund is obtained within the period named, upon the presentation thereof the county treasurer shall refund the excessive amount. It will be observed that the subdivision does not expressly provide that the application must be made by the party aggrieved nor that an application for an order of refund shall be made to the superior court, but it is not likely the Legislature intended that the county treasurer should make the repayment without a judicial order. The requirement of such an order is expressly provided for in subdivision 4.

Subdivision 4, on the other hand, is concerned solely with the repayment of amounts of tax "erroneously paid" in all cases where an adjudication is not necessary to determine the amount excessively paid. Subdivision 3, however, as stated above, requires an adjudication that the order fixing the tax was excessive in amount, and then prescribes an exclusive mode for the recovery thereof. In other words, where the original order is modified or reversed the repayment also is made under that subdivision—3; all other repayments are made under subdivision 4. But the remedy prescribed in subdivision 4 is not predicated upon an adjudication that there has been an overpayment; it extends to all those cases where no complaint is made of the original order fixing the tax but due to some error or inadvert-

ence in giving effect to it a sum was "erroneously paid." Under this subdivision application for an order, directed to the county treasurer, for the repayment of the excessive amount must be made to the court within one year of the date of the entry of the original order fixing the tax or of the decree of final distribution of the estate.

[1] From the foregoing discussion of these two subdivisions their scope may be thus briefly summarized: Where any attack is made on the original order fixing the tax the complaining party must pursue either of the two alternative remedies specified in subdivision 3 for the modification or reversal thereof within the time prescribed for either remedy. But, where the order fixing the tax is not questioned, and it is merely sought to recover an amount "erroneously paid" arising from an error or inadvertence in paying under the original order fixing tax, then the remedy is found in subdivision 4.

[2] This subdivision (4) in the opening sentence refers to "said tax" and it has been suggested that this term connotes the excessive tax mentioned in subdivision 3. In view of the variant statutes of limitations the phrase is not susceptible of such a construction. Moreover, the "said tax" would more consistently refer to the inheritance tax in general as provided for in section 2 of the act.

[3] In view of the language of subdivisions 3 and 4 we are unable to accept the reasoning of the appellants that it is not necessary to have the original order alleged to be erroneous modified or reversed in order to effect a refund—that is to say, recourse may be had to subdivision 4 for a refund due to any error in the amount fixed in the original order without having the said order otherwise modified or reversed; that it is optional with the aggrieved party to ask for a refund of the amount "erroneously paid" either by applying for a modification or reversal of the order under subdivision 3 or by applying for the amount "erroneously paid" directly under subdivision 4.

If meaning is to be given to section 18 of the act (Stats. 1917, p. 900; Stats. 1921, p. 1520), which provides that an order fixing tax is to have the effect of a judgment in a civil action it would follow that if any such order has fixed an erroneous amount it would have to be in some manner modified or reversed before a refund of any portion of the tax paid thereunder could be accomplished, for the order otherwise would have the effect of a final judgment in a civil action. Appellants have offered no suggestion as to what disposition would be made of the unmodified or unreversed order, which has ripened into a final judgment. It is conceded by appellants that where the original order is to be modified or reversed, it must be done under subdivision 3, contending, however, that:

" * * * Under subdivision 4 of section 11 of our act * * * it is absolutely unnecessary, because of the sweeping terms in which the right to relief is given, to modify the order before ordering a refund of money paid under it."

Subdivision 4 does not provide for an adjudication of the amount of the tax fixed in the original order in any case; and to allow a refund thereunder where it is claimed the order fixed an erroneous amount would, in effect, be a modification or reversal of such order—a function assigned in plain terms to subdivision 3. Subdivision 4, as already stated, looks solely to the repayment of amounts "erroneously paid" under a valid order, but the order itself is not open to attack on the ground it fixed an erroneous amount. It should be kept in mind that subdivision 4 repeatedly refers to amounts "erroneously paid"—thus indicating an amount was "erroneously paid" and not that the determination of the amount was erroneous.

Nor do we think the Legislature intended to give a complaining party an election of remedies where the amount of the original order fixing tax is alleged to be erroneous—the election of proceeding either under subdivision 3 or subdivision 4. If that had been the intention of the Legislature, each subdivision would have fixed an identical statutory limit within which application should be made to the court for the order on the county treasurer directing the "refund" provided for in subdivision 3, or the repayment of the amount "erroneously paid" in subdivision 4. On the contrary, as we have shown, the time within which the application must be made is not the same in each subdivision.

There is no merit in the contention that subdivision 4 is one of those exceptions contemplated by the phrase "except as otherwise herein provided" in section 18 of the act, and that therefore it provides a mode of review of the original order without a modification or reversal thereof or appeal therefrom. As we have shown, subdivision 4 applies only to those cases where the order fixing the amount of the tax is not questioned. Subdivision 3 provides for a modification or reversal of the order by the superior court or on appeal, while subdivision 4 does not, as already indicated, provide for an adjudication of the amount of the order. It follows that as the respective subdivisions cover different situations they cannot be held to provide alternative remedies.

Appellants have cited authority to the effect that it is not necessary to take an appeal from the original order to secure a refund, but that this may be accomplished by an alternative remedy. It is true, as we have shown, that under our statute where the refund is sought on the ground that the order fixing tax has prescribed an excessive amount the party need not appeal therefrom, but may obtain the refund by having the original or-

der modified or reversed by the superior court. But this alternative remedy, as we have said, is peculiar to subdivision 3 and is in no way contemplated by subdivision 4.

As stated, appellants have claimed and now claim they are entitled to a refund under subdivision 4 without securing a modification or reversal of the original order under subdivision 3. It was upon this question that the demurrer was sustained. But, it is apparent from the foregoing interpretations of the respective subdivisions that if appellants are entitled to relief it is not under subdivision 4; such relief, if at all, can only be granted under subdivision 3.

It was suggested by the court during the oral argument whether, if the facts set up in the application for refund were sufficient, it might be considered as an application under subdivision 3 for modification or reversal by the superior court of the original order fixing the tax rather than an application for relief under subdivision 4.

The brief of appellants, filed after oral argument, contains the following statement:

"On leaving this subject of modification it may be well to say that we concur with respondents' argument * * * that we cannot now move to modify the original order because of the passage of the two-year period mentioned in subdivision 3 of section 11, although we deny there is any necessity under subdivision 4 for modifying the original order. * * *"

Following the conventional allegations the application alleges that:

"Said inheritance tax report, the order fixing said inheritance tax report, and each of them was and is erroneous and illegal, and the payment of said inheritance taxes as alleged * * * was erroneously and illegally exacted. * * *

"That as a result of said erroneous and illegal inheritance tax report and decree fixing said inheritance tax as aforesaid your petitioners * * * were erroneously and illegally compelled to pay inheritance taxes as aforesaid. * * *

"Wherefore, said petitioners * * * pray for an order of said court requiring said county treasurer to refund and repay to each of said petitioners, * * * and for such other relief as to the court may seem proper in the premises." (Italics ours.)

[4] We think the application is sufficient to constitute an attack on the validity of the original order calling for an adjudication of the amount of tax fixed therein, rather than an application for refund of an amount "erroneously paid," thus bringing the case exclusively within subdivision 3 instead of subdivision 4. The demurrer went to this point. This being so, should not the application be determined under subdivision 3?

We quote with approval what was held in *Zellner v. Wassman*, 184 Cal. 80, 88, 193 P. 84, 87:

"It is not essential that a complaint state a cause of action for the relief which plaintiff

seeks, provided the facts stated show some right of recovery, and a party cannot be thrown out of court merely because he may have mis-conceived the form of relief to which he is entitled. * * *

Respondents' position is thus stated :

"If we grant that the petition states facts sufficient to warrant relief under said subdivision 3, we are confronted with the fact that said petition also shows that the tax, as fixed, has been paid. Therefore, in order to entitle appellants to a refund, the order must be modified 'within two years.' It is not enough that the petition be filed or the motion made within two years, but the order of modification must, under the wording of said subdivision 3, be made within two years. The two years have elapsed and the order has not been made. We take it, that even if this court should hold that the superior court should have overruled the demurrer and modified the order fixing the tax, in spite of the fact that appellants did not ask it to do so, that the judgment of the superior court will not now be reversed when it appears that appellants are not now entitled to said modification, the two years having elapsed, and that the superior court would not now have the right to make such a modification."

In the face of the record facts the contention of respondents cannot be maintained. It has been shown that the original order was made on April 22, 1921. The application for refund was filed April 22, 1922. The demurrer was interposed on May 12, 1922, and sustained November 21, 1922, and the notice of appeal from said order and the judgment based thereon was filed December 9, 1922, less than 20 months after the original order was made. In view of the fact that the jurisdiction of the superior court was suspended by the filing of the notice of appeal during the two-year period mentioned in subdivision 3, it is not necessary to decide whether the running of the statute would date from the filing of the application or from the taking of the appeal. Having concluded that the application of appellants may be determined under subdivision 3, we are brought to consider whether the original order fixed an erroneous amount of tax.

We have already stated the contention of appellants that the method of computation employed by the inheritance tax appraiser in the instant case is illegal and erroneous, as being contrary to the holding in the second decision in *Estate of Potter*, 188 Cal. 55, 204 P. 826, handed down after the filing of the appraiser's report herein. That case involved the question of the rates of computation of inheritance tax upon the valuation of property given at the death of decedent and that given prior to her death, respectively. In the first decision the court held that the rates in force at the time of the transfer are controlling, but that, as a transfer made in contemplation of death is only taxable in aid of a succession tax, the Legislature has power to consider, in fixing the rate of taxation up-

on the property passing at the time of death, all property which has theretofore passed to the legatee by gift in contemplation of death, and the fact that it has no power to increase the amount of tax upon the property already vested in the legatee in no way bears upon the power to consider that element in fixing the tax to be paid by the legatee for property transferred at death. In the decision upon rehearing upon the order was reversed, the court holding that the value of the parcel of property transferred by the gift and the value of the parcel transferred at death cannot be combined for the purpose of ascertaining the rate chargeable upon the property left to the child at the death of the parent, but the rate is to be calculated and the exemption allowed solely upon the value of the property vesting in the child at such time, without adding the value of the previous gift. It is to be noted that the act of 1917, in which transfers made before and after the taking effect of that act are to be combined in one taxable entity, was not involved in the *Estate of Potter*, supra, for the reason that it was not in force in 1916, the date of the death of the parent. Respondents point out there is "nothing in the final opinion in said matter [*Estate of Potter*] inconsistent with the order of the court fixing the tax in the instant case, under the changed facts, Mrs. Brown having died after the taking effect of the 1917 act." The final majority decision declares, concerning the 1917 act:

"Likewise it is clear that the language does not indicate an intent to declare that for the purpose of taxing the property received at the death of Mrs. Potter in 1916 it shall be raised into the class above \$500,000 in value in order to tax it at 12 per cent. on the whole thereof. The only statute which purports to authorize such a combination of values for computing the tax is the act of 1917 (Stats. 1917, p. 880). Section 2 of that act declares that when, 'either before or after the passage of this act' more than one transfer has been made by a decedent to one person, the tax shall be imposed upon the aggregate market value of all such transfers as if the property had passed by one transfer. (Subd. 9.) This act cannot be given a retroactive effect upon transfers vested in 1916, so as to increase the tax thereon. Any attempt to do so would, of course, be void."

[5] In *Estate of Potter*, supra, each of the transfers involved was governed by a different act, and the court was concerned primarily with the question of whether or not the amendment of the 1917 act was retroactive, so as to allow a combining or lumping of an antecedent transfer with one occurring at the death of the grantor for the purpose of determining the tax on the transfer resulting from the death of the grantor—that is to say, considering both transfers as a single taxable entity with one exemption. Nevertheless, the court expressed the view that in so far as transfers of property were amenable to an inheritance tax, each was to be treated

as a separate and distinct transaction, the taxpayer being entitled to a separate exemption on each transfer and subject to the primary rate prescribed by the act in force at the time such transfer was made. This view is not, expressly or impliedly, restricted to transfers occurring under different acts, but is broad enough to extend to all transfers whether governed by the same or different acts, there being no provision for the joining of the several transfers into one taxable entity. It follows that the inheritance tax appraiser in computing the tax in the instant case had erroneously joined the transfers of 1909 and 1910 into a single transfer and allowed but a single exemption. Each of said transfers being a separate, distinct, and completed transaction should have been treated in line with the reasoning of *Estate of Potter*, supra, as an independent transfer entitled to the exemption fixed by the statute in force when it was made and taxable at the rate prescribed therein—this, in view of the fact that both of such transfers are governed by the same Inheritance Tax Act of 1905 (St. 1905, p. 341).

[6] Now, with regard to the transfer which vested on the death of the decedent in 1920 after the amendment of 1917, which provided for the first time for a joining of several independent transfers: By adding the amount of the transfers of 1909 and 1910 to that of 1920 a total of over \$75,000 to each heir was arrived at, thereby fixing a higher rate on the last transfer.

In our opinion the amendment of 1917 permits a joining of independent vested transfers only where all of such transfers were made after it became effective. We have seen that the rate of taxation on the transfers of 1909 and 1910 cannot be increased by a statute passed subsequent to such transfers. To hold that those transfers could be joined to that of 1920 for the purpose of determining the rate on the latter would, in effect, be to impute to the Legislature an intention to do indirectly what could not be done directly. The illustration was given in *Estate of Potter* supra, that where a decedent having two children made a gift to one of them in advance of death, dividing at death the remainder of his estate equally between them, the tax imposed on the one receiving the gift would approximately be three times as large as that on the other. The opinion continues:

"This would seem to put the Legislature in the position of attempting to do indirectly what it could not do directly; that is, to increase the burden of his tax on his share of the estate and discriminate between him and his brother in that respect, solely upon the ground that he had received a prior gift taxed at a lower rate, which the state was unable to increase by the subsequent statute. A construction imputing to the state a design so indicative of resentment

or regret should not be adopted. Such meaning, if intended by the Legislature, should be clearly expressed in the statute."

Respondents point out that in *Estate of Potter*, supra, the respective transfers were made under different acts, and that, had they been made under one act as the transfers of 1909 and 1910 in this case, the court would have been disposed to allow them to be joined. In support thereof they quote as follows:

"A comparison of the respective sections of the acts of 1905 and 1913 on this subject shows that while each act provides for an appraisal of all property subject to tax, including that passing by a prior gift as well as that passing at death, *and perhaps the imposition of the tax on the whole thereof passing to the same person at the tax rates fixed by the respective acts*, the language in which these provisions are expressed is not by any means the same in the two cases."

If it be conceded that the language we have italicized was intended as a qualification of the rule laid down, it would be obiter dicta for the reason that *Estate of Potter*, supra, did not involve two transfers under the same act; and, moreover, it would be opposed to the holding that no transfer can be joined to another to increase the rate on either, unless a statute is in existence at the time each transfer is made authorizing such a joinder.

The question of prior transfers made under the same act was not, of course, involved in *Estate of Potter*, supra, and hence the decision contains no definite statement that the rule would be the same as when prior transfers come under different acts; but, nevertheless, the decision indicates that the holding would have been no different if the transfers had been made under the same act. We think no other conclusion could have been adopted.

And as the transfers of 1909 and 1910 may not be joined in determining the tax thereon, notwithstanding the 1920 transfer was subsequent to the amendment of 1917 providing for joining transfers, those of 1909 and 1910 cannot be availed of to increase the rate on the later transfer, because that would be doing indirectly what could not be done directly.

Finally, as each of the three transfers herein involved must be treated as a separate and independent transfer taxable at the rate fixed by the act in force when each was made, allowing the exemptions provided for in each act, the order and decree appealed from are reversed, with directions to the superior court to overrule the demurrer and take such further proceedings as are in accordance with the views herein expressed.

We concur: RICHARDS, J.; SHENK, J.; WASTE, J.; LENNON, J.; SEAWELL, J.

71 Cal. App. 646

DAVIS et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR ALAMEDA COUNTY et al. (Civ. 5140.)

(District Court of Appeal, First District, Division 2, California. March 11, 1925.)

1. Prohibition ☞9—Writ will lie only where inferior tribunal about to do some act unauthorized by law.

Writ of prohibition will lie only where inferior tribunal is about to do some act unauthorized by law.

2. Prohibition ☞13—Would not lie to restrain superior court from hearing an appeal after determination thereof.

Writ of prohibition would not lie to restrain superior court from trying appeal from justice court because fees required to be paid to justice court under Code Civ. Proc. § 981, had not been paid in time, where superior court had prior to service of writ heard and determined appeal.

3. Prohibition ☞28—Application for writ not treated as writ of review when complete record not brought up.

Application for writ of prohibition to restrain superior court from trying an appeal from justice court would not be treated as a writ of review upon determination of appeal by superior court before service of writ, where a complete record had not been brought up so that court could know that it was doing exact justice between parties.

Application by Robert Taylor Davis and another for writ of prohibition against the Superior Court of the State of California in and for the County of Alameda, Hon Joseph S. Koford, Judge thereof. Writ denied.

C. W. White, of Hayward, for petitioners.
J. J. Rose, Jr., of Oakland, and W. W. Laidley, of Bakersfield, for respondents.

STURTEVANT, J. This is an application for a writ of prohibition to restrain the respondent superior court from further proceeding to try the purported appeal in the case of *Davis v. Stadler*.

The application was made to this court on December 22, 1924. On the 23d day of December, 1924, this court ordered an alternative writ to issue returnable before this court on the 12th day of January, 1925. The respondent answered by filing an affidavit by J. J. Rose, Esq., attorney for Stadler, a general demurrer and a certified copy of the judgment of the superior court made and entered in the case of *Davis v. Stadler* on the 29th day of December, 1924. The cause was submitted on all of said documents, as on a motion for judgment on the pleading.

On the 14th day of June, 1924, Hon. Jacob Harder, Jr., as justice of the peace of the township of Eden, county of Alameda, state of California, in an action wherein Robert

Davis and Elise Davis were plaintiffs, and Jacob Stadler was defendant, entered a judgment in favor of the plaintiffs against the defendant in the sum of \$267.52, and said justice thereupon gave written notice to all parties that said judgment had been entered. Thereafter a purported appeal was taken to the superior court. Thereafter the plaintiff appeared in the superior court and made a motion to dismiss, alleging that the said appeal had not been legally perfected by reason of the fact that the fees required to be paid to the justice court under the provisions of section 981, Code of Civil Procedure, were not paid until a date more than 30 days after the rendition of the notice of judgment in the said action entitled *Davis v. Stadler*. The petition further recites that the motion to dismiss was thereafter presented to the superior court and that the superior court denied the motion, and it is further averred that the respondent superior court will proceed and try said action de novo unless restrained by this court.

The petition does not raise any issue on the question: (1) That a notice of appeal was duly and regularly filed; (2) that an undertaking in due form to recover costs and to stay proceedings was duly and regularly filed; but (3) it does present an issue as to whether the fees required by the provisions of section 981, Code of Civil Procedure, were paid within 30 days after the judgment was rendered by the justice court. The petition is so drawn that it shows on its face that the question as to whether said fees were paid was, under the facts of this case, a mixed question of fact and law and which question was presented to the superior court in the form stated when the petitioner applied to the superior court to dismiss the appeal. The petition recites that the motion to dismiss the appeal was supported by "all the records and files in said action together with the affidavit of J. J. Rose, Jr., the affidavit of Jacob Harder, Jr., justice of the peace, and the written stipulation of counsel of the respective parties, * * *" but the petition does not purport to set forth that evidence, excepting to furnish a copy of the two affidavits specified. In its return the respondent superior court alleges that on the 29th day of December, 1924, and prior to the service upon it of the alternative writ of prohibition, the case of *Davis v. Stadler* was heard and determined and a judgment in favor of the defendant was entered therein; and to that return is attached a copy of the judgment.

[1, 2] It is settled law of this state that a writ of prohibition will lie only where the inferior tribunal is about to do some act unauthorized by law. It is a preventive rather than a corrective remedy and issues only to restrain the commission of a future act and not to undo an act already performed. *Blade*

v. Fresno County, 60 Cal. 290; Hull v. Superior Court, 63 Cal. 179; Havemeyer v. Superior Court, 84 Cal. 327, 393-394, 24 P. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; Valentine v. Police Court, 141 Cal. 615, 75 P. 336. It is clear, therefore, that a writ of prohibition should not under the facts of this case be issued.

[3] At the time of the argument the petitioner requested that this court treat this proceeding as an application for a writ of review. When the petition is filed in time and a complete record has been brought up and all of the facts are before the court so that the court can know that it is doing exact justice as between the parties, the court will adopt that procedure (Van Hoosear v. Railroad Commission, 189 Cal. 228, 236, 207 P. 903); but the record in this case does not bring it within the purview of that rule. In the first place, all of the evidence taken before the trial court is not before this court, and, in the second place, the evidence taken before the trial court consisted of certain affidavits which were very brief and did not even purport to state all of the facts.

The writ is denied.

We concur: LANGDON, P. J.; NOURSE, J.

71 Cal. App. 571

CLARK v. BURNS HAMMAM BATHS et al.
(Civ. 5014.)

(District Court of Appeal, First District, Division 2, California. March 7, 1925.)

1. Bailment ⇨14(4)—**Defendant held grossly negligent in delivering plaintiff's property to person presenting key, without ascertaining his identity.**

Where plaintiff, as patron of a bathhouse, deposited his valuables with clerk, who placed them in a box, delivering key thereto to plaintiff, delivery of such valuables to person presenting key, without inquiry as to his identity, was gross negligence, rendering defendant liable for their value.

2. Bailment ⇨14(4)—**Defendant was bailee for hire and required to use ordinary care for preservation of things deposited.**

Where plaintiff, as patron of a bathhouse, deposited his valuables with the clerk, who placed them in a box, and delivered key thereto to plaintiff, who paid value for such keeping, defendant was a bailee for hire and required to use at least ordinary care for preservation of things deposited, under Civ. Code, § 1852.

3. Bailment ⇨14(4)—**Contributory negligence of plaintiff held immaterial, where proximate cause of loss was defendant's negligence.**

In suit to recover value of property deposited for safe-keeping with bathhouse proprietor and placed in box to which plaintiff was given a key, contributory negligence of plaintiff in not going to office immediately on dis-

covering loss of his key held immaterial, where proximate cause of loss was defendant's negligence in not requiring identification of some kind before delivering property to person presenting key.

4. Bailment ⇨14(4)—**Plaintiff not contributorily negligent barring recovery for misdelivery of deposited property by not securing different type of sleeping quarters.**

In suit to recover value of property deposited with bathhouse proprietor and by him delivered to person presenting key to box in which it was kept, plaintiff held not contributorily negligent in not paying a larger sum and securing a different type of sleeping quarters so that key would not have been stolen, since it was defendant's duty to exercise same care in handling guest's property irrespective of price paid for accommodations.

5. Bailment ⇨31(2)—**Evidence, showing that none of patrons of bathhouse establishment had suffered any loss under system of handling property used in plaintiff's case, held properly excluded as immaterial.**

In suit to recover property deposited with bathhouse proprietor, and by him delivered to person presenting key to box in which it was kept, evidence showing number of patrons of such establishment during year preceding loss, and that none of them had suffered any loss under system of handling property, was properly excluded as immaterial.

6. Damages ⇨64—**Plaintiff's recovery against bathhouse proprietor misdelivering his deposited property not affected by insurance thereon.**

In suit for value of property deposited with bathhouse proprietor and misdelivered by him to person presenting key to box in which it was kept, that plaintiff had insurance on one of articles lost was immaterial, since defendant had no interest in any benefit under policy.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Frank R. Clark against the Burns Hammam Baths and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Albert I. Loeb, of San Francisco, for appellants.

Egan & Morris, of San Francisco (Hugh F. Keon, Jr., of San Francisco, of counsel), for respondent.

LANGDON, P. J. This is an appeal by the defendant Burns Hammam Baths from a judgment against it in the sum of \$889.50, the value of certain property intrusted by the plaintiff to the care of said defendant, which was never returned to the plaintiff.

On July 23, 1921, the plaintiff was a patron of the bathhouse operated by the defendant and deposited money and jewelry in a box provided by the defendant for that purpose, which box was locked and the key, attached

to a rubber band, fastened about plaintiff's wrist. At the time of receiving this property, an employee of defendant wrote the name of the plaintiff, together with a list of the articles deposited in the box by him, upon a slip of paper and attached this slip of paper to the outside of the box in some manner, and then replaced the box in its proper compartment. The box and the key for the same were numbered 26.

After plaintiff had availed himself of the bathing facilities of the establishment, he retired for the night to a room, which was merely separated from other rooms by curtains. In the morning, about 8:45 o'clock, he went to a washstand provided for his use, and while there, noticed that the key to his box was not attached to his wrist. He mentioned this to a Chinese laborer cleaning up the place and was told to go "downstairs." The office was downstairs. Plaintiff returned to his room and dressed, and called at the office about 15 minutes later, explaining that his key had disappeared and he wished the contents of his box. There he was told that the key had already been presented by some one else and the contents of the box carried away by such person. This litigation resulted. The trial court found that the defendant was guilty of gross negligence in making no inquiry as to the identity of the person presenting the key for access to box numbered 26, and that the defendant at that time had the means of identifying said person.

[1] The question presented is whether or not this finding is supported by the record. We think it is. As we have stated, the defendant had placed outside the box the name of the person owning the property and the nature of that property. When the key was presented, it would have been very simple and effective to have asked the person presenting it for his name. In this case, such a precaution, probably, would have prevented the loss. The clerk who delivered the contents of the box stated that he did not ask for the man's name, nor use any precaution to identify him; that he had no recollection even of his appearance.

[2] The defendant was a bailee for hire. The plaintiff had paid a lump sum for the privilege of a bath, and the use of a room and a lockbox for his valuables. A depositary for hire must use at least ordinary care for the preservation of the thing deposited. Civil Code, § 1852. We agree with the trial court that ordinary care required the defendant to inquire as to the identity of the person presenting the key, and the fact, that the defendant had a paper upon which was written the name of the owner of the property fastened to the outside of the box, placed the defendant in a position where it could have exercised easily a precaution which doubtless would have prevented the loss.

[3] The appellant contends that the plaintiff was guilty of contributory negligence, be-

cause he did not go to the office immediately upon discovering the loss of his key, but waited until he had dressed completely. The plaintiff testified that he discovered the loss of the key only about 15 minutes before notifying the office. The clerk who delivered the property testified at the trial that he recalled delivering the same about 15 or 20 minutes before the plaintiff appeared and stated he had lost his key. There is a conflict in the evidence upon this question, however, for the record contains the statements of a police officer, who investigated this matter on the morning of the loss, to the effect that when he questioned the clerk as to the appearance of the man who had received the property and the time at which he had received it, the clerk stated that he did not recall anything about it; that he did not know at what time he had delivered the property, and thought the night clerk had probably delivered it before he left at 6 o'clock in the morning. But even though we accept the version most favorable to appellant, it appears that the proximate cause of the loss was the negligence of defendant in not requiring identification of some kind before delivering the property. If it had taken the simple precaution of asking the name of the man, it would have discovered the fraud and it would have been immaterial then whether the plaintiff reported the loss at 9 or 10 or 11 o'clock. It is only where contributory negligence is the proximate cause of an injury that it will bar recovery.

[4] It cannot be successfully argued that the plaintiff was guilty of negligence barring his recovery, because he lost his key, for it does not appear in the record that he lost it. It may have been removed from his arm while he slept, so far as the record discloses. To meet this situation, the appellant urges that plaintiff was negligent in not paying a larger sum and securing a different type of sleeping quarters—a room with a door which could be locked. We think there is no merit in this contention. The defendant offered accommodations at different prices and it was its duty to exercise the same care in handling the property of guests who had paid only \$1.75 for their accommodations as in handling the property of guests who had paid \$2.25.

[5] Complaint is made because the trial court excluded offered testimony to show the number of patrons of this establishment during the year preceding the loss, and the fact that none of them had suffered any loss under the system of handling property which was used in the plaintiff's case. We think the testimony entirely immaterial. In this case loss was suffered; a simple method of precaution was available to defendant by which it might have been avoided, and it is immaterial that in innumerable other instances the defendant failed to use this same simple precaution and, nevertheless, escaped without loss.

[6] The fact that the plaintiff had \$150 insurance upon one of the articles lost is of no advantage to the defendant. The insurance was not for the benefit of the defendant. The plaintiff stated he had not collected this money from the insurance company, and the adjustment of the loss is a matter between him and the insurance carrier. Doubtless the insurance company would have had a right of subrogation to plaintiff's claim against the defendant had it paid this loss, but the defendant has no interest in any benefit under the policy. It is answering for its own tort, and the adjustment between the plaintiff and the insurance company need not concern it.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

72 Cal. App. 39

BIRD v. MURPHY et al. (Civ. 2872.)

(District Court of Appeal, Third District, California. March 26, 1925.)

1. Trial $\S$ 397(1)—Material issue at trial must be determined.

In action to quiet title, where fraudulent conveyance of lots in question to plaintiff was in issue, failure of trial court to pass on question *held* error.

2. Fraudulent conveyances $\S$ 299(12) — Evidence held sufficient to support issue of fraudulent conveyances.

Where husband conveyed property to wife immediately after daughter had obtained judgment for maintenance against him under Civ. Code, $\S$ 206, evidence *held* sufficient to support issue of fraudulent transfer.

3. Fraudulent conveyances $\S$ 269(1)—Issue of fraudulent transfer raised on general denial of title in action to quiet title.

In action to quiet title, where complaint is silent as to source of plaintiff's title, general denial that plaintiff is owner or entitled to possession is sufficient to raise issue of fraudulent transfer without specific allegation, since defendant is not required to anticipate source of plaintiff's title.

4. Pleading $\S$ 34(7)—All reasonable deductions will be made in favor of cross-complaint objected to for first time on appeal.

Where objection to cross-complaint for failure to state cause of action is raised for first time on appeal, all reasonable deductions will be made in favor of pleading.

5. Fraudulent conveyances $\S$ 241(5)—Execution not prerequisite to maintenance of equity suit to enforce judgment, where clearly fruitless.

Where transfer of lots left judgment debtor without any property, issuance and return of execution, which would clearly be fruitless, *held* not prerequisite to raising issue of fraudulent conveyance.

6. Fraudulent conveyances $\S$ 226 — Title remains in fraudulent grantor so far as existing judgment creditor is concerned.

Title of property conveyed with intent to defraud remains in grantor so far as existing judgment creditor is concerned.

7. Fraudulent conveyances $\S$ 237(1) — Conveyance to defeat subsisting judgment can be set aside.

Conveyance to defraud creditors and defeat valid subsisting judgment may be set aside in proper proceeding.

Appeal from Superior Court, San Joaquin County; J. A. Smith, Judge.

Action by Dan W. Bird against Lulu Mig-non Murphy, in which S. S. Murphy and wife were made cross-defendants. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

B. M. Bainbridge and A. P. Hayne, both of Stockton, for appellant.

John R. Cronin, of Stockton, for respondent.

THOMPSON, Justice pro tem. This is an action to quiet title to two lots at Lodi, San Joaquin county. The defendant specifically denied the allegations of ownership and right of possession by the plaintiff. In a cross-complaint the defendant also alleged the existence of a judgment in her favor in said county, and a fraudulent conveyance of the property to plaintiff to defraud creditors and defeat her judgment. The cross-defendants appeared and filed disclaimers and specific denial of the alleged fraudulent conveyance. From a judgment quieting title in plaintiff, and failing to pass upon the issue of fraudulent conveyance, this appeal was taken.

[1] The question of the fraudulent conveyance of the lots was an issue at the trial, and should have been passed upon by the trial court.

The complaint contains the simple allegations of a suit to quiet title, as follows:

"That the plaintiff is now, and for a long time hitherto has been, the owner and in possession of those certain lots (describing them). * * * That the defendant claims an estate or interest therein adverse to the plaintiff. * * * That the claim of the defendant is without any right whatever."

The complaint fails to allege the source of plaintiff's title.

The answer and cross-complaint are inartificially drawn. The material portions are in the following form:

"Denies that plaintiff holds any cause of action against the defendant. Denies that the above Dan W. Bird and wife are the real owners of the hereindescribed property, or any interest therein.

"Admits that the property was recorded in

the name of the above Dan W. Bird on November 13th, 1914. * * *

"Admits that the said property was recorded in the name of the above Alice K. Murphy on August 10, 1914. * * *

"Admits that the defendant holds a judgment against the above S. S. Murphy, which said judgment clouds the therein title.

"Admits that said defendant holds a judgment lien against the title and premises therein by reason of a judgment in an action in above court against the above S. S. Murphy. Said judgment found and docketed in her favor prior to the above transfer into the name of the above Dan W. Bird. * * *

"Alleges that above defendant, with full knowledge on the part of above plaintiff Alice K. Murphy, secured above judgment against the grantor S. S. Murphy prior to the above recording of said property into the name of Alice K. Murphy, from the name of above S. S. Murphy.

"Further, by way of cross-complaint (defendant) complains:

"That above defendant S. S. Murphy has paid all of the payments due above defendant under said judgment * * * up to and including May 5, 1914. That said defendant S. S. Murphy thereupon ceased to pay and refused to pay said defendant any further moneys * * * under said judgment. That there is now due * * * sixty-two months payments * * * under said judgment. * * *

"That, at the time * * * the said judgment * * * was found, * * * above S. S. Murphy was the owner of the above property. * * * That, soon after the * * * recording of the above property in the name of Dan W. Bird, said property was mortgaged in favor of above Alice K. Murphy. * * *

"Therefore above defendant holds that the aforescribed transfer of above property into the several names of Alice K. Murphy and Dan W. Bird * * * was for no legal purpose whatever, but said transactions were for the purpose of defrauding said Lulu Mignon Murphy out of the income of * * * said judgment * * * and evading payment thereof."

Then follows the prayer, asking among other things that the court "declare that the afore-described transfer of the above-described property into the name of said Alice K. Murphy was not for any legal purpose whatever, but for the purpose of defrauding the above defendant. * * *" And further asked the court to find that the judgment created a lien upon the property in question, and that an execution might issue against said property for the satisfaction of said judgment.

The plaintiff, Bird, answering the cross-complaint, denied that he acquired the property "for the purpose of defrauding the defendant," or for the purpose of "assisting S. S. Murphy to evade any judgment that the said defendant held against him." And further alleged that the property was acquired in good faith and for a valuable consideration.

Cross-defendants S. S. Murphy and Alice K. Murphy, answering the cross-complaint,

denied that the plaintiff acquired the real property in question "for the purpose of defrauding defendant." They further alleged that plaintiff acquired the property in good faith and for a valuable consideration. Both cross-defendants disclaimed any interest in the property.

[2] The evidence shows that the defendant is a daughter of cross-defendant S. S. Murphy. In an action for maintenance under section 206 of the Civil Code, the defendant obtained a judgment against her father for the sum of \$15 per month, payable in monthly installments. This judgment was rendered July 2, 1914, and was entered nunc pro tunc as of March 21, 1912, and was docketed October 8, 1914. No part of the judgment has been paid or satisfied since July, 1914. At the time of the commencement of the present action to quiet title, that judgment for maintenance was in full force. A considerable sum was then due and payable thereon. August 8, 1914, the cross-defendant S. S. Murphy conveyed the lots in question to his wife Alice K. Murphy. Cross-defendants testified that the consideration consisted of voluntary contributions from the wife's separate funds to the household expenses. The amounts of these alleged contributions are very uncertain. There was no previous agreement to refund these sums so advanced, nor to recompense the wife therefor. The conveyance of these lots was made from the judgment debtor to his wife one month after the entry of the judgment. S. S. Murphy owned no other property, except, as he says, one jackknife. Three months later the lots were conveyed to this plaintiff. The consideration for the last transfer was \$500. This was paid with plaintiff's note. He denied securing this note by mortgage. Yet February 19, 1915, he executed his mortgage on these same lots to Alice K. Murphy to secure payment of his note for the sum of \$500. He also took the acknowledgment as notary public to the deed from S. S. Murphy to his wife.

These circumstances furnish at least some evidence of a fraudulent conveyance.

[3] Even though it may be said that the allegations of the cross-complainant are insufficient to raise the issue of a fraudulent transfer, still, under the general denial that the plaintiff is the owner or entitled to the possession of the lots in question, since the complaint is silent as to the source of plaintiff's title, and the defendant is not required to anticipate the source of plaintiff's title, a fraudulent transfer may be shown by defendant without specifically alleging such fraud. 12 Cal. Jur. 1056; *Mason v. Vestal*, 88 Cal. 396, 26 P. 213, 22 Am. St. Rep. 310; *Howe v. Johnson*, 107 Cal. 77, 40 P. 42; *Banning v. Marleau*, 121 Cal. 240, 53 P. 692.

In this case there was no objection on the part of plaintiff or cross-defendants to the

answer or cross-complaint, by demurrer or otherwise. Nor has the insufficiency of defendant's answer or cross-complaint been attacked on appeal, either by briefs or oral argument. In the case of *United Land Ass'n v. Pacific Improvement Co.*, 139 Cal. 370, 69 P. 1064, 72 P. 988, it is said:

"We are * * * of the opinion that in a suit to quiet title, as in other suits, a denial of the allegations of the complaint is a sufficient answer."

[4] It is the general rule that an objection to a complaint, or cross-complaint, on the ground that it fails to state a cause of action, may be raised for the first time on appeal, yet "objections of this character * * * are looked upon with great disfavor, and if, with all reasonable deductions that can be drawn therefrom, the facts alleged are sufficient to show a cause of action, the pleading will be upheld. 2 R. C. L. 87; *County Bank of San Luis Obispo v. Jack*, 148 Cal. 437, 83 P. 705, 113 Am. St. Rep. 285; *Johnson v. Taylor*, 150 Cal. 208, 88 P. 903, 10 L. R. A. (N. S.) 818, 119 Am. St. Rep. 181.

[5] The defendant held a valid judgment against S. S. Murphy, at the time he conveyed the lots in question to his wife, and thence to plaintiff. She then had a right to issue execution against these lots for the satisfaction of the accrued portion of said judgment. Ordinarily a judgment creditor must exhaust his remedies at law before he can proceed in equity to satisfy a judgment, but, when it appears that the issuing of an execution would be fruitless, the issuing and return of the execution is not a necessary prerequisite to the maintenance of a suit in equity. 12 Cal. Jur. 1038; *Blanc v. The Paymaster Mining Co.*, 95 Cal. 524, 30 P. 765, 29 Am. St. Rep. 149. In this case it clearly appears that the transfer of the lots left the judgment debtor without any property subject to execution. Therefore the issuing and return of an execution prior to the raising of the issue of a fraudulent conveyance was unnecessary.

[6, 7] So far as an existing judgment creditor is concerned, the title and ownership of property conveyed with intent to defraud creditors remains in the fraudulent grantor as completely as though the transfer had not been attempted. A conveyance made to defraud creditors, and to defeat a valid subsisting judgment, will be set aside in a proper proceeding. *Ohio Electric Car Co. v. Duffet*, 48 Cal. App. 678, 192 P. 298; *First National Bank v. Maxwell*, 123 Cal. 360, 55 P. 980, 69 Am. St. Rep. 64; *Bank of South San Francisco v. Pike*, 53 Cal. App. 524, 200 P. 752; *Hyde v. Stockwell*, 44 Cal. App. 344, 186 P. 391; *Smith v. Morse*, 2 Cal. 524.

There was an effort on the part of defendant to plead a fraudulent conveyance of the property. The form or insufficiency of this

pleading was not objected to. The question of a fraudulent conveyance was an issue in the case. There is substantial evidence in the record to support this issue. There is an absolute right to have a material issue which is presented determined by the findings of the court. A failure to make a finding upon such material issue is reversible error. 2 Cal. Jur. 1032; *Conway v. Supreme Council, etc.*, 131 Cal. 437, 63 P. 727.

Because of the necessity to reverse the judgment in this case for failure to find upon the issue of fraudulent conveyance, it becomes unnecessary to pass upon the question as to whether a judgment payable in installments creates a judgment lien.

The judgment is reversed and the cause remanded.

We concur: FINCH, P. J.; HART, J.

71 Cal. App. 713

FEIGENBAUM et al. v. AYMARD et al.
(Civ. 4795.)

(District Court of Appeal, First District, Division 1, California. March 18, 1925.)

1. Landlord and tenant ⇨291(13)—Finding that new lease was not executed sustained.

In unlawful detainer, finding that new lease, which had been drawn up and signed, and under which rent was to be secured by chattel mortgage, had not been executed *held* sustained under evidence.

2. Landlord and tenant ⇨25(5)—Mere signature of lease without delivery to lessee not binding.

Mere signature of a lease without delivery to lessee who refused to comply with terms demanded by lessor *held* not to create binding obligation; lease not being fully executed.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Unlawful detainer by Lionel B. Feigenbaum and another against Frank Aymard and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Raymond Perry, of San Francisco, for appellants.

Jas. P. Sweeney, H. S. Young, and B. J. Feigenbaum, all of San Francisco, for respondents.

TYLER, P. J. Action in unlawful detainer. The plaintiffs are the owners of certain premises known as the Hotel Lafayette, situated in San Francisco, and defendant entered into possession of the hotel as a tenant under a written lease. This instrument provided for a three-year period commencing on the 1st day of November, 1919, and ending on the 31st day of October, 1922, at a month-

ly rental of \$650. It also contained a clause to the effect that, in the event the lessee should hold over beyond the term provided for, such holding over would be a month to month tenancy at a rental of \$650, payable monthly in advance. At the expiration of the written lease defendant held over. On November 29, 1922, he was served with a written notice, informing him that the terms of his then month to month tenancy would be changed on and as of January 1, 1923, in respect of the amount of rent, which would be increased from \$650 to \$800 per month. Prior to the date named the parties met, and it is plaintiffs' claim that it was finally agreed that the rental should be the sum of \$700 under a month to month tenancy, and that under this arrangement defendant paid the \$700 for the months of January and February, 1923. On January 29th plaintiffs served on defendant a written notice, terminating this tenancy, and which took effect February 28, 1923. Defendant refused to vacate, and this action in unlawful detainer was thereupon commenced.

Defendant in his answer denied the alleged tenancy from month to month, and claimed that the agreement by which the rent was increased to the sum of \$700 contemplated a new lease for a period of three years, to be secured by a chattel mortgage similar in effect to that which secured the terms of the written lease under which defendant originally entered in 1919. In this connection the answer alleged that plaintiffs drafted the lease agreed upon, which was fully executed by the parties. It is then charged that plaintiffs presented for execution a chattel mortgage entirely different from the one agreed upon, for which reason defendant refused to sign the same. By way of further defense he alleged that possession was held by him under an executed parol agreement, the terms of which had been fully performed.

Prior to the institution of this action defendant had filed a suit in specific performance. By stipulation that action was consolidated with the instant one.

Upon the question of what agreement was reached by the parties upon the termination of the original lease with reference to an extension of the tenancy there is evidence to show that they had in contemplation the execution of a new lease at the monthly rental of \$700, which was to be secured by a chattel mortgage different in terms from the one given as security for the original lease, and that pending its execution defendant was to hold under a month to month tenancy at the monthly rental of \$700, and that under this arrangement defendant paid two months' rent. It appears therefrom that the negotiations for a new lease were carried on through the attorneys of the respective parties. A lease providing for a three-year extension

was drawn and signed, though it was never delivered to the lessee, for the reason that his attorney objected to the new conditions contained in the chattel mortgage. That the minds of the parties never met at any time upon the terms of the proposed three-year extension is clearly indicated by written communications had between the respective attorneys of the parties. The attorney for defendant addressed a letter to plaintiffs' representative as follows:

"It is now several days since I delivered to you the lease signed by Mr. Aymard for this hotel. Neither Mr. Aymard nor myself have received word that the lease with the corrections made at his suggestion have been accepted or signed by the owners, your clients. Mr. Aymard has refused to sign the chattel mortgage presented to him by the agent Louis Feigenbaum, who told him that he would either sign that chattel mortgage or he would get no lease. Mr. Aymard therefore notifies your clients and you, their attorney, that negotiations for the delivery of the lease to him are ended, and cancels the signature on the documents of proposed lease heretofore handed to you for submission to your clients. Be good enough to either return the same to me for canceling the signature of Mr. Aymard, or in lieu of that you are hereby authorized to cancel such signature yourself. Yours very truly," etc.

To this communication plaintiffs' attorney replied as follows:

"I am in receipt of yours of the 24th inst. announcing your withdrawal of further negotiations on the subject of the lease of Feigenbaum et al. to Aymard, and requesting your client's name be eliminated from the document. I am authorized by Messrs. Feigenbaum to communicate to you that in so far as Mr. Aymard is concerned at present all negotiations are concluded, and he is released subject to notice to vacate in thirty days. Yours truly," etc.

This correspondence shows that the negotiations for an extension of the lease were not successful. Notice terminating the month to month tenancy immediately followed, and plaintiffs made a new lease with others at a rental of \$800 per month.

[1, 2] The trial court found in accordance with the facts we have recited, and gave judgment for restitution of the premises.

The evidence is amply sufficient to support the findings. Defendant never agreed to the terms of the chattel mortgage, for which reason the contemplated lease was never executed. The mere fact that the lease was signed by the parties in no manner affects the question. It was never delivered to plaintiffs for the reason that defendant refused to comply with the terms demanded by the lessors. It was therefore never fully executed, and the parties never became obligated under its terms. *Stetson v. Briggs*, 114 Cal. 511, 46 P. 603. This being so, other ques-

tions based upon the assumption that the lease was executed become unimportant.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

71 Cal. App. 550

PEOPLE v. ROSE. (Cr. No. 1137.)

(District Court of Appeal, Second District, Division 2, California. March 6, 1925.)

1. Criminal law — 1167(2)—Refusal to require state to elect in information charging grand larceny and embezzlement held not prejudicial.

Refusal to require state to elect in information charging grand larceny and embezzlement by same act held not prejudicial, in view of Pen. Code, § 954, where defendant was found guilty of embezzlement and acquitted of charge of grand larceny.

2. Embezzlement — 44(1)—Evidence held to sustain conviction for embezzlement.

Evidence held to sustain conviction for embezzlement.

3. Witnesses — 337(1)—Evidence as to defendant's reputation for truth, etc., held admissible, though defendant had not raised such issue.

In prosecution for embezzlement, in which defendant had testified, evidence that defendant's reputation for truth, honesty, and integrity was bad in community in which he lived, was admissible, though defendant had not raised such issue.

4. Criminal law — 1036(2), 1044—Evidence that defendant's reputation was bad not ground for complaint, where no objection and motion to strike was not based on want of foundation.

In prosecution for embezzlement, admission of evidence that defendant's reputation for truth and honesty was bad was not ground for complaint, though witnesses had not discussed defendant's reputation with others, where he made no objection to introduction of such evidence and motion to strike was not based on lack of sufficient foundation.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

L. F. Rose was convicted of embezzlement, and he appeals. Affirmed.

Charles I. Rosin, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

CRAIG, J. The information in this case consisted of two counts, respectively charging that the defendant committed the crime of grand larceny, in that he unlawfully stole, took, and carried away the sum of \$475, lawful money of the United States, belonging to a Mrs. Clara Reich; and that at

the same time he embezzled said sum of money.

Motion was made that the district attorney be required to elect upon which count the prosecution would be based, on the ground that each negated the other, and that inasmuch as the defendant could not have committed both offenses by the same act, the jury should not be compelled or permitted to convict upon both counts, or to make the election. There was some controversy as to when the defendant formed the intent to convert the money to his own use, and if he did so intend, and the trial court denied the motion upon the ground that the jury should decide whether he intended to obtain the money without giving consideration therefor, or legitimately obtained the same and thereafter converted it to his own use, should the evidence warrant a conviction upon either count.

[1] Section 954 of the Penal Code provides that an indictment or information may charge two or more different offenses connected together in their commission, or different statements of the same offense, under separate counts, and that the prosecution is not required to elect between the different offenses or counts, though the court may in its discretion require that they be tried separately. The jury were instructed, at appellant's request, that the defendant could not be convicted upon both counts, and that if they believed him guilty at all, they should convict him on but one count. From the nature of the evidence, as will hereinafter appear, it was a serious question of fact as to whether appellant at first conscientiously interested the prosecuting witness in the transaction, or did so with intent to defraud her, and the citation of authority requiring the submission of all questions of fact to the jury is not necessary. Since the jury found him guilty of embezzlement, and by a separate verdict acquitted him of the charge of grand larceny, we see no merit in appellant's assertion that error was committed in denying his motion.

[2] It is contended that the verdict is contrary to the evidence. It appears that appellant agreed that three lots in a tract known as the Val Halla Memorial Park, in Los Angeles county, should be sold to Mrs. Reich; that between the 20th day of December, 1923, and the 27th day of March, 1924, she paid him various amounts of money aggregating \$375; that on several occasions she asked for a contract, but was at each time informed by appellant that she was not entitled to one until she had paid him more money; Mrs. Reich finally consulted an attorney who called appellant to his office, and after various consultations, her counsel advised her to cease paying. Appellant was taken to the district attorney's

office, and, after making a statement, was arrested.

The prosecuting witness testified that appellant represented to her that he held an option on three lots in block F, or section F, of said tract, belonging to a Mr. Dunley, which appellant desired to sell for \$750; that he demanded \$300 as a first cash payment, but that she paid him \$150, which was all she had; and that he told her a contract for the purchase of said lots would be furnished her upon the payment of \$100 more. She said that she made payments by check, noting thereon "section F," "Val Halla Memorial lots," or "From Dunley," and at times paying cash, receiving appellant's receipt, on which he noted "lots Memorial Park on which I have option"; that she continued to press him for a contract; but that after she had paid him more than the additional \$100 originally required, he still refused her a contract unless she pay him \$100. She further testified that about the middle of March appellant suggested that three lots in section A be substituted for those at first agreed upon, that they belonged to the same people, but were worth more; that she consented to this change, believing that she was buying from Mr. Dunley, but that each time appellant mentioned price he increased the amount, at first from \$750 to \$875, then to \$900; and that he finally informed her that these lots belonged to a Mrs. Archer, from whom he held an option.

In the meantime appellant has been subjected to a somewhat thorough quizzing by Mrs. Reich's counsel regarding the Dunley lots, and it was testified that appellant admitted to him that he had no option from Dunley, that "there is no Mr. Dunley; I just told her that," and that appellant declined to show any written option from Mrs. Archer, though he claimed to hold one. Mrs. Archer testified that she gave appellant no option in writing; that on March 21st he requested that she permit him to sell her lots for \$900, and that she loaned him her contract, to be exhibited to Mrs. Reich's counsel; that she was not inclined to sell her property, but that inasmuch as she had paid but \$450 therefor, and appellant had agreed to obtain much more, payable \$30 per month, she consented; that he told her he would have a new contract prepared, and would collect his commission from the other party, but that she never saw this latter document. Mrs. Reich's attorney also testified that appellant demanded \$900, stating that his commission or profit was to be all he could obtain for the property in excess of \$500; that he finally submitted a form of contract, which was introduced in evidence, reciting that \$18.25 should be paid to the Osborne-Fitz-Patrick Finance Company at first, and the same amount in two consecutive monthly installments, and thereafter the sum of \$390 should be paid Mrs. Archer; this instrument

was not signed, and the witness said that appellant demanded \$106 down, a part of which he claimed to be due himself. The counselor also testified that he told appellant that there had been so much lying about the transaction that he would not permit Mrs. Reich to proceed further, and that he called the matter to the attention of the district attorney.

A deputy district attorney testified that appellant admitted to him that "Dunley" was a fictitious name; Mrs. Archer testified that if there was any mention of \$390 in the contract, "there must have been some mistake," and that she never received any money from appellant in the transaction.

The defendant took the stand and denied that he ever mentioned a man by the name of Dunley to Mrs. Reich, that he knew a person by that name, but did not know whether or not he owned lots in said tract, or that he was even in the city; that Mrs. Archer had requested him to dispose of her lots; and that Mrs. Reich's attorney told him to bring the papers to his office and that he would turn the money over to him. He denied having ever represented to Mrs. Reich that she was buying lots in section F, or in block F, or that they were in any section, or block, but that he had a verbal option from Mrs. Archer to sell her lots, and that his compensation should be all over \$500 that he might obtain for them.

The principal contention as to a lack of sufficient evidence to support the conviction is that it was immaterial whether the lots in question were the property of Dunley, or Mrs. Archer, or of some person unknown to appellant at the time of agreeing to sell them, so long as he should obtain them and ultimately furnish Mrs. Reich three lots in Val Halla Memorial Park; that the latter was interested only in buying three lots; and that she so testified upon the preliminary examination.

It is obvious from the evidence before us that regardless of the owner's name, appellant had no option on any of the lots when he collected payments aggregating \$375 from Mrs. Reich. There being evidence of the falsity of appellant's statements regarding Dunley, representations concerning the latter's ownership were undoubtedly material, and might be taken by the jury as some evidence of appellant's criminal intent. They were justified in believing that he represented himself as being able to deliver three lots in section or block F, belonging to Dunley, and that he later admitted that there was no such person. He admits having received about \$400 from Mrs. Reich, and the evidence tends to show that he demanded \$106 more, but there is not the slightest intimation in the record that any one other than defendant L. F. Rose ever received a dollar of the money which he collected; the sole possibility of Mrs. Archer receiving any

money arose from the provision of the draft of a proposed contract whereby Mrs. Reich would be required to pay her \$390 three months thereafter, which Mrs. Archer said was not her agreement with appellant, but that she had been assured of a \$900 consideration for her \$450 purchase. Upon this state of facts the jury would be warranted in disregarding appellant's testimony, and if they did that they doubtless concluded that Mrs. Reich's money was converted by appellant to his own personal use; and even had they accepted as true appellant's intricate but novel recitation of details, which he repeatedly termed "explanations," the record is entirely silent as to any intention upon his part to devote her payments to any other purposes. He does not attempt to deny that he intended to keep her money, or to indicate to whom he believed it should be paid; and from the terms of his proposed contract and his own demands it would appear that Mrs. Reich would not only be required to pay Mrs. Archer, and the Osborne-Fitz-Patrick Finance Company, in full, but to contribute \$106 more to appellant. If Mrs. Archer in fact agreed that he should receive \$400 upon consummation of the sale of her lots, which she denied, such an understanding could not have arisen until after he had received that amount from Mrs. Reich, and it was procured by him when he was in dire straits to produce some sort of contract. This is true according to his own testimony.

[3] Two witnesses, asked if they knew the reputation of the defendant for truth, honesty, and integrity in the community in which he lived, answered that they did; asked what it was, they replied that it was bad—but each testified that he had not heard his reputation discussed. Appellant insists that it was error to deny his motion to strike this testimony, both because he had not raised the issue, and because they had not heard his reputation mentioned by others in the community. He is clearly in error as to the first reason assigned. In *People v. Cowgill*, 93 Cal. 596, 29 P. 228, it was said that—

"Evidence is not admissible to prove that the character of a witness for truthfulness is *good*, unless the opposite party has tried to impeach him by showing that his general reputation is *bad*." (Italics supplied.)

[4] Appellant is in no position to urge that the answers should have been stricken out on the ground that the witnesses had not discussed the defendant's reputation with others, because he made no objection to the introduction of the evidence in the first instance. In making his motion to strike he did not base it upon an alleged lack of sufficient foundation, and it is elementary that he must inform the trial court of the true

ground for objection or motion to strike in order to avail himself of it upon appeal.

Appellant contends, further, that two of the witnesses for the people were impeached by the showing that they had made contradictory statements, but the jury were fully instructed in this respect, and since they were at liberty to disregard any portion of the testimony, we are unable to say that any construction which they may have placed upon minor conflicting details affected their verdict.

Burke v. Watts, 188 Cal. 118, 204 P. 578, is quoted by appellant, as holding that—

"A person taking goods which he honestly believes are his own, under a claim of title, is not guilty of larceny, nor of embezzlement, if the property is openly and avowedly taken under a claim of title preferred in good faith."

Here again the jury were called upon to decide a question of fact as to the defendant's intent, but we fail to see how his actions could be reconciled with an honest belief upon his part that the money was his own, or the idea that any claim to it could have been made in good faith.

A motion was made that the case be dismissed, which motion was denied, and appellant assigns this as error; but we think the evidence amply sufficient to sustain the conviction, and we need not, therefore, discuss that point.

Other points attempted to be raised are equally untenable, and are unworthy of further discussion. We do not think there was prejudicial error in the proceedings below.

The judgment and order denying motion for new trial are affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

71 Cal. App. 749

GAIDOS v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.
(Civ. 5154.)

(District Court of Appeal, First District, Division 1, California. March 20, 1925.)

Master and servant §417(7)—Commission's finding on conflicting evidence not reviewable.

On application by an injured employé for compensation under the Workmen's Compensation Act, where evidence as to when employé first complained of injuries, and whether condition of his back was due to lumbago, injury, or congenital defect was conflicting, commission's findings thereon cannot be inquired into on certiorari.

Proceeding under the Workmen's Compensation Act by Joseph Gaidos, opposed by the Western Brass Manufacturing Company, employer, and the Associated Industries Insurance Corporation, insurance carrier, in which an award was made by the Indus-

trial Accident Commission refusing claimant compensation, and claimant applies for certiorari to review such award. Affirmed.

E. E. Keyes, of Oakland, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondents.

TYLER, P. J. Certiorari to review an award of the Industrial Accident Commission refusing compensation to an applicant for certain injuries to his back alleged to have been sustained in the course of his employment.

It appears from the petition that Joseph Gaidos was, on the 1st day of April, 1924, the date of the injury complained of, an employee of the Western Brass Manufacturing Company, a corporation, one of the respondents herein, and that the Associated Industries Insurance Corporation was its insurance carrier. Petitioner filed in the office of the Industrial Accident Commission a claim against these companies for benefits under the Workmen's Compensation Act (St. 1913, p. 279, as amended). Respondents answered, denying all liability, and also traversing all the allegations except that the applicant was an employee of the company above named, and that the Associated Industries Insurance Corporation was the insurance carrier for that company. The application came on for hearing before the Commission, and evidence was taken by the referee appointed by it. On the 11th day of December, 1924, findings and award in favor of respondents and against petitioner were filed, the Commission concluding that the applicant had failed to prove his case.

At the hearing he testified that on the afternoon when the alleged injury occurred, he was assisting another workman to move a barrel filled with brass scraps and weighing from 300 to 400 pounds, and while doing so he felt a pain in his back; that he mentioned the matter to a fellow employee, and thereafter went home, and had been disabled ever since. There is a serious conflict in the evidence as to when he first complained of his back condition being caused by an injury. His own testimony on the subject is contradictory. It appears therefrom that he never attributed this condition to the alleged injury when first questioned by his attending physician, Dr. Scudder, who was called in immediately to care for the applicant. There is also a conflict in the evidence as to

when the latter reported to his employer and others that he had received an injury. He first claimed that he told a fellow employee, who was assisting him in his work, that he had injured his back; while further on in his testimony he admits that he may not have done so. This employee testified that the applicant had complained of a pain in his back on the morning of the day of the injury but prior to the time of its occurrence. The superintendent of the company testified that no complaint was made to him concerning the matter, but that some time later in the month of April the applicant brought a doctor's certificate to him which indicated that he was run down and would have to take a rest on account of his back, but no claim at this time was made that the condition was due to any injury. There is also testimony in the record to show that petitioner had suffered two prior injuries, in one of which his back had been hurt, and that an insurance company had paid for the services of the physicians who attended him at that time. His wife gave testimony to the effect that he suffered from lumbago about eight years prior to the alleged injury.

The medical expert testimony is also conflicting as to the cause and nature of petitioner's ailment. The attending physician testified that he considered it a case of lumbago until informed, some weeks later, of the alleged injury. Other medical testimony was to the effect that petitioner's condition was due to arthritis, which is not caused by an injury, though it may be aggravated by it. X-rays of petitioner's spine were in evidence, and they showed a congenital enlargement of the articulating facets of the fifth lumbar vertebra with the sacrum. From the medical testimony as a whole, it is uncertain whether the back condition complained of was due to lumbago, injury, arthritis, or congenital defect. The case presents the situation where the findings of the Commission are based upon conflicting evidence, and, this being so, they cannot be inquired into upon certiorari. A petition for a rehearing based upon a medical report was denied by the Commission. There is nothing therein contained which would warrant a reopening of the case and it was therefore properly refused.

The award is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

71 Cal. App. 705

BONFIELD v. BONFIELD. (Civ. 5084.)

(District Court of Appeal, First District, Division 2, California. March 17, 1925.)

1. Divorce ☞ 165(5)—Objection to notice of motion waived by proceeding to hearing on motion without objection.

Objection that notice of motion to set aside final decree of divorce did not show on what grounds movant sought to be relieved, as required by Code Civ. Proc. § 1010, was waived by defendant proceeding to hearing on motion without objection.

2. Divorce ☞ 165(1)—Appeal or action in equity to set is aside proper method of attacking final divorce decree regular on its face.

Where order and judgment for final decree of divorce was regular on its face, the proper method of attacking such decree is by appeal or by an action in equity to set same aside for fraud or other sufficient reason.

3. Divorce ☞ 165(3)—Judgment granting final decree of divorce cannot be attacked by motion to set it aside because of fraud of plaintiff's attorney.

Where judgment granting plaintiff final decree of divorce is regular on its face, such judgment could not be attacked by plaintiff by motion to set it aside on ground of extrinsic fraud on part of her attorney, and, where plaintiff did not set up facts entitling her to relief under provisions of Code Civ. Proc. § 473, judgment is binding on her until set aside in proper proceeding.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Divorce action by Cleo A. Bonfield against Haswell T. Bonfield, in which a final decree of divorce was entered in favor of plaintiff. From an order setting aside such final decree on plaintiff's motion, defendant appeals. Reversed.

J. L. Smith, of San Francisco, for appellant.

Harold Ide Cruzan, of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal by the defendant from an order of the superior court in and for the city and county of San Francisco setting aside a final decree of divorce in favor of plaintiff.

The action was commenced on April 28, 1921, by the filing of a complaint charging extreme cruelty. After trial plaintiff secured an interlocutory decree of divorce on May 3, 1921. On February 23, 1923, defendant made a motion for the entry of the final decree. Plaintiff appeared and objected to the granting of the motion upon the ground that since the entry of the interlocutory decree the parties had lived to-

gether as husband and wife. As a result, the motion for a final decree of divorce was denied. Later the parties entered into a stipulation, waiving all legal objections to the entry of the final decree and requesting the court to enter the same, and the defendant agreed to pay to plaintiff the sum of \$600, in monthly installments of \$50. This stipulation was signed by the attorney then acting for plaintiff and the attorney for defendant. It was filed in court on May 11, 1923, and thereupon the order was made granting the motion of defendant for the final decree. On June 12, 1923, the plaintiff served a notice of motion to set aside the final decree of divorce. This motion was supported by the affidavit of plaintiff. It recites the entry of the final decree on May 12, 1923, and states that on or about the 11th day of May, 1923, the defendant, through the attorney for the plaintiff, signed a certain stipulation, wherein it was stated in substance that the final decree might be entered altering and modifying the terms of the interlocutory decree heretofore granted on the 3d day of May, 1921; that the stipulation purports to be entered into by the attorney for plaintiff and the attorney for defendant; that said stipulation was signed on behalf of the plaintiff by her attorney, without her knowledge or consent, and that the terms set forth in said stipulation for final decree were without her knowledge and consent, and that it was made wholly and solely at the request of the defendant, and without any knowledge on the part of his attorney, and was solely made and agreed to by and between plaintiff's attorney and the defendant; that the attorney for plaintiff repeatedly importuned her to agree to the granting of the final decree in accordance with the terms set forth in said stipulation; that in order to compel the plaintiff to sign a stipulation granting the final decree, her attorney informed her that the defendant was making every effort to have her sent to the insane asylum, and advised her rather than go through that it would be better for her to sign said stipulation; that she thereupon refused so to do, and that afterwards without her knowledge and consent her said attorney signed said stipulation as her attorney without any authority so to do. The foregoing statements are contradicted in counter affidavits, but, as the trial court has resolved the conflict in plaintiff's favor, we shall have to accept the statements in her affidavit as established facts.

[1] Appellant contends: (1) That the trial court was without jurisdiction to revoke the final decree; (2) that the control and management of the action was in plaintiff's attorney, and plaintiff is bound by his stipulations and actions taken therein, and

may not repudiate his actions during the time he was her attorney of record; (3) that neither the notice of motion nor the record shows upon what grounds respondent seeks to be relieved from the effect of the final decree, and therefore the trial court was without power to grant the motion. Section 1010, Code Civ. Proc. The latter objection to the notice of motion was undoubtedly a good one, but it was one that could be and was waived by defendant in proceeding to the hearing upon the motion without objection. *Mallory v. See*, 129 Cal. 356, 61 P. 1123; *Barron v. Deleval*, 58 Cal. 95.

[2] As to the jurisdiction of the court to make the order appealed from, it appears that the order and judgment for the final decree was regular upon its face, and that the proper method of attack was by appeal or by an action in equity to set the same aside for fraud or other sufficient reason. In *was said in United Railroads v. Superior Court*, 170 Cal. 755, 151 P. 129, Ann. Cas. 1916E, 199:

"Nothing is more firmly settled in this state than the doctrine that the superior court may not revoke, modify, or otherwise disturb its judgments and orders regularly made in pursuance of plain statutory provision, where the statute prescribes the method by which such judgments and orders may be reviewed, except as authorized by statute."

In *Holtum v. Greif*, 144 Cal. 521, 78 P. 11, it was said:

"The decisions of this court are numerous and uniform to the effect that a judgment or order once regularly entered can be reviewed and set aside only in the modes prescribed by statute. If they have been entered prematurely, or by inadvertence, they may be set aside on a proper showing [citing cases] and if the order as entered is not the order as made, the minutes may be corrected so as to make them speak the truth [citing cases], but subject to these exceptions the order is reviewable only on appeal, and the decision of the trial court having been once made after regular submission of the motion its power is exhausted—it is *functus officio* [citing cases]."

"It cannot be doubted that a judgment can be nullified by the court which rendered it only, first, on motion for a new trial; second, by a motion under the provisions of section 473 of the Code of Civil Procedure, where the judgment is inadvertently made and where application is made to set it aside within six months; third, by motion therefor at any time where the judgment is void on its face; fourth, by an independent suit in equity where the judgment is regular on its face but extrinsically void for want of jurisdiction, or by reason of fraud or mistake." *Benning v. Superior Court*, 34 Cal. App. 296, 167 P. 291.

[3] The present appeal presents a case where a judgment is regular upon its face, and plaintiff is claiming extrinsic fraud on the part of her attorney as a reason for

setting it aside. She does not set up facts entitling her to relief under the provisions of section 473, Code of Civil Procedure. If she is not bound by the action of her attorney under the cases of *Holmes v. Rogers*, 13 Cal. 191; *Clemens v. Gregg*, 34 Cal. App. 245, 167 P. 294; *Crescent Canal Co. v. Montgomery*, 124 Cal. 134, 56 P. 797, then, in any event, the judgment is binding upon her until set aside in a proper proceeding, and it appears that the one adopted in this case was not the proper proceeding.

The order appealed from is reversed.

We concur: STURTEVANT, J.;
NOURSE, J.

71 Cal. App. 453

PEOPLE v. VATEK. (Cr.824.)

(District Court of Appeal, Third District, California. Feb. 26, 1925. Hearing Denied by Supreme Court April 27, 1925.)

1. Homicide ⚡253(1)—Conviction of first degree murder held supported by evidence.

Evidence held to support conviction of first degree murder.

2. Criminal law ⚡1144(1/2)—People presumed to have presented case on any theory of which proofs are reasonably susceptible.

Appellate court may assume that case was presented by people in court below on any theory of which proofs are reasonably susceptible.

3. Homicide ⚡169(2)—Testimony that articles found in defendant's room and on his person were in witness' possession when he entered house held admissible.

In murder prosecution, testimony of state's witness that when he entered defendant's house on day of homicide therein he had possession of articles found secreted in defendant's room and on his person when arrested, held material and relevant in proof of defendant's guilt, on theory that defendant assaulted deceased either because incensed by latter's protest against, and attempt to prevent theft of such articles from, witness, or because of fear that witness might testify for people in case of defendant's prosecution for larceny.

4. Witnesses ⚡281—Question to defendant whether police officer asked him if knife found on his person was one he cut deceased with held not objectionable as assuming fact.

District attorney's question to defendant as to whether police officer asked him if knife found on him after homicide was one he cut deceased with held not objectionable as assuming fact, not in evidence, that defendant stabbed deceased.

5. Witnesses ⚡387—Question to defendant as to whether police officer asked him if knife found on person after homicide was one with which he cut deceased proper for impeachment.

In murder trial, question to defendant, on cross-examination, as to whether police officer asked him if knife, found on his person imme-

diately after homicide, was one with which he cut deceased *held* proper for impeachment purposes.

6. Witnesses ⚡387—May be cross-examined as to former statements inconsistent with present testimony.

Under Code Civ. Proc. § 2052, witness, whether party to action or defendant in criminal case or not, may be asked, on cross-examination, any question as to any material statement, made by him at some other time, inconsistent with his present testimony, for purpose of securing admissions or to lay foundation for impeachment.

7. Witnesses ⚡268(1), 340(3)—Cross-examination of defendant's wife as to whether she was practicing prostitution in rooming house, operated by her and defendant and wherein murder was committed, *held* improper.

In murder trial, cross-examination of defendant's wife, associated with him in operating rooming house in which homicide was committed, as to whether she was practicing prostitution there *held* improper for impeachment or any purpose.

8. Criminal law ⚡706 — Prosecuting officer should not ask question which would only degrade character of witness without eliciting competent testimony.

Prosecuting officer should ask no question, which he knows or should know could not elicit relevant or competent testimony, but would only degrade character of witness in jury's estimation.

9. Criminal law ⚡1044, 1129(1) — Improper cross-examination of defendant's wife *held* not reviewable, in absence of assignment as misconduct or request for instruction to disregard.

Question, on cross-examination of defendant's wife in murder trial, as to whether she was practicing prostitution in house wherein homicide was committed *held* not reviewable, where defendant did not assign it as misconduct nor ask court to admonish jury to disregard it, and district attorney did not pursue inquiry after objection was sustained.

10. Criminal law ⚡1144(12)—Presumed that jurors understood that sustaining of objection to question meant that subject-matter should be disregarded.

Presumption is that jurors were persons of intelligence and clearly understood that sustaining of objection to question on cross-examination of defendant's witness meant that subject-matter was irrelevant and should be disregarded, and that they did disregard it.

11. Criminal law ⚡1186(4)—Improper cross-examination of defendant's wife *held* not to have resulted in miscarriage of justice.

District attorney's question to defendant's wife in murder trial as to whether she was practicing prostitution in house wherein homicide was committed *held* not to have influenced verdict, or resulted in miscarriage of justice, within Const. art. 6, § 4½, in view of strong case made by people.

12. Homicide ⚡178(1) — Testimony as to movements and statements of one whom defendant claimed might have committed crime *held* properly excluded.

In murder trial, testimony as to movements and statements of one whom defendant claimed might have committed crime charged, on day and evening thereof, *held* properly excluded for lack of sufficient evidence to connect such person with crime or commission thereof.

13. Criminal law ⚡359—Proof tending clearly to point out another as guilty of crime charged necessary to permit evidence of his commission thereof.

To permit evidence that another committed crime charged there must be such proof of his connection therewith or such train of facts and circumstances as tend clearly to point him out as guilty party, and remote acts, disconnected and outside crime itself, cannot be proved for such purpose.

14. Witnesses ⚡388(1)—Sheriff's testimony as to defendant's wife's statement exculpating another suspect *held* admissible.

In murder trial, testimony of defendant's wife that she did not remember whether she had made statement to sheriff and district attorney, on day named, that one whom defendant claimed might have committed crime charged left her room in afternoon of evening in which crime was committed *held* sufficient foundation for introduction of sheriff's testimony as to such statement for impeachment purposes.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Sam Vatek was convicted of first degree murder, and he appeals. Affirmed.

W. E. Davies and E. S. Norby, both of Marysville, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant, a Greek, and his wife, Ethel Vatek, an American, were jointly indicted by the grand jury of Yuba county for the crime of murder. A motion for a separate trial of the accused having been allowed by the court, the defendant, Sam Vatek, was put upon his trial for the crime charged, and the jury returned against him a verdict of guilty of murder of the first degree, and fixed the penalty at imprisonment in the state prison for life. Penal Code, § 190.

A motion for a new trial was made by the defendant and denied, and he appeals from the judgment of conviction and the order denying a new trial.

The points urged for a reversal are: Insufficiency of the evidence to support the verdict and alleged errors in rulings involving questions as to the admissibility of certain evidence.

The homicide took place in the early part of the evening of March 31, 1924, in a rooming house conducted by the defendant and

his wife at the southeast corner of Second and D streets, in the city of Marysville. The party charged to have been slain by the defendant was a Hindu by the name of Arjan Singh Brar, who was of the age approximately of 21 years, and said by one of the witnesses (an American) to be a student. Brar was occupying room No. 2 in said rooming house at the time of the tragedy.

The building in which the homicide occurred consists of three stories, the first or ground floor of which was occupied by one Heisch as a soft drink saloon and a cigar store, and the two upper stories used as a rooming house by the defendant and his wife, as above stated. On the evening of March 31, 1924, between the hours of 7 and 8 o'clock, a noise resembling that which would ordinarily be produced by the falling on a floor of a human being or an article of heavy weight, a sort of thud, as Heisch expressed it, was heard to proceed from the second story of the building by said Heisch and a night watchman by the name of Dehoff. These men were in the store of Heisch at the time this noise was heard by them. Dehoff said that the noise sounded as though some one had fallen downstairs. No other noise was heard to proceed from the second story for an interval of about 15 or 20 minutes, when the same parties heard a noise sounding like some persons were "scuffling" or, perhaps, engaged in a fight. Dehoff, from the nature of the noise, suspecting that a general fight was in progress in the second story, immediately telephoned the police station, and reported that a disturbance was taking place in said rooming house. Dehoff then left the store, and hurriedly started south on Second street with the expectation of meeting any police officer who might have been detailed to investigate the matter. Reaching an alley near the post office, a few feet south of the rooming house, he met Police Officer Allen and one Bennett, the first named having been directed to respond to Dehoff's telephone call and to proceed to the rooming house and ascertain the cause of the noises. About the time Dehoff was proceeding towards the alley he observed a Hindu step out upon the sidewalk from the Second street entrance to the stairway leading to the second story of the rooming house. This Hindu, whose name the officers thereafter learned was Dahram Singh, took several steps in the direction of the alley or the post office building, and was still walking in that direction when Officer Allen and Bennett came out of the alley and were met by Dehoff. This was a few minutes after 8 o'clock p. m. Immediately Allen, Dehoff, and Bennett together proceeded to the entrance of the second story of the rooming house, taking with them the Hindu, Dahram Singh. Bennett was stationed by Allen at the foot of the stairway, and instructed by that officer to allow no one to leave or enter the building

until after a full investigation of the disturbance in the second story had been had. Dehoff was the first to reach the second story, and was immediately followed by Allen, with Dahram Singh. When Dehoff reached the top of the stairway at the second story, the first thing observed by him was a man—an American whose name was later learned to be W. H. Ladner—lying, apparently in a state of unconsciousness, on the floor in room No. 6. This room was near the head of the stairway, and was occupied by the defendant and his wife. Then he saw the defendant's wife run down the hallway and turn into room 6. She, so Dehoff said, was intoxicated. Immediately thereafter Dehoff saw three Hindus and the defendant come from the direction of room No. 2. The defendant passed Dehoff and entered room No. 6. The Hindus approached Dehoff and said to the latter: "The Greek (referring to the defendant) stuck a Hindu boy in the front room." Dehoff thereupon entered the room, and there he saw the deceased, Arjan Singh Brar, lying on the floor, apparently in an unconscious condition. While all this was going on, Officer Allen, having reached the second floor within a moment's time after Dehoff had arrived at said floor, entered room 6, where the defendant and his wife then were, and in which as seen, Ladner was lying on the floor in an unconscious condition. Dehoff, after a limited investigation, discovered that Arjan Singh Brar had been stabbed in the breast. Blood was flowing from the wound, and had soaked through the front part of his shirt. Dehoff reported this to Allen. At the same time three Hindus were standing in the hallway near room 6, and one of them, so Dehoff testified, "hollered into Allen," still in room 6, accusing the defendant of having stabbed the deceased. Dr. Hoffman, of Marysville, was called, and shortly after his appearance and a superficial examination of the deceased the young man passed away. It was then about half past 8 o'clock p. m. An autoptical examination of the body of the deceased, later conducted by Dr. Hoffman, disclosed that the cause of the death of Arjan Singh Brar was "hemorrhage as the result of an incised wound of the heart." Dr. Hoffman gave it as his opinion that a person so wounded would probably not retain consciousness for a longer period than two minutes.

Officer Allen's version of what transpired after he reached the second floor may the better be told as he related it in giving his testimony at the trial, as follows:

"When I arrived at the head of the stairs room No. 6 was on the right, the door was open. I saw a man lying on the floor, who later was identified as Mr. Ladner. I started to go in the door, and Mrs. Vatek was just inside of the door, she grabbed the door and slammed it shut. I gave it a couple of kicks, and kicked it open before she could get the lock turned, and then I stepped inside of the room. The defendant, Vatek, was coming from the corner of

the room where there was a wash basin in the corner, coming towards me. I asked what the trouble was; Mrs. Vatek, who seemed to be highly intoxicated, said there wasn't any trouble, and began—I says 'What are you trying to keep me out of here for?' She said, 'There's no trouble, go on out,' and put her hands on me and began to try to shove me out of the room, and I shoved her away from me a few times, and in the meantime there was several of these Hindus, this Hindu wearing a turban, Bishan Singh, he came right up to the door and he told me there was a man cut, a Hindu man cut in another room; I told Dehoff to go see. He came back and told me, yes, there was a Hindu in there lying on the floor that was cut, so I told him to stay there while I went and looked at the Hindu. I looked at the Hindu, tried to talk to him, couldn't get anything out of him, I was asking him who cut him. I asked Mit Singh to ask him to tell him to tell me who cut him and what the trouble was. Mit Singh told me he could speak good English; that Arjan Singh, the man on the floor, was a student. So I went back and told Officer Dehoff to get a doctor. He left the building to get the doctor, and I had returned then to room No. 6, and Mrs. Vatek attempted to close the door again to room No. 6, I kicked it open again. At that time, when I entered she put her arms—tried to put her arms around my neck, she was just in a drunken condition, trying to get me out of the room, trying to smooth things over, telling me everything was all right. I pushed her away from me; in pushing her away she stumbled and fell over this man Ladner that was still lying on the floor, and then the defendant, Vatek, rushed over to me, grabbed me by the arm, and began to say, 'This is white woman, you no strike this white woman, this white woman like you'; then Bishan Singh, he told me, he said, 'You look out, this man has got knife,' pointing towards Vatek, the defendant. So I struck with the back of my hand; he had hold of my clothes, my coat; I struck with the back of my hand like that, struck him on the throat, he staggered back against the bed; then I grabbed him by both arms and reached in his inside coat pocket here and pulled a paring knife—

"Q. Who reached in there first, he or you? A. I reached in there first, when I knocked him against the bed he staggered back, and he reached like this, I was right on top of him immediately, and I reached in the same pocket he started to reach in first and found this paring knife.

"Q. I will show you a knife and ask you to look at it and ask you if you can identify it? A. That is the same knife.

"Q. That is the same knife that you took out of his inside coat pocket? A. Yes. * * * I asked Mit Singh and Bishan Singh who cut this Hindu, and they both told me that the Greek did.

"Q. Was Vatek present at the time? A. He was present.

"Q. Did they point to him? A. They pointed to him; said this Greek cut him—this was in room 6—the Hindus were just outside the door, but Vatek and myself were inside the door.

"Q. Where was Vatek's wife? A. She was right there, she was present, part of the time she was on the floor, part of the time she was standing up; I pushed her down several times; after that she would get up and come to me,

put her hands on me; after I took the knife from Vatek, he looked in a highly excited manner, was glancing around the room, and I pulled my revolver around in front like this, my scabbard, had my coat unbuttoned, I told him to stay over in that corner and not start anything or I would drill him. I told him he had killed this Hindu and I wasn't fooling with a murderer. We remained in about that position until Officers McAuliffe and Barrett arrived, and I placed my handcuffs on Mrs. Vatek, and Officer Barrett placed his handcuffs on Vatek, the defendant, and these two officers took the defendants and started off.

"Q. At the time that the Hindus told you that Vatek had cut the Hindu what did Vatek say? A. He didn't say anything, that is, he didn't say yes or no. * * *

"Q. When you got that knife out of his pocket did you ask him anything? A. I asked him what he was doing with that knife in his pocket, and he said that he used it to cut greens with.

"Q. Did you ask him if he had used that knife to cut the Hindu with? A. I don't recall now whether I asked him that or not.

"Q. What was Vatek's condition at that time? A. In what respect?

"Q. Intoxicated or sober? A. He was apparently sober, but in a highly excited condition."

Allen stated that he aroused Ladner from his sleep and asked him a few questions, but that all he could get from him was, "I'll fight 'em—I can hold my own." Allen said that Ladner's shirt had been "pulled up above his trousers, and he had a money belt on under his shirt that was exposed"; that "his coat was open, and there were papers from his inside coat pocket, some were out and looked like they had been pulled out and stuck back again"; that Ladner had blood on his right hand, which "looked like a smear of blood, and a little blood on his hair. His hat was lying over in the corner of the room." The officer, on making an examination of the room, found a raincoat smoothly tucked under the mattress of a bed in the room, opera glasses in the drawer of a dresser under some feminine wearing apparel, a knife on the floor near where Ladner had been lying, and a little over \$4 in silver under a rug in the room. He also found under the cover of the dresser a notice addressed to Ladner from a Marysville newspaper, notifying him that his subscription had expired.

Allen testified that all of the Hindus present, with the exception of one Rulla Singh, were sober. Rulla Singh appeared to be much under the influence of intoxicating liquor.

The witness, Mit Singh, testified that he, Bishan Singh, Nadham Singh, and Rulla Singh went to the rooming house in question at about the hour of 3 o'clock p. m. of March 31, 1924, and rented room No. 3, in which there were several beds. They were assigned to said room by the wife of the defendant; Nadham Singh writing the name of

each in the register. After registering and being shown their room they left the house and went down upon the streets. About 8 p. m. of said day the witness and Bishan Singh, accompanied by another Hindu, who was met by the first witness on one of the streets of Marysville, returned to the rooming house. Mit Singh testified that just as he and his companions reached the top of the stairway at the time last mentioned the defendant's wife partly opened the door of room 2 (occupied by the deceased), looked towards him and the other Hindus, and then started out of the door into the hallway, and, addressing the Hindus, commanded them to "go back," or "go away," repeating the command several times. The witness, or one of the other Hindus, replied that they "had rooms there and would not go back." She thereupon hastily passed the Hindus and entered her own room, No. 6. Immediately following the entrance of defendant's wife into room 6, the witness continued, the defendant, holding the deceased about the upper part of his body with his left hand and his right hand extending down and backwards, came out of room 2. The witness saw no knife or other weapon in the right hand of defendant. On observing the Hindus in the hallway, the defendant ordered them to "go away," and at about the same instant of time he released his hold on deceased and rushed past the Hindus, and, as other witnesses testified, entered his own room. The deceased fell to the floor, and Mit Singh and the other Hindus hastened to his side to assist him. The deceased called for water several times, also exclaimed that he had given "his life for the old American," and thereafter lapsed into unconsciousness, from which state he did not recover. Before the young man expired the Hindus carried him into room 3, and placed him on a bed from which he rolled or fell to the floor, where, as seen, he was lying at the time the police officers and Dr. Hoffman arrived at the premises. In room 3, during all the times mentioned, was Rulla Singh, who had in the course of the afternoon become intoxicated and had gone to said room. Rulla was lying on a bed apparently oblivious to his surroundings and the occurrences of which we have spoken.

The testimony of the other Hindus who were with Mit Singh was, substantially, the same as that of the latter in all important particulars. Bishan Singh, though, added that, when Allen and Dehoff appeared at the second floor, he said to the former that Brar had been stabbed, "so look out for this Greek (referring to the defendant), he had a knife." It should be stated that Dahram Singh testified, and he was corroborated in this by two of the other Hindus, that, when the serious condition of the deceased was discovered,

he was requested to go to the police station and get an interpreter. This accounted for Dahram Singh leaving the rooming house and being met by the officers on the sidewalk as above explained.

All of the Hindus named testified that there was no fight, altercation, or difficulty of any kind or character by and between them or any one of them and the defendant or his wife on the 31st day of March, 1924.

The defendant, his wife, the four Hindus above named, and Ladner were placed under arrest and taken to the police station. Later the defendant and his wife were removed to the county jail. On examining the person of the defendant a watch and chain which he admitted belonged to Ladner were found in his possession.

W. H. Ladner, an American, and a farmer of Yuba county, and of whom mention is made above, testified that between the hours of 4 and 5 p. m. of March 31, 1924, he went to the rooming house in question to procure a room; that when he reached the second floor, and was still near the last upper step of the stairway, the defendant's wife came into the hallway from her room, and seeing him, asked him "if I ever drank"; that he asked her what kind of liquor she had, to which she replied, "Some good wine." She invited Ladner into her room (No. 6). There were then in the room, so Ladner testified, the defendant and another man. The witness had four drinks. He paid \$1 for the wine. The interval of time between the drinks was from 10 to 20 minutes. He remembered nothing that occurred in the room after taking the fourth drink. He stated that he was perfectly sober when he arrived at the rooming house; that he was accustomed to drinking wine; and that ordinarily four of such glasses of wine as he drank on that occasion would not have the effect of rendering him so intoxicated as to lose his senses. It was later discovered that Ladner had received an injury on the back of his head. There was matted blood in his hair on that part of his head. He testified that he did not know how the injury was caused; that he had not had a fight with any one that afternoon or evening, and did not know that any one had struck him, if he had been struck. When he first arrived at the premises, he stated, he had on his person about \$12 in money. He recalled that he had a \$5 and a \$2 bill and some silver. He also had a raincoat, a watch and chain, a pocket knife, a pair of gloves, a pair of spectacles, or, as some of the witnesses called them, "opera glasses." At the trial he identified the coat, the opera glasses, the knife, gloves, etc., found in the defendant's room, as described by Officer Allen, as his property. He also identified the watch and chain which had been taken from the person

of the defendant as his property. He testified that he did not give said personal property to any one and did not know how or by whom they were taken from his possession.

The sheriff of Yuba county, certain police officers, and the district attorney testified that on a number of occasions after his arrest the defendant, referring to the trouble occurring in his house on the evening in question, declared: "I had to do it to protect my wife"; and, on one occasion, when he made the declaration just quoted, the sheriff asked him what he did with his knife, but the defendant made no answer, and appeared not to be disposed further to discuss or talk about the case.

[1] The above is a sufficient statement of the people's proofs to show that the verdict of the jury is well supported, evidentially. Indeed, it would be difficult to conceive how the jury, if they believed the witnesses testifying for the people, as the verdict implies that they did, could have formed any other conclusion than that at which they arrived. It is true that no knife with blood upon it was found in the defendant's room, or anywhere on the premises, nor did the potato knife found in his coat pocket have upon it blood stains; but, while the circumstance of finding in the room of the defendant or upon his person a blood-stained knife would have afforded strong support to the other evidence tending to connect the defendant with the commission of the crime, yet the proof of such circumstance was not, in view of the strong case otherwise made by the people against the accused, indispensable as in proof of the defendant's guilt or as in justification of the verdict arrived at. But there was testimony, as, for instance, the fact that the defendant was seen to rush towards the sink in his room just as Officer Allen entered the apartment, a circumstance from which, in view of the many strong inculpatory circumstances disclosed by the evidence against the accused, the jury might and could well have reasoned that his purpose in going to the sink was to cleanse the "potato knife" of blood stains, and that he did so, or the jury might have concluded that the knife with which the fatal wound was inflicted had in some way been secreted about the premises or so disposed of as to make it impossible to find or locate it. There is some testimony relating to the condition of the premises which would lend support to that theory. But there is no call for an analytical examination herein of the testimony to demonstrate that, as before declared, the verdict is amply supplied with evidentiary support. Some one killed Arjan Singh Brar. It is not claimed that the fatal wound was self-inflicted, nor, in view of the character of the evidence presented by the people, could such a claim reasonably be advanced or sustained. There is no testimony that any one of the

Hindus present at the time committed the crime. All the proved circumstances appear to point to the guilt of Vatek. Of course, the latter vigorously denied that he was the author of the homicide, and attempted to explain, consistently with the theory of his innocence, the many damaging circumstances which the evidence by the people developed against him. His wife, testifying for him, attempted to support his plea of innocence. An effort was also made to bolster the defendant's plea of not guilty upon the theory that another party, a Greek, known as Pete Kumbus, might have committed the crime. All of these matters, though, were for the jury to consider with all the other evidence and determine what the truth was as to the ultimate issue upon which their judgment was required. But we find it necessary to examine herein the Kumbus theory, not that the effect thereof, from the standpoint from which a Court of Appeal must view the proofs, has been to introduce a doubt as to the impregnability of the case made by the people, but solely because it bears upon the rulings of the court disallowing certain testimony presented by the defendant, and which, it is contended, involved errors highly prejudicial to the rights of the accused. Before taking up these assignments for consideration we will dispose of several other points arising from rulings admitting certain evidence.

[2, 3] Assignments Nos. 1, 2, 3, 4, 5, and 6 involve exceptions to the rulings of the court in allowing the district attorney, over objections by the defendant, to show by the witness Ladner that the several and various articles of personal property which, with the exception of the watch and chain, which, as seen, were found on the person of the defendant, were found on the evening of the homicide secreted in different places in the room of the defendant, belonged to the witness. The several articles mentioned were shown to Ladner when he was on the witness stand, and he identified them as his property and which he had in his possession when first he went into the room of the defendant on the invitation of the latter's wife on the afternoon of the day the homicide was committed. Except in so far as it may be extracted from the evidence as a whole, the particular theory upon which the testimony now under consideration was offered by the people and allowed by the court is not shown by the record. The evidence presented by the people, however, obviously justifies and supports this theory: That, when Ladner entered the room of the defendant, the latter conceived the idea of taking from him any money or other personal property he had in his possession; that, to accomplish that purpose, he plied Ladner with liquor in which he had placed some sort of narcotic in a sufficient quantity to produce sleep or unconsciousness; that Ladner having, as a result of drinking the

liquor, become unconscious, or so much so as to render him incapable of appreciating his surroundings or realizing what was going on about him, the defendant proceeded to carry out his scheme to deprive Ladner of whatever personal property he then had in his possession; that the man other than the defendant that Ladner saw in the latter's room when he (Ladner) first entered it was the deceased; that, while the defendant was engaged in taking or perhaps had taken from Ladner his personal belongings, the deceased protested against such conduct, and thus a fight between the defendant and the deceased was precipitated, resulting finally in the slaying of the deceased by the defendant. Or a reasonable theory from the evidence is that, after Ladner had gotten under the influence of the liquor, the defendant started to remove from his person whatever money and other personal property were then in his possession; that Ladner was not so far intoxicated as not to be able to realize what defendant was trying to do, and that he resisted or attempted to defend himself and his property; that the deceased went to Ladner's assistance, and so attempted to prevent his being injured or his property taken from him; that in the skirmish Ladner was knocked or thrown violently to the floor by the defendant, sustaining an injury to the back of his head, and by the blow rendered unconscious; that the defendant, either incensed at the interference of deceased in the matter, or fearful of what he might, in the event of his (defendant's) arrest and prosecution on the charge of larceny, become a witness for the people, assaulted the deceased; that the latter thereupon fled to his own room, and was followed by defendant, and that in said room the latter dealt the knife blow that caused the death of the deceased. The declaration of the deceased, just before he passed away, that he had given his life "for the old American" is significant, and would seem to afford strong support, when considered with the other evidence, to the general theory suggested upon either of the hypotheses pointed out. This court may assume that the theory upon which the case was presented by the people in the court below is any theory of which the proofs are reasonably susceptible. Obviously the theory suggested is pregnant with a motive in the defendant for the commission of the crime, and the testimony of Ladner that the articles of personal property found secreted in the room of the defendant and on his person when arrested, that he had said property in his possession when he entered defendant's room on the day of the homicide, and that he gave the property to no one or otherwise voluntarily parted with it, was, of course, peculiarly material, relevant, and important in proof of the defendant's guilt upon that theory.

[4-6] Assignment No. 7 is based upon a ruling permitting the district attorney to propound the following question to the defendant on cross-examination: "Did he (Police Officer Allen) ask you if this is the knife you cut the Hindu with?" referring to the "potato knife" found in the coat pocket of the defendant immediately after he was seen holding and later letting go his hold of the deceased as described. The objection to the question was that it assumed something not in evidence—that is, that the question proceeded on the assumption, unauthorized by any evidence, that the defendant stabbed the deceased and so took his life. The objection was not well taken. It will be noted that the defendant himself was not asked, as a witness, "if this is the knife you cut the Hindu with," but whether the officer, in a conversation with the defendant shortly after the homicide, asked the latter "if this is the knife you cut the Hindu with." Readily it will be seen that the question was not obnoxious to the particular objection urged against it. Nor was it subject to any objection. The question was proper for the purpose of impeachment. The rule is elementary, and, indeed, expressly declared in our Code, that a witness, whether or not he is a party to the action or whether he be the defendant in a criminal case, may be asked on cross-examination any question as to any material statement he might at some other time have made inconsistent with his "present testimony" for the purpose, either of securing an admission from him of the fact which it is the design of the question to elicit, or for laying the foundation for his impeachment as to the particular matter to which the question was addressed. Code Civ. Proc. § 2052.

[7-11] The district attorney (assignment No. 8), cross-examining defendant's wife, put this question to her: "Was any prostitution being practiced on the premises?" referring to the rooming house in which the homicide occurred. The defense objected to the question on the usual grounds. Before the court had time to rule on the objection the district attorney withdrew the question and then asked this question: "Were you practicing prostitution there?" a prompt objection to which was made, and as promptly as well as properly sustained. The line of inquiry involved in the question did not constitute a proper mode for the impeachment of the witness, if such was its purpose, and, indeed, was not proper for any purpose. The witness being the wife of the defendant, and associated with him in the operation of the rooming house in which the homicide was committed, the asking of the question, if having any effect at all upon the jury, would be unjustly to militate against the interests of the defendant or wrongfully diminish the force of any defense which he had interposed or was putting before the jury. A prosecut-

ing officer, as often the Supreme Court and this court have said, should never ask any question which he knows or ought to know could not elicit relevant or competent testimony, but whose only effect would be to degrade the character of a witness in the estimation of the jury. But the defendant here did not assign the fact of the asking of the question as misconduct on the part of the district attorney, nor did he ask the court to admonish the jury to disregard the question and the unsavory imputation which it carried. It has been held that, where a district attorney, in the examination or cross-examination of a witness in a criminal case, asks questions relative to a matter wholly foreign to the issues and which are pregnant with an innuendo against the personal character of the witness or the defendant, the latter must, to preserve his right to have the conduct of the prosecuting officer in asking such questions reviewed on appeal, except to and assign such conduct as misconduct, and also request the court to instruct the jury to disregard the questions and all that they imply. This rule has been departed from in cases where the district attorney, after objections to the questions have been sustained, has persistently pursued the inquiry to which the questions were addressed. Here the prosecuting officer did not pursue the inquiry after the objection to the question was sustained. Furthermore, the presumption is that the jurors were persons of intelligence and that they clearly understood that the action of the court in sustaining the objection by the defendant to the question meant that the subject-matter thereof had no true relation to the case, and should be by them disregarded in considering whether the accused was or was not guilty, and that they did disregard it. At all events, we cannot say, in view of the strong case of guilt made by the people against the defendant, that the asking of the question could have exercised any baleful influence in bringing about the verdict returned. Certainly, after considering the entire record, this court cannot justly hold that the alleged misconduct of the district attorney in asking the question referred to resulted in a miscarriage of justice. Const. art. 6, § 4½.

[12] Assignments Nos. 9, 10, 11, 12, 13, 14, 15, and 16 are founded on the rulings disallowing proof in support of the rather vaguely grounded theory, above referred to, that the crime charged against the defendant might have been committed by one Pete Kumbus. As all of these assignments relate to the same general proposition, they may be considered together. To clarify the consideration of said assignments, it will be requisite to state herein briefly the circumstances which the defendant seemed to have conceived afforded a handle for the introduction of or an attempt to introduce a theory which might bring home to Kumbus responsibility for the homicide.

The defendant and his wife testified that in the early morning hours of March 31, 1924, they left Marysville in their automobile for Yuba City, Sutter county, which is situated south of and just across the Feather river from the city of Marysville, their object being to gather "some greens" growing near Yuba City; that, reaching said place within a few minutes after they left their home, and not knowing just where greens could be found, they called at the residence of an acquaintance in Yuba City, one Paul Diacoumes, a Greek, and asked him where the greens could be obtained; that Diacoumes accompanied them to a spot several blocks from his residence, and pointed out where the greens were growing; that defendant and his wife gathered a quantity of the greens, and thereupon, with Diacoumes, returned to the latter's home, where they had lunch at the noon hour, and thereafter remained until about 2 p. m., when they left in their car, first taking a short ride, and then returning to their home, reaching there about the hour of 3 p. m. The defendant testified that the Pete Kumbus mentioned above called at the home of Diacoumes while they were having their lunch, and that he also ate lunch with them; that he (defendant) was introduced to Kumbus on that occasion; that Kumbus then stated to him (defendant) that he (Kumbus) expected to go to work within a few days as a section hand for the W. P. R. R. Co. at Marysville. The wife of the defendant testified that, while it was true that she had seen Kumbus at different times on the streets of Marysville prior to the 31st day of March, she could not recall that she saw him at the house of Diacoumes in Yuba City on the 31st day of March. Both the defendant and his wife testified that about 30 minutes after they reached their home from their trip to Yuba City Paul Kumbus appeared at their rooming house; that Kumbus was invited into the room of defendant and wife, and remained there several hours drinking wine; that Kumbus was there while Ladner was there. Shortly after 7 o'clock p. m., the defendant, so he testified, left the rooming house and went to a Chinese restaurant to procure a chicken for dinner, leaving both Kumbus and Ladner in the room with his wife; that he had previously invited both Kumbus and Ladner to remain and have dinner with him and his wife; that he returned about 5 minutes to 8 o'clock, and that Kumbus was not there, having before his (defendant's) return left the house; that Ladner was still there; that, while he was in the kitchen preparing the dinner, Ladner started to leave and stepped out into the hall, where there were four or five Hindus "standing around"; that the Hindus, for some reason, attacked Ladner, and that his wife excitedly ran into the kitchen and told him of the attack; that he thereupon ran out into the hallway, found that Ladner had been knocked or fallen down the stairway a few steps,

and that he began fighting the Hindus for the purpose of protecting Ladner from further assault at their hands; that finally the fighting ceased, and he and his wife then assisted Ladner into their room and laid him on the floor. In this connection it may be stated that the defendant, in explanation of his possession of Ladner's watch and chain, testified that when he assisted Ladner to his feet from the stairway he saw the watch and chain lying on one of the steps and that he picked them up and placed them in his pocket. Mrs. Vatek testified that Kumbus was still in their room when the defendant returned with the chicken, but left while her husband was in the kitchen preparing the dinner and prior to the time of the alleged assault upon Ladner by the Hindus.

No one saw Kumbus leave the rooming house, nor is there any evidence in the record showing the precise time at which he did leave. As to the time that he left the room of the defendant the testimony of the latter and that of his wife, as will be observed, do not agree. It is important to note, however, that their testimony is in accord upon the significant fact that he left the room before any disturbance occurred in the house and was not seen by either defendant or his wife while the alleged fighting was in progress.

This statement is sufficient to point the reasons moving the court to disallow the testimony offered for the purpose of showing the movements and statements of Kumbus.

We now proceed to the consideration of the rulings excluding the testimony so proposed. As stated above, the assignments now to be considered all relate to the same general proposition, and the testimony offered for that purpose and excluded by the court may generally be stated as follows: By Paul Diaconoules: That, having stated that Kumbus had been stopping at his home, the period of time during which he had lived there, when he left there and whether the witness saw Kumbus on the evening of the 31st day of March, 1924, after he (Kumbus) had left the witness' house earlier in the day. By one Steve Ontales, section foreman for the Western Pacific Railroad Company at Marysville: Whether Kumbus, on Monday morning, March 31, 1924, applied to said foreman "with reference to obtaining work" and also by the same witness, who testified that at different times Kumbus worked under the witness for said railroad company, whether he saw Kumbus at his residence on the evening of March 31st, and, if so, as to how long he (Kumbus) remained there, and whether the witness had seen Kumbus since the evening of the 31st of March, and whether witness had a conversation with Kumbus on the occasion just mentioned. Exception No. 15: The striking out of the testimony of one Otto after he had testified that in the evening of the day of the homicide, about 8 o'clock, as he was crossing an alley about 120 feet from

the entrance to the rooming house of the Vateks, he was run down by a man who bore the appearance of being a Hindu; that when witness first noticed this man the latter was "looking up Second street towards the entrance of the Vatek house; that, after striking him (witness) the man proceeded down the alley as fast as he could until he disappeared from sight." Allowing, over objection by defense, Sheriff McCoy to say, in response to questions by the district attorney, that, in a conversation with Mrs. Vatek on the 2d day of April, 1924, two days succeeding that upon which the tragedy occurred, she stated that "there was another Greek there (referring to her room) that afternoon" (March 31st), and further said that "he left there about 4 o'clock."

[13] The court was clearly right in excluding and striking out the testimony purporting to show the alleged movements and statements of Kumbus on the day and evening in question. There was no showing worthy of being called such which in any measure or degree connected Kumbus with the crime or the commission thereof, and therefore his statement to others as to his intentions with respect to applying for work with the railroad company, that he was offered work and agreed to accept the same, and then abandoned his purpose to enter upon such work, was hearsay and incompetent. There was no offer to show that Kumbus had any acquaintance with the deceased, or knew that he was rooming at the house of the defendant, or that he was at said house at the time he (Kumbus) was there on the 31st day of March, or that he ever had any trouble with the deceased, or any reason or motive for having trouble with or slaying him. It is true that it is proper for the defendant "to show by any legal evidence that another person committed the crime with which he is charged, and that he is innocent of any participation therein. But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tend clearly to point out such other person as the guilty party. Remote acts, disconnected and outside of the crime itself, cannot be separately proved for such a purpose." 8 R. C. L. § 178. It is to be added that there was no testimony, nor offer to introduce any, that Kumbus, while at the rooming house, had trouble with anybody, or that, immediately after leaving the room of the defendant, there was any noise indicating that trouble or a fight or an assault took place in the room of the deceased, which was located near the room of the defendant and within sight thereof. To the contrary, according to the testimony of the defendant and his wife, the first and only disturbance which occurred on the second floor of the house on the day in question or the evening thereof was that between the Hindus and Ladner and in which the defend-

ant took a hand. There was no testimony, or even pretense that, assuming that the disturbance or fight described by the defendant and his wife did actually take place, either the deceased or Kumbus took part in it or was in the hallway when it occurred. The proposed testimony of the witness Otto as to seeing a dark complexioned person, resembling a Hindu, passed rapidly down an alley at about the time the disturbance was heard in the upper story of the house constituted the most powerful of all the circumstances which the defendant proposed to introduce as tending to show that Kumbus might have been the slayer of Brar. But, if allowed, that testimony, without assistance from other facts more directly tending to connect Kumbus with the commission of the crime, could not have had the effect of supporting the theory that the latter was the author of the crime, or of shaking the force of the people's evidence, both positive and circumstantial, tending to show, and, indeed, if believable (and the jury believed it), clearly enough showing that the defendant took the life of the deceased.

[14] The ruling allowing Sheriff McCoy to say that Mrs. Vatek, on the 2d day of April, 1924, stated to the witness, in the presence of the district attorney, that Pete Kumbus left her room at 4 p. m. on the 31st day of March was proper. Mrs. Vatek, when testifying, was asked whether she made such a statement to the sheriff and the district attorney on the day named, and replied that she did not remember whether she had or not. Thus the proper foundation was laid for the introduction of the sheriff's testimony as in impeachment of Mrs. Vatek regarding the matter to which the said testimony related.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

71 Cal. App. 656

McDONALD v. SOUTHERN PAC. CO. et al.
(Civ. 5078.)

(District Court of Appeal, First District, Division 2, California. March 13, 1925. Hearing Denied by Supreme Court May 11, 1925.)

1. Railroads — 400(10) — Pedestrian's negligence held for jury.

In pedestrian's action for injuries when struck by train, whether he was negligent held for jury.

2. Trial — 260(8) — Refusal of instruction held not erroneous in view of given instruction.

In pedestrian's action for injuries when struck by train, refusal of instruction that even though train operators failed to give warning of its approach, plaintiff was not relieved from duty of ordinary care to look and listen for trains which might injure him, and if by use of such care he might have ascertained that

a train was coming and failed to do so, he could not recover if such failure proximately contributed to his injury, held not erroneous in view of given instructions.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by Joseph E. McDonald against the Southern Pacific Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Ford, Johnson & Bourquin, of San Francisco, for appellants.

Ostrander & Carey, Philip M. Carey, and Chapman, Trefethen & Chapman, all of Oakland, for respondent.

LANGDON, P. J. This is an appeal by the defendants from a judgment against them for \$25,000, in an action to recover damages for personal injuries sustained by plaintiff, and alleged to have been caused by the negligence of the defendants. The defendant company is the owner and operator of the electric train which caused the injury, and the other defendant is the motorman who operated the same.

The defendants admit, in the briefs filed on their behalf in this court, that, from the conflicting evidence upon the subject and the implied finding of the jury, this court must start from the premise that the negligence of the defendant was established. The question argued by appellant upon appeal is that the evidence offered by plaintiff on his own behalf convicts him of contributory negligence, barring his recovery.

The accident occurred near the intersection of Fourteenth and Franklin streets, in the city of Oakland, Cal. Franklin street runs north and south. It is intersected by Fourteenth street, which runs east and west. The block to the east of Franklin street, between Fourteenth and Thirteenth, is used by the appellant company as a depot where trains to and from San Francisco have their terminals. Double tracks approach the terminal from a northerly direction on Franklin street, and turn in a curve into the depot premises, and in doing this, necessarily, cross the east sidewalk on Franklin, between Fourteenth and Thirteenth streets. In walking in a southerly direction on the east sidewalk of Franklin street opposite the depot premises, the first track to be passed is that used by the outgoing or west-bound San Francisco trains, while the second track is used by the incoming or east-bound trains. All of these incoming trains come to a stop on the north side of Fourteenth street before proceeding over that street and into the depot premises. The distance between the outgoing and incoming tracks is approximately 35 feet. The accident occurred in the afternoon. Plaintiff was walking in a southerly direction on the

public sidewalk on the east side of Franklin street, approaching its intersection with Fourteenth street. Upon arriving at the north side of Fourteenth street, he looked both ways for traffic and proceeded across the street. When at about the center of Fourteenth street he looked back and saw a single south-bound car of the defendant at a stop on the north side of Fourteenth street near the "Stop" sign. He continued to cross Fourteenth street, and after crossing the sidewalk on the south side of Fourteenth street, proceeded on the east sidewalk of Franklin street across the tracks of the defendant, which turned off Franklin street on a curve and into its station property. When he arrived at about the center of the more easterly north-bound track, he again looked back and saw the car standing in the same position as before. He continued on his way, and when he was upon the west or south-bound track, he heard a rush of air, and looking around, saw the car was almost upon him. He jumped back, but was struck by the left-hand front corner of the car. The car had moved rapidly over the crossing, and was then allowed to coast around the curve and across the sidewalk without any bell or warning being sounded, and without any lookout being kept by the person operating the same.

Appellants contend that because the plaintiff did not turn and look for the third time before stepping upon the south-bound track he is guilty of negligence as a matter of law under the cases decided in this state. We think the facts of this case distinguish it from the cases depended upon by appellant. Here the plaintiff looked twice, and both times saw the car standing stationary. He then attempted to walk about 35 feet, relying upon the car either remaining stationary or giving a warning signal of its approach. He was in plain view of the motorman upon the car, and the car came up behind him. To see it again he would have had to turn around. An adequate idea of his situation and the naturalness of his actions under the circumstances cannot be conveyed without the aid of the map appearing in the record, or a view of the premises involved here. Such a view was had by the jury, and the physical facts evidently had much to do with the determination of the controversy.

The peculiarity of the physical situation, the noisy, congested portion of the city in which the accident happened, the fact that the car approached plaintiff from the rear on a curve, the fact that the car was at a standstill on both occasions when the plaintiff looked at it, are factors entering into the determination of what was reasonable care upon the part of the plaintiff.

[1] It is a question for the jury to determine what would be the conduct of a person of ordinary prudence under similar circumstances. *Scott v. San Bernardino, etc., Co.*, 152 Cal. 604, 93 P. 677. The jury has done so in this instance under most careful instructions, after hearing the evidence and viewing the premises.

[2] The only other question raised is as to the failure of the court to give certain instructions on behalf of the defendant. One of these instructions was to the effect that even if the operators of the train failed to give a warning of its approach, this would not relieve the plaintiff from the duty of ordinary care to look and listen for trains which might injure him, and if by the use of such care he might have ascertained that a train was coming and failed to do so, he cannot recover if such failure proximately contributed to his injury. The same idea is embodied in the following instruction given by the court:

"The tracks of a railroad company are themselves a sign of danger, and one about to cross such tracks must exercise his faculties of sight and hearing to watch and listen for trains or cars going in either direction, and if, by exercising his faculties of sight and hearing as would an ordinarily careful person, he could see or hear a car approaching either from the side or from behind, he fails to see such train and is injured thereby, and his failure so to see or hear said train contributes in the slightest manner, directly or proximately, to the collision, * * * the plaintiff cannot recover."

Repeatedly the court laid down the rule in the instruction:

"* * * If in this case you find from the evidence that plaintiff did not exercise ordinary care or caution and that such failure on his part contributed * * * to such accident in the slightest degree, or in any manner whatever * * * plaintiff cannot recover."

Again, the jury was instructed:

"* * * A pedestrian, if upon a railroad track, must leave it when a train approaches, and must use his senses of sight and hearing while walking over or along a railroad track to ascertain whether a train is approaching in either direction, and if he fails to take such precaution he is guilty of contributory negligence. * * *"

We think the instructions fully and fairly covered the defendants' rights in this litigation.

There are no other matters requiring discussion, and the judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

71 Cal. App. 683

SALISBURY v. CAMPE-ROSE CO.
(Civ. 5102.)

(District Court of Appeal, First District, Division 2, California. March 16, 1925. Hearing Denied by Supreme Court May 15, 1925.)

- 1. Appeal and error** ⚡635(3)—**Appeal will be affirmed where only statement under assignment is that evidence is insufficient to sustain verdict and evidence is not printed in record.**

Appeal under Code Civ. Proc. § 953a, providing for appeal by filing transcript in lieu of bill of exceptions, will be affirmed, where assignment relating to insufficiency of evidence is submitted on statement that it is self-evident that the competent evidence in record is insufficient to justify verdict, and no other argument is made to support point, and evidence is not printed in record, especially where appellant stated in reply brief that "no issues of fact are now before this court."

- 2. Appeal and error** ⚡882(19) — **Appellant cannot complain that damages were result of passion and prejudice, where his evidence might have unfavorably influenced jury.**

Appellant cannot complain that damages were result of passion and prejudice, where the only evidence in transcript which might have prejudiced jury was evidence by appellant's witnesses of appellant's trickery and deception.

- 3. Appeal and error** ⚡1078(1)—**Record will not be searched for error, if assignment is not argued in brief.**

Appellate court will not search record to find error, if assignment of error is not argued in brief.

- 4. Appeal and error** ⚡901—**It is appellant's duty to show wherein evidence is insufficient to sustain verdict.**

If verdict was not sustained by evidence, it is appellant's duty to show wherein evidence was insufficient.

- 5. Witnesses** ⚡227—**Unnecessary to reswear witness to whom judge directed questions at close of trial.**

Where trial judge, at close of trial, directed questions to party who had previously been sworn as witness, it is unnecessary to again swear him, and whether he answered questions from witness stand or while standing at counsel table is immaterial.

- 6. Appeal and error** ⚡932(1)—**It is assumed that evidence is sufficient to warrant verdict in the amount rendered.**

It will be assumed on appeal in support of judgment that jury deemed evidence sufficient to warrant verdict in the amount which it rendered.

- 7. Appeal and error** ⚡1033(9) — **Appellant cannot complain of reduction of verdict against him.**

Error, if any, in reducing verdict against appellant is not error prejudicial to appellant, and therefore not ground for appeal.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by W. S. Salisbury against the Campe-Rose Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hoefler, Cook & Lingenfelter, of San Francisco, for appellant.

Colston & Hamm and J. G. Moser, all of San Francisco, for respondent.

NOURSE, J. This is an action for damages for breach of contract. The cause was tried before a jury, and a verdict for \$3,231, the full sum demanded in the complaint, was returned in favor of the plaintiff, and judgment was entered accordingly. Thereafter the defendant moved for a new trial, and pending the determination thereof the trial judge reduced the judgment to the sum of \$2,110. This remission was accepted by the plaintiff, the motion for a new trial was denied, and judgment for the reduced sum was accordingly entered. From this judgment the defendant appeals under the provisions of section 953a, Code of Civil Procedure.

On this appeal four assignments of error are made as follows: (1) Excessive damages appearing to have been given under the influence of passion and prejudice; (2) insufficiency of the evidence to justify the verdict and judgment; (3) that the verdict is against law; and (4) error in law occurring at the trial and excepted to by the defendant.

[1] The second assignment of error, that relating to the insufficiency of the evidence, is submitted to us by the appellant on the mere statement that "it is self-evident that the competent evidence in the record is insufficient to justify the verdict." No other argument is made in support of this point, and the evidence itself is not printed in the record. For this reason alone we should affirm the judgment upon that point. *Estate of Berry* (Cal. Sup.) 233 P. 330. In addition to this, after the respondent had printed portions of the evidence tending to support the verdict, and had pointed out to us the conflict in the testimony of various witnesses, the appellant in its reply brief practically withdrew the point in its statement that "no issues of fact are now before this court."

[2] Upon the point that the damages were excessive, the appellant does not print any of the evidence and does not direct our attention to any portion of the typewritten transcript bearing upon the point urged. From our examination of the transcript we are unable to find any evidence supporting the contention that the verdict was the result of passion or prejudice, unless it be that the jury was influenced by the unfavorable picture which the appellant's witnesses dis-

closed of its own trickery and deception in the conduct of its business relations with the respondent. We cannot say whether this evidence influenced the verdict, but, if it did, it is not an error of which the appellant may complain.

[3] To the point "error in law occurring at the trial and excepted to by the appellant," the appellant has not directed our attention to any specific error, and has not made any argument in support of the point urged other than to refer us to what is said under the heading, "The verdict is against law." If an assignment of error is not of sufficient importance to justify an appellant in making an argument in the brief in support of it, it is not incumbent upon this court to search the record to find error to aid the appellant on the appeal.

Under the assignment that the verdict is against law, the whole argument is based upon a misconception of the issues of the case. The respondent sued upon a claim for damages for breach of contract, and alleged that on December 27, 1921, he entered into a written contract with Lou H. Rose Company whereby respondent was to act as dealer of Maxwell motor vehicles for which said company was then distributor. It was then alleged that, while the respondent was acting under the terms of this contract and about July 1, 1921, the appellant Campe-Rose Company, a corporation, became the successor of Lou H. Rose Company, and that the plaintiff continued to act as such dealer for the appellant under the old contract; that about the 12th day of July, 1922, appellant and respondent entered into a supplemental agreement to the effect that the contract should terminate upon plaintiff's completing any unfinished business then on hand; that in accordance with said agreement and the supplement thereto the respondent continued in the actual sale of said motor vehicles and to take orders therefor, and that he, did actually sell and contract to deliver 15 touring cars, 1 sedan, and 1 coupé for the total price of \$16,145, for which he was entitled to a discount by way of commission at the rate of 20 per cent. on the factory price of the cars sold.

All the material allegations of the complaint were denied in the answer, and the affirmative allegation was made that on the first day of June, 1922, the appellant entered into a contract with the Maxwell Motor Sales Company whereby it became a distributor for Maxwell motor vehicles in the same territory as that named in the original contract with Lou H. Rose Company, and that said Lou H. Rose Company was not interested in the latter contract.

From this it is argued that, the Lou H. Rose Company having ceased to be a distributor for the Maxwell cars on June 1, 1922, its contract with the respondent became ab-

rogated on that date. From the foregoing résumé of the pleadings it will be seen that the claim for damages is based, not upon the contract of Lou H. Rose Company of December 27, 1921, but upon the contract between appellant and respondent made on the 12th of July, 1922. This contract referred to in the pleadings and briefs as the supplemental contract of July 12th is found in the appellant's letter of that date addressed to the respondent and signed by Lou H. Rose, vice president of that corporation. It was written upon the following letter head of the corporation: "Campe-Rose Co., *Successors to Lou H. Rose Co.*," and reads as follows:

"W. S. Salisbury, 555 Valencia St., San Francisco, Cal.—Dear Mr. Salisbury: The correspondence which we have been awaiting from Detroit arrived to-day and I regret to report that the general policy as outlined indicates very clearly that for the future the factory will expect us to cover our retail territory. Under these circumstances, and as explained in our recent conversation, we feel that you should be advised as to what the future policy will be so that you can make your plans accordingly. I believe you mentioned at the time another proposition pending, which, under the circumstances, would most likely be advisable to accept. I will say, however, that *there is no objection on our part to your completing any unfinished business now on hand.* Both Mr. Campe and myself are very sorry that future policies will not justify a continuance of our relations. Yours very truly, Campe-Rose Company [Signed] Lou H. Rose."

The pith of the contract is in that portion of the letter from which it appears that the appellant authorized the respondent to complete any unfinished business then on hand. Evidence was offered without objection to show that from June 1, 1922, when the Lou H. Rose Company retired from business as distributor of the Maxwell cars, the respondent and all other dealers within the territory covered by that company were orally directed to continue the business as such dealers upon the same basis as that fixed in their written contracts with the Lou H. Rose Company. Evidence was also offered that all these dealers, including the respondent, were led to believe that they would be given written contracts with the appellant, and in the case of respondent the agent for appellant frankly admitted that his purpose was to deceive the respondent into thinking that his contract would be rewritten until the appellant was able to procure another dealer or make other arrangements regarding the sale of cars in the territory covered by respondent's contract. During all this time the respondent was led to believe that the appellant corporation was the successor in interest to the Lou H. Rose Company, and the appellant held itself out to the public to be such. During all this time the appellant led the respondent to believe that he was

acting as dealer for it under the same terms as those contained in the contract with Lou H. Rose Company, and cars were delivered to the respondent by the appellant and settlements made therefor upon the basis of the old contract. At the same time the appellant corporation caused to be printed in the public press an advertisement of the Maxwell cars in which the corporation announced the respondent as its authorized dealer. The letter of July 12, 1922, was therefore merely a written confirmation of the oral arrangements between the parties whereby the appellant obligated itself to pay the respondent for any unfinished business in the hands of the respondent upon the terms of the old contract. The question of fact to be determined by the jury was, therefore, How much unfinished business the respondent then had on hand.

From the fragmentary portions of the evidence printed in the briefs it appears that the respondent claimed to have had on hand orders for 15 touring cars, 1 sedan, and 1 coupé, and that for these cars written orders covering 10 were received in evidence, and that as to the others respondent claimed to have procured a sale, though he had no written order as evidence thereof.

[4, 5] The jury returned a verdict for \$3,231, which was the full amount demanded in the complaint. Appellant attacks this verdict upon the ground that it is not sustained by the evidence, and that it must be against law, and that it can only be accounted for as damages upon the contract with the Lou H. Rose Company. In this regard the appellant directs our attention to the court's instruction that the breach of the original contract did not entitle the plaintiff to any damages against the defendant, Campe-Rose Company. We do not understand that this instruction is involved in the verdict at all. The respondent was not seeking damages for breach of the original contract by the appellant, but was merely seeking damages for the breach of the contract contained in the letter of July, 1922. If this verdict was not sustained by the evidence, it was the duty of the appellant to make that showing upon this appeal. That it has not done so has already been pointed out in connection with the first assignment of error. The appellant has merely copied from the transcript portions of the evidence covering the subject of the price of the cars at the factory and showing that the discount was to be allowed on that basis, a point which is not in dispute upon this appeal. In addition to this, the appellant has printed portions of the transcript covering a colloquy between the trial judge and counsel at the close of the trial wherein the trial judge endeavored to clear up the conflicting evidence covering the num-

ber of cars sold and the discounts which should be allowed. At that time the trial judge directed his questions to counsel for both parties, as well as to the respondent, and this was all done without objection from either party. The only objection which appellant makes at this time is that the respondent was not sworn when he gave these answers. It appears from the record that he had been previously sworn and testified, and, of course, it was wholly unnecessary to put him through the form of swearing again. Whether he gave his answers from the witness chair or while standing at the counsel table does not appear in the record, and it is wholly immaterial anyway.

[6, 7] Appellant has not cited us to any evidence bearing in any respect upon the point at issue; that is, the amount of business which the respondent had on hand when appellant's letter of July 12th was written. We must therefore assume, in support of the judgment, that the jury deemed that evidence was sufficient to show that the respondent had on hand a sufficient number of car orders to warrant a verdict in the amount which it rendered. In reducing the amount of the verdict the trial judge merely exercised his discretion, probably reaching the conclusion that the orders which were not in writing should not be deemed to be business on hand. Though we are not prepared to say the trial judge was correct in this ruling, it is plainly evident that the appellant was not prejudiced thereby, and it has therefore no ground of appeal.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

71 Cal. App. 661

SMITH v. MASSACHUSETTS BONDING & INS. CO. (Civ. 5091.)

(District Court of Appeal, First District, Division 2, California. March 14, 1925. Hearing Denied by Supreme Court May 11, 1925.)

Evidence — 413—**Liability insurance policies, issued on trucks after collision, held admissible to show oral agreement to insure trailers also.**

Liability insurance policies, issued on motor trucks only, after collision of truck and trailers with automobile, *held* admissible to show that oral contract sued on covered trailers, as well as trucks, in language identical with that of policies; not being attempt to vary terms of written instrument.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by H. S. Smith against the Massachusetts Bonding & Insurance Company.

Judgment for plaintiff, and defendant appeals. Affirmed.

Thomas, Beedy & Lanagan, of San Francisco, for appellant.

G. C. Ringole, of San Francisco, Henry Hauser, of San Jose, and Samuel Hamburg, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff, as assignee, commenced an action against the defendant to recover a judgment for moneys alleged to be due under an alleged oral contract of insurance. The jury returned a verdict in favor of the plaintiff and the defendant has appealed.

Prior to July 26, 1920, B. C. Martin and M. P. Martin, doing business under the name of Martin Bros., were engaged in operating automobile trucks and trailers in transporting milk from Santa Clara and the adjacent neighborhood to San Francisco. Shortly prior to that date an accident occurred that resulted in an insurance adjustment being made by and through Burdette A. Palmer. On the date last mentioned Mr. Palmer called upon Martin Bros., and held a conversation with M. P. Martin. At the time of holding that conversation, and until after the Swanson accident, which will hereafter be adverted to, it is the uncontradicted evidence that Mr. Palmer was an insurance solicitor and adjuster of insurance for the firm of Goodwin, Klinger & MacKay, and that that firm was the general agent of the Massachusetts Bonding & Insurance Company in the transaction of the automobile department of that company's business on the Pacific Coast. When Mr. Palmer called on Mr. Martin, a conversation was had, looking toward the taking over of the automobile insurance business of Martin Bros. As he represented indirectly the appellant, we shall take the story as testified to by him.

Mr. Palmer testified that he held the conversation with Mr. Martin at San Jose in the presence of Mr. Martin's sister.

"I made the trip down there at the request of Mr. MacKay, a representative of Goodwin, Klinger & MacKay. I went down there on an adjustment of a loss and the soliciting of business. I went down to adjust a loss on a truck which Mr. Martin had and to solicit additional business in the insurance line on the trucks which were not covered. This visit was made in the latter part of July. I adjusted the loss on Mr. Martin's car and naturally brought up the question of full coverage in a collision, as he was not covered in his present policy. His trucks were covered, but that is with what is known as a \$100 deductible collision policy, and naturally Mr. Martin was very much disappointed. He had to stand \$100 of the loss and then I explained to him the features of the full coverage clause. A full coverage clause amounts to this, that in case of a loss he would not have to lose a cent himself, but that the company would have to assume the entire liability. This was on his Packard

truck, the Reo truck, and also two trailers which were operated in conjunction with the two trucks in hauling loads to San Francisco. The trailers were attached to the rear end of the trucks. I solicited full coverage in collisions, features which we decided upon, depending on the rates. I then solicited property damage and public liability, and, not having the rate manual with me, I telephoned to Mr. Tompkins in San Francisco. Mr. Tompkins is at the counter, and is what is called the underwriter of Goodwin, Klinger & MacKay, or the office manager, and he quoted all the rates. Mr. Martin gave me the numbers of the Packard truck and also of the Reo truck. We looked for the numbers on the Trailmobile and on a Reliance trailer. We could not locate any number on them, and I came back to San Francisco. He explained how he was using those trucks and those trailers; that they were being worked in conjunction; and that he would hook up a trailer on the rear of his truck. He told me the number of gallons of milk that he could carry on the truck and the number of gallons of milk that he could carry on the trailer. I don't remember which truck was for which trailer, but I believe that Mr. Martin operated two trucks, and he had the two trailers, and, if he would pull off one truck, he would use the other one, and he would hook it on with either of the trailers, if one of the trailers was undergoing minor repairs. I asked Mr. Martin how many men he carried on these trucks and he told me that there was always two drivers so that in case one man fell asleep the other man would be there to handle it.

"That is about all of the conversation with the exception that Mr. Martin was insured. He received full coverage. He was covered. He was absolutely insured. I told him that he had a full coverage collision insurance on his trucks and on his trailers. The amount was \$5,000 for injury to one person and \$10,000 as the maximum injury to two persons or more. I told him it would not make any difference if he had truck No. 1 hooked to the Trailmobile and then if truck No. 1 was laid off and truck No. 2 was put into service; that we were taking care of those trucks and trailers and they would be protected; that the truck and the trailer attached were jointly insured. When I returned, I took the insurance right into the office of Goodwin, Klinger & MacKay. There I saw Mr. Tompkins; he was at the desk. I filed a written application. I made it. That paper is not now available; you will remember that Mr. Klinger testified the application is lost. On that written application was the make of the truck, whether a Packard or a Reo, and the style of the trailer and the year in which manufactured, the tonnage of the truck and the general extinguisher, etc., and the names of the Martins and their address, and the general use in which the trucks were to be put. The collision was changed from a \$100 deductible to collision on each one of the trucks and they fully covered the trailers. They had property damage on each truck and public liability on each truck. They had property damage on each trailer and I believe that, at that time that I wrote that, that covered both trailers, and I took those applications into the office to Mr. Tompkins and verified the numbers of the trucks, both the motor numbers and the serial numbers

and the capacity, and checked that up with the manual to see that the motor numbers corresponded with the year in which they were manufactured and also with the capacity. I got down to the trailers and on those there were no numbers—no serial number or motor number. Those are supposed to be the same as the automobile equipment, and I told Mr. Tompkins that I was not able to get the serial numbers, but he said that he would carry them for me and, if possible, I was to get the serial numbers even if necessary to make another trip to San Jose to get them. Mr. Tompkins said that he would carry them; that the whole equipment was covered from then on; and that on my next trip to San Jose I was to secure those numbers on both of those trailers, the Trailmobile and the Reliance trailer. He accepted the application to cover the trucks, and to cover with us means for a period of a year. Nothing was said at that time with reference to the length of time of that oral coverage. Nothing was said at that time as to when I should go to San Jose to get the numbers of the trailers. I made a second trip to Santa Clara. I saw M. P. Martin and B. C. Martin on the occasion of that visit. I had a conversation with them concerning this insurance at that time and place. I said to Mr. Martin that I wanted to get the numbers off the trailers and then we again tried to find the numbers. We looked every place we possibly could, but we couldn't find them. Then Mr. Martin finally succeeded in getting those numbers off an old policy or a bill of sale which he had and then those numbers were turned into Mr. Tompkins. They were turned in by me some time in the first part of August.

"The amount of the premium agreed to between Mr. Martin and myself I have forgotten. It was some place in the neighborhood of \$1,000 for the whole coverage; that is, for the public liability, property damage, and the additional feature of collision insurance."

The story above recited is confirmed in every material detail by the testimony of Manuel P. Martin, one of the members of the firm of Martin Bros., and the individual with whom Mr. Palmer held his conversation.

At 12:30 midnight on the morning of August 9, 1920, an accident occurred between one of the trucks and trailers and an automobile being operated by Emil J. Swanson, and a little later during the same morning Martin Bros. called up the office of Goodwin, Klinger & MacKay, and spoke to Mr. Palmer over the telephone and advised him of the accident, whereupon Mr. Palmer replied, "All right, Mr. Martin, I will take care of you."

Communications between Martin Bros. and the defendant and the agents of the defendant are not called to our attention again until the month of January, 1924. During that month a summons and complaint was served on M. P. Martin. Thereupon Mr. Martin called up Mr. Palmer on the phone, made an appointment with him, and thereafter came to San Francisco. On arriving here he met Mr. Palmer and Mr. Tompkins and they went upstairs into the office of Mr. Hill, who

was the attorney of the appellant. Mr. Potwin, the authorized agent of the appellant, was also present. Mr. Martin testified:

"They first began to read the policy to me—I just can't recall whether it was Mr. Hill or Mr. Potwin who read the policy, I can't say just what one read the policy. *Prior to that time I had not received any policy from the Massachusetts Bonding & Insurance Company, the defendant in this case.* * * * I didn't think it was just right and I came down and I went home. The next day I hired Mr. Hauser as my attorney and we went back. Mr. Tompkins, Mr. Hauser, and myself went upstairs to the office of the Massachusetts Bonding Company and at that time we got the policies. Mr. Hill and Mr. Potwin were there. Mr. Hill handed the policies to Mr. Hauser and remarked, 'We refuse responsibility.'"

As recited above, in January, 1924, a summons and complaint were served on M. P. Martin. The portion of the record showing whether or not that summons and complaint issued in the action of Swanson v. Martin has not been called to our attention. We assume they did, because the record is clear that after the accident above mentioned as occurring on the night of August 9, 1920, Swanson commenced an action against the Martins and thereafter recovered judgment in the sum of \$8,000 and \$1,062 as costs, and that thereafter the Martins settled the judgment for the sum of \$5,500, and then commenced this action to recover under their alleged oral contracts of insurance.

The policies above mentioned were Nos. 121800 and 121811. The respondent produced them in court and offered them in evidence for the purpose of showing the terms of the oral contract of insurance as contended for by the respondent. The policy No. 121811 covers the Reo truck hereinabove mentioned, and, so far as has been called to our attention, squares with the oral testimony hereinabove recited. Policy 121800 covers the Packard truck. Same remark. But, in violation of the oral agreement as contended for by the respondent, neither of the policies contained any reference to the trailers. In pleading his case, the respondent treated the two policies as being the contract between the parties, in so far as the trucks were concerned, and he pleaded that the parties had orally agreed to insurance as to trailers; the language being identical with that of the policy on the trucks and that the policies should have been issued accordingly. In reply to this contention, the appellant takes the position that the respondent should have maintained an action to reform the policies and in that action should have prayed for relief under the contracts as reformed. Failing so to do, it is the position of the appellant that nearly all of the evidence offered by the respondent was objectionable because the respondent was attempting to vary the terms of a written instrument. The vice

in that contention is that it assumes that there was a written instrument. The liability of the appellant rests on its contractual relations as they existed at 12:30 midnight, August 9, 1920—the date of the accident. At that time the uncontradicted testimony is to the effect that Martin Bros. were fully covered, both as to trucks and trailers, under and pursuant to an oral contract. There was no writing; hence the objection that the respondent was attempting to vary the terms of a written instrument was not well founded. True it is that subsequently policies were issued on trucks and that, as far as they went, they truly stated the contract. However, as no collision occurred between a truck and any other vehicle, we are not concerned as to whether the trucks were insured or otherwise. As pieces of evidence admissible for the purpose for which they were offered, the policies were clearly admissible, and the trial court did not commit any error in admitting them in evidence.

We find no error in the record.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

71 Cal. App. 690

DAVIES-OVERLAND CO. v. BLENKIRON
et al. (Civ. 4224.)

(District Court of Appeal, Second District, Division 1, California. March 16, 1925.)

1. Sales —472(3)—Conditional vendee may convey only such title as he has.

Vendee under conditional sales contract may convey only such title as he possesses.

2. Sales —472(3)—Vendor ordinarily permitted to protect himself by contract against transfer by vendee to financially irresponsible or other undesirable person.

Vendor should ordinarily be permitted to protect himself, in conditional sales contract, against transfer by vendee to financially irresponsible person, or one with whom vendor, for any reason, may not care to intrust property.

3. Sales —472(3)—Vendor held not entitled to refuse unpaid contract price tendered by vendee's assignee.

Vendor, under conditional sales contract, containing stipulation against assignment of automobile by vendee without vendor's written consent, could not refuse to accept total unpaid contract price, tendered by one to whom vendee assigned his interest without such consent; purpose of stipulation being solely for vendor's financial protection.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Davies-Overland Company against Paul Blenkiron and another, copartners, doing business as the Imperial Valley

Buick Sales Company. Judgment for defendants, and plaintiff appeals. Reversed.

Harry W. Horton, of El Centro, for appellant.

E. R. Simon and Harry B. Ellison, both of Los Angeles, for respondents.

HOUSER, J. In this action it appears that defendants sold an automobile on a conditional sales contract, and that the vendee sold his interest in the automobile to the plaintiff, with the understanding that the original vendee would pay to defendants the balance remaining due on the automobile, or, in the event that such vendee should fail in that regard, the plaintiff would make such payment. On the day on which the next succeeding payment on the automobile became due under the terms of the contract, the plaintiff offered to pay to defendants the total unpaid contract price on the automobile, but defendants refused to accept the same or any part thereof. The contract called for no interest on deferred payments until after such payments had matured. Defendants obtained possession of the automobile from plaintiff without plaintiff's consent, and refused to return it to plaintiff after plaintiff's demand upon defendants so to do. Thereupon plaintiff brought this action in claim and delivery against defendants, and paid into court, for defendants' benefit, an amount greater than the total unpaid balance due on said automobile. Judgment was ordered in favor of defendants, and plaintiff appeals therefrom.

The conditional sales contract contained the following stipulation:

"Said purchaser agrees that he will not, and has no right to, assign, pledge, mortgage, or otherwise dispose of, this contract, or said automobile or any part thereof, * * * during the existence of this agreement without the written consent of the owner."

The sole point involved in the appeal is whether or not, in a conditional sales contract containing a stipulation which requires that, before an assignment of the vendee's right therein may be made, the written consent of the vendor must be first obtained, upon a sale thereof by the vendee without first obtaining such consent, the vendor may refuse to accept from the assignee of the vendee the total unpaid contract price, whether tendered to him by the vendee or by his assignee.

[1-3] It is clear that a vendee under a conditional sales contract may convey only such title as he possesses; also that it is only reasonable that by contract with the vendee the vendor should ordinarily be permitted to protect himself against a possible transfer by the vendee to a financially irresponsible person, or to one with whom for any reason the vendor might not care to intrust the prop-

erty. There are but few cases officially reported which deal with a situation such as is here presented.

The case of *Dame v. Hanson & Co.*, 212 Mass. 124, 98 N. E. 589, 40 L. R. A. (N. S.) 873, Ann. Cas. 1913C, 329, involved the sale of personal property under a conditional sales contract which contained a provision that, if the vendee should sell, mortgage, pledge, or attempt to sell, mortgage, or pledge the property, or any part thereof, or should fail to pay a promissory note given by the vendee to the vendor, the vendor should have the right to take immediate possession of the property and hold it, absolutely free from all claims and demands of the vendee. Few facts are stated in the opinion; but it appears that, in violation of the terms of the contract, the vendee mortgaged the property, and thereupon the vendor took possession thereof. Among other things, the court said:

"Assuming that the title was in the defendant [the vendor], it was held by it subject to the performance by Terrell [the vendee] of the conditions named, and Terrell had therefore a right or interest which he could and did convey in mortgage to the plaintiff [citing cases]. Upon tender of the amount due by Terrell or his assignee before possession was taken by the defendant, the title vested in Terrell or his assignee [citing cases]. * * * In the present case possession was not taken till after the tender, when the rights of the plaintiff to redeem had become fixed."

In the case of *Oppenheimer v. Telhiard*, 123 Miss. 111, 85 So. 134, a conditional sales contract for the sale of personal property contained a provision that the vendee should not sell, sublease, transfer, loan, pawn, give away, or remove said article or articles from his house or place of residence, except in case of fire, without the written consent of the vendor. Contrary to the terms of the agreement, the vendee sold his interest in the personal property which was the subject of the contract, and the new vendee tendered to the original vendor the full amount of the balance due thereon, which offer was refused by such vendor. It was held that the assignee of the vendee was entitled to judgment against the original vendor for the possession of the property. See, also, *Finance Corporation v. Jones*, 98 N. J. Law, 165 (1922) 119 A. 171.

No authorities have been called to the attention of this court which hold to the contrary of those just cited. In the instant case, it is clear that the vendee acquired an interest in the property which was sold to him under the contract in question. The only property right retained by the vendor was that of repossessing the property in case the vendee failed to make the payments on the purchase price as they became due. Whether those payments were made at the times

they actually became due, or whether they were combined and paid in one sum, could not injuriously affect the rights of the vendor; but, to the contrary, a payment of the entire balance of the purchase price of the automobile would be a benefit to defendant to which he would not be lawfully entitled. The purpose of the stipulation in the contract against assignment thereof, without the written consent of the vendor, was solely for his financial protection. His only interest in the contract was to receive the total amount of money for which he sold the property. Whether the money was to be paid in one lump sum by the vendee or by the assignee of the vendee was of no concern to the vendor. "One man's money is just as good as another's." By such payment the vendor's rights in the premises would be fully protected, and he would have no cause for complaint.

The judgment is reversed.

We concur: CONREY, P. J.; CURTIS, J.

71 Cal. App. 649

COOPER et al. v. REARDON. (Civ. 5093.)

(District Court of Appeal, First District, Division 2, California. March 12, 1925. Hearing Denied by Supreme Court May 11, 1925.)

1. Street railroads ⇨24(5)—Municipal street railway not controlled by statute regulating franchise conditions imposed on private corporations.

Assessments levied on abutting property owners for paying entire street, including space between tracks of street railroad operated by city, held not violative of Civ. Code, § 498, providing that city in granting franchise must require street railroad corporations to pave portion of street used by track between rails, and for two feet on each side thereof, such statute referring only to private corporations.

2. Municipal corporations ⇨425(3)—Failure to assess municipal street railway for paving not violative of charter.

Failure to assess city operating street railway for portion of paving improvement held not violative of San Francisco Charter, art. 6, c. 2, §§ 7, 8, 9, imposing such expenses on corporations required by law to keep portion of street in order, city not being required by law to pave such portion, and Civ. Code, § 498, not being applicable to cities.

3. Municipal corporations ⇨278(1/2)—Ordinance providing for paving improvement properly authorized under charter.

Ordinance of 1918, providing for paving improvement, was authorized and adopted in accordance with 1916 amendment to charter, and therefore that power created by amendment to charter in 1911, allowing adoption of an ordinance similar to one in question, had been exhausted, would not be material.

4. Appeal and error ☞1079—Constitutionality not determined in absence of proper presentation.

Whether ordinance providing for paying assessment was violative of Const. art. 1, § 21, should not be considered in absence of proper presentation and submission of authority.

5. Municipal corporations ☞437—Assessment for paving street requiring expensive blocks along municipal street car track held not burden for benefit of others.

Where, in paving street on which city operated street car, basalt blocks, required along track, were more expensive per square foot than asphalt, assessment on abutting owners held not burden for benefit of others, as maintaining railway system, in view of showing that blocks were to protect asphalt, and that space occupied by track added to that of basalt blocks rendered that area no more expensive pavement than the asphalt.

6. Appeal and error ☞937(1)—Objection on grounds not raised by pleadings cannot be raised on appeal.

Objection to validity of assessment, on grounds not raised by pleadings, and on which no finding was made, cannot be raised on appeal, it being assumed in support of judgment that appeal was not taken on such grounds.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Proceeding by F. F. Cooper and others against T. A. Reardon and others to set aside assessment for street improvement. Judgment for defendants, and plaintiffs appeal. Affirmed.

Sawyer & Sawyer and F. W. Sawyer, all of San Francisco, for appellants.

George Lull, City Atty., Milton Marks, Asst. City Atty., Oscar Samuels, and Jacob Samuels, all of San Francisco, for respondents.

NOURSE, J. The plaintiffs, as abutting property owners along a public street in San Francisco, brought this action to set aside an assessment for improvement of the street levied under the San Francisco street improvement ordinance of 1918. The defendants are the members of the board of public works of the city and county, and the contractor who performed the work which was the basis of the assessment. The cause was tried by the court, and judgment went for the defendants, from which the plaintiffs appeal under section 953a, Code of Civil Procedure.

The controversy revolves about the single fact that over the entire portion of the street included in the assessment the city owned and operated a municipal street railway, and that in the improvement of the street the abutting property owners were assessed

to pay the entire cost of the street improvement, including the paving between the rails of the street railway, and for two feet on each side thereof, whereas, in the case of a privately owned street railway, this cost is imposed upon the owner of the railway.

The appellants designate six points as grounds for a reversal of the judgment. We will consider them in the order presented:

[1] (1) That the assessment violates section 498 of the Civil Code. This section reads in part as follows:

"The city or town authorities, in granting the right of way to street railroad corporations * * * must require a strict compliance with the following conditions: * * * (2) To plank, pave, or macadamize the entire length of the street, used by their track, between the rails, and for two feet on each side thereof, and between the tracks, if there be more than one."

The appellants have not made any argument or cited any authorities in support of their point, but the respondents point out that the section is found in part 4 of division first of the Civil Code, which relates solely to private corporations, and has no reference to public utilities owned and operated by municipalities for the public benefit. The arrangement of the section in this part of the Code, as well as the context of the section itself, makes it apparent that it deals only with the conditions to be imposed by the municipal authorities in granting franchises to private corporations and individuals. Now a city does not require a franchise to operate a public utility for the benefit of its own citizens; that power is inherent in the municipality if authorized by the charter under which it operates. "It is not true that a city is a private corporation when carrying on a municipally owned public utility. No decision so holds. All the decisions on the subject recognize the fact that a city does not change its character by engaging in such enterprises." *City of Pasadena v. Railroad Commission*, 183 Cal. 526, 530, 192 P. 25, 27 (10 A. L. R. 1425).

Such being the case, when a city is engaged in the operation of such a public utility, it is not controlled by statutory regulations covering conditions to be imposed in the grant of franchises to private corporations or individuals. *United Railroads of San Francisco v. San Francisco*, 249 U. S. 517, 520, 39 S. Ct. 361, 63 L. Ed. 739; *United Railroads of San Francisco v. San Francisco* (D. C.) 239 F. 987, 994; *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 36, 26 S. Ct. 224, 50 L. Ed. 353.

[2] (2) That the assessment violates sections 7, 8, and 9 of the San Francisco charter, meaning, we assume, sections 7, 8, and 9 of chapter II, article VI, of that charter. The only argument advanced by appellants

on this point relates to that portion of the charter sections cited which provides that:

"The expense of all work on such portion of any street required by law to be kept in order by any person, company, or corporation, having railroad tracks thereon, shall be borne and paid for by such person, company or corporation, and shall be included in the assessment hereinbefore provided for."

The argument is that, as section 498, Civil Code, places the expense of paving the roadbed on the municipality, the assessment should have charged the cost of that portion of the work to the city, and the assessments upon the abutting owners should have been reduced accordingly. But we have seen that the code section does not require the municipality to bear the cost of this work, and we have not been referred to any other statute which places this burden on the city. Therefore, the city is not "required by law" to keep that portion of the street in order, and the charter sections relating to the apportionment of the cost of street improvements do not apply to a municipality owned street railway.

[3] (3) That the ordinance of 1918, under which the assessment was made, is void. The argument is that, as the city charter was amended in 1911 authorizing the board of supervisors to "adopt an ordinance which may from time to time be revised or amended, providing a method of procedure for such improvement and assessment," and that, as the board did in 1913 adopt an ordinance providing such a method, its power was then exhausted, and the ordinance of 1918, being a new ordinance, was beyond the charter authority. But the appellants neglected to inform us that the charter was again amended in 1916, giving the board of supervisors similar authority, and that the ordinance of 1918 was adopted in accordance with the 1916 amendment.

[4] (4) That the ordinance of 1918 is void as offending the constitutional inhibition against class legislation. The attack under this subdivision is directed to that portion of subdivision 13 of section 21 of the ordinance of 1918, which, after requiring "the expense of all work on such portion of any street required by law to be kept in order by any person, company, or corporation, having railroad tracks thereon, shall be borne and paid for by such person, company or corporation, * * *" contains the following proviso:

"The provisions of this subdivision shall not be deemed applicable to any street whereon railroad tracks have been constructed and are being maintained by the city and county."

The argument is that this exemption imposes an unequal burden on those property owners abutting a street whereon the city maintains a street railway, as against those

abutting a street whereon a private corporation operates a street railway, and this, it is said, violates the provisions of section 21 of article 1 of the state Constitution, which prohibits the granting of privileges and immunities to any citizen which are not on like terms granted to all citizens. No authorities are cited in support of appellants' point, and the argument is merely a statement of the proposition advanced. The respondents have been content to submit the point merely upon the statement that the distinction made by the ordinance is one between the municipality and a privately owned street railway, and not one between property owners subjected to assessments to pay for street improvements.

The ordinance has been in force for more than six years, and has been made the basis of a large number of street improvement proceedings. Through these proceedings assessments have been made upon properties widely scattered throughout the city, and property rights have grown up as a result. The ordinance has been before the courts on several occasions, and has been sustained against constitutional attack generally, but the question here presented has not been passed on. We do not feel that we should seek to determine this question without having it fully presented, and we do not feel that it is incumbent upon us to assume the burden of original research to support the position of either party to the appeal.

[5] (5) That the assessment is void because it places a burden on a few for the benefit of all. As we understand the position of appellants under this heading, it is that as the work called for the laying of basalt blocks on either side of the four rails, and that as this was properly a part of the maintenance of the railway line rather than an improvement of the street, the cost thereof should have been paid by the entire city, and should not have been included in the assessment.

The evidence was that the basalt blocks were laid to protect the asphalt pavement of the street from being broken by vehicular traffic, and not to benefit the railway. It was also shown that, though the cost per square foot of laying these blocks was more than the cost of laying an equal surface of asphalt pavement, the total cost was less because of the space occupied by the rails. The trial court found in accordance with this evidence, and held that none of the appellants suffered any detriment by reason of the fact that these basalt blocks were laid. These findings are supported by the evidence, and the appellants do not argue to the contrary. They dispose of their objection to the assessment, as they demonstrate that the appellants were charged for street improvement work only and not with the cost of improving the railway system.

[6] (6) That the assessment is void because it is in excess of the contract price. The appellants instance the case of Mr. Wright, who was one of the plaintiffs below—the owner of a 25-foot lot. The assessment against this lot was \$247.93. Appellants claim that it should have been \$227.68 when calculated according to the bid and the contract. The reason for the difference in these figures is not explained in any of the briefs, but it does appear that these appellants appealed to the board of supervisors in protest against the assessments, and that these protests were overruled.

The appellants have not directed our attention to any portion of the record showing what grounds were urged before the supervisors on these appeals, but from our own examination it appears that the point now urged was not raised in the pleadings before the trial court, and no finding was made thereon. We must assume, in support of the judgment, that the appeals were not taken on the ground now urged, and the point cannot, therefore, be raised by appellants at this time. *Federal Construction Co. v. Newhouse*, 186 Cal. 284, 289, 199 P. 519.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

71 Cal. App. 767

ROSENER v. HANLON DRY DOCK & SHIPBUILDING CO. (Civ. 4864.)

(District Court of Appeal, First District, Division 2, California. March 23, 1925. Hearing Denied by Supreme Court May 21, 1925.)

1. Appeal and error ⇨1010(1)—When supported by some evidence, findings conclusive.

Where record contains some evidence to support findings, they are conclusive.

2. Appeal and error ⇨193(6)—Lack of particularity in pleadings not considered, where objection is first raised on appeal.

Failure of petition to specifically set forth particular failure to perform contract cannot be raised for first time on appeal by party who failed to object to evidence, and introduced evidence on the subject.

3. Judgment ⇨251(1), 256(1) — Answer and findings held to support judgment for defendant.

Answer, alleging written contract to act as consulting engineer and give work usual attention, and findings that engineer did not give work usual attention, and that he neglected to exercise reasonable skill, care or diligence, and was negligent, held to support judgment for defendant, in engineer's action for balance due, independent of amendment setting up oral agreements, and findings thereon.

4. Appeal and error ⇨1010(1)—Finding of negligence, supported by testimony, conclusive.

In action for money due on contract, where defense was plaintiff's failure to use skill required, thereby resulting in damage, finding that damage was caused by plaintiff's want of necessary care, which was supported by testimony, held conclusive of appeal.

5. Contracts ⇨280(3)—Consulting engineer held to knowledge of use and necessity of well-known safety device in dry dock.

Consulting engineer, who held himself out as an expert, and assumed responsibility of supervising construction of marine railway dry dock, which was one of largest in world, held to a knowledge of necessity of safety device practically indispensable to a dry dock similar to one in question and in general use and well known.

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Action by Leland S. Rosener against the Hanlon Dry Dock & Shipbuilding Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Ira S. Lillick, of San Francisco (Hunt C. Hill, of San Francisco, of counsel), for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against him in an action in which he sought to recover something over \$6,000, balance due him upon a contract with the defendant by which plaintiff was to act as consulting engineer in the building of a marine railway dry dock at Oakland, Cal.

The defendant denied that the plaintiff had performed his written contract set out in his complaint and also filed an amendment to its answer, setting out that the written contract between the parties did not have incorporated in it all the terms of the agreement and that, among other things, and in addition to the written contract, the plaintiff agreed, at the time that the written contract was made:

"To personally superintend the building of said dry dock and to give said plans and said superintendence his personal attention, and that said dry dock was to be designed and built under his superintendence and to be of the highest class of design, and as nearly perfect as a dry dock could be built, and of such a character that the same could be operated by an inexperienced operator without the danger of any breakdown, and without the danger of any harm or danger to said dry dock or any part thereof * * * that by reason of said failure and neglect of said plaintiff * * * said defendant was required to and did rebuild portions of said marine railway dry dock, and rebuild and replace portions of

the machinery designed and provided therefor, all to said defendant's damage in excess of the amount claimed by plaintiff."

[1] We shall not discuss the evidence in detail, because we must begin our investigations from the findings of the trial court in a case like this one, where the record contains some evidence to support those findings. The court found the foregoing allegations to be true, except that it found the representation that the dry dock would be of such a character that the same could be operated by inexperienced operators without danger of a breakdown, etc., was made during the construction of the same, and not at the time of the making of the contract between the parties.

It was further found that, at the time of the making of the written agreement, plaintiff agreed that he would give to the work to be performed by him his usual attention, and would use all the skill possessed by him in doing this work, and would use all the care, attention, and skill reasonably required by the character of said work. It was found that plaintiff had fulfilled his contract in all particulars, except that he had failed and neglected to give to the work his usual attention or the care or attention or skill reasonably required by said work, or agreed by him to be given to said work, and failed and neglected to exercise reasonable skill, care, or diligence in the performance of said work and was negligent in the performance of said work in the following particular:

"That plaintiff failed and neglected to design or specify for use in connection with the operation of said marine railway dry dock any tachometer, or other device or means by which or whereby the person operating said marine railway dry dock would be advised, or could know, with any reasonable degree of accuracy or certainty, the speed at which either the said marine railway dry dock, or the induction motor which was a part of the equipment for the handling of said marine railway dry dock, was being operated, and failed and neglected to install any such device, or to cause the same to be installed, as a part of the machinery for the operation of said marine railway dry dock, or otherwise, and failed and neglected to advise or notify said defendant that such installation was proper or necessary as a part of the machinery or equipment for the operation of said marine railway dry dock, and, on the contrary, stated and represented to said defendant that said marine railway dry dock could be properly and safely operated by an inexperienced operator, and with the equipment installed thereon, and as a part thereof, under the direction and supervision of the said plaintiff; that said marine railway dry dock was not properly equipped, and that the machinery for the operation thereof, in part designed by plaintiff and in part selected and designated by plaintiff, and all of which was either designed by plaintiff or selected and designated by him, and all of which was installed under the direction of said plaintiff, was not reasonably adapt-

ed for the purpose for which the same was installed, without the installation of a tachometer or similar device to be used in connection therewith; that for at least 20 years last past the use and purposes of tachometers, and the necessity for the use of tachometers, in connection with the equipment and operation of machinery similar to the machinery installed under plaintiff's supervision as a part of such marine railway dry dock equipment, have been generally known to persons in the same profession and calling as plaintiff, and for said period of time tachometers have been generally used by such persons in connection with the equipment and operation of machinery similar to the machinery installed under plaintiff's supervision as a part of said marine railway dry dock equipment, and that the said uses and purposes of tachometers were well known to said plaintiff at all times during the construction of said marine railway dry dock; that by reason of the negligence of said plaintiff * * * and by reason of his failure * * * to fully and faithfully perform the work, and to do the things agreed by him to be performed and done, and on the 23d day of August, 1922, and while said marine railway dry dock was being operated by plaintiff, and in accordance with the instructions of said plaintiff, and without any negligence on the part of defendant, the said induction motor was wrecked, and the operation of said marine railway dry dock was rendered impossible until after the installation of another motor and the incurring of a large expense by said defendant."

[2] Appellant contends that the issue upon which the trial court found against him was not properly raised by the pleadings. It is true that it is not specifically stated in the answer, but it is alleged that plaintiff failed to build a dry dock of the highest class and design or as nearly perfect as plaintiff knew how to build it, and failed to build a dry dock that could be operated by inexperienced operators without danger of a breakdown, and that, because of this failure and negligence on the part of plaintiff, defendant was compelled to rebuild and replace portions of the machinery designed and provided therefor. While the pleading might have set forth specifically the incident relied upon, nevertheless, the plaintiff tried the case without objection to evidence about this incident, and sought by testimony offered on his own behalf to explain and excuse the absence of the tachometer, and we think it is now too late for him to complain that it was not specifically set forth in the pleadings.

[3] The appellant complains that by amendment to its answer the defendant was permitted to set up alleged oral agreements modifying and changing the written contract between the parties. Plaintiff objected to this amendment and now contends that it and the findings in response thereto are in violation of sections 1625 and 1698, Civil Code, and of section 1856 of the Code of Civil Procedure. But to concede this point to the appellant would not compel a reversal

of the judgment, for it appears that there is enough in the pleadings and findings relative to the written obligations of the parties to warrant the judgment. The written contract upon which plaintiff relies, and which was pleaded by him and found by the trial court to have been entered into by the parties, contains the agreement by the plaintiff to act as consulting engineer in the construction work contemplated, to design the hauling machinery, and "whereas I am continually in touch with all of my jobs, it must be understood that the details of your work will be taken care of directly by my office assistants, though no effort on my part will be spared to give your work expedition and our usual attention."

[4] Plaintiff pleaded that he had fulfilled the terms of his contract. Defendant denied this, and the court found that the plaintiff had failed to give the work his usual attention or the care or attention or skill reasonably required by said work or agreed by him to be given to said work, and failed and neglected to exercise reasonable skill, care, or diligence in the performance of said work and was negligent in the performance of said work. The failure to include a tachometer in the hauling machinery with the resultant damage is recited in the findings as the basis for the conclusion as to negligence and want of skill and care. There is expert testimony in the record from which this finding may be supported and so our inquiry upon appeal comes to an end. It is useless for appellant to argue that the damage was proximately caused by the negligence of defendant's servant in the operation of the machinery, for the record contains a finding that the defendant was free from negligence in the operation of the dry dock at the time of the accident.

[5] Appellant devotes some time and many authorities to the proposition that the plaintiff is to be held responsible only for the ordinary skill and experience possessed by persons in his line of work. There is no dispute about this matter, but the testimony and findings are to the effect that tachometers had been in general use for many years; that they were a practical necessity upon machinery such as was used in the dry dock and that their use and necessity were well known to persons in the engineering profession. Plaintiff certainly held himself out as an expert in his line when he undertook so large a responsibility as that presented by the building of one of the largest dry docks in the world to cost about \$380,000. This dry dock was designed to haul ships to the weight of 10,000 tons. The plaintiff was to be paid a lump sum of \$10,000 for his services and a specified sum per hour for any time his assistants, devoted to the work, which latter charge amounted to over \$5,-

000. The plaintiff was to act as consulting engineer, design the hauling machinery, and generally to supervise all the construction work which was to be done by the defendant. Obviously, he should be held to a knowledge of the use and necessity for a safety device which, the record discloses, was practically indispensable and in general use and well known to the profession, and which had been included in similar hauling machinery which was installed at another large dry dock under the general supervision of plaintiff.

The appellant contends that there is not sufficient evidence of damage suffered by the defendant to offset the claim of plaintiff. The record might well be more specific upon this matter, but there is evidence to support the conclusion that the damage suffered by the defendant exceeded the claim of plaintiff. There are no other objections which require discussion by us, and the judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

71 Cal. App. 788

PEOPLE v. YATES. (Cr. 1147.)

(District Court of Appeal, Second District, Division 1, California. March 24, 1925.)

1. Criminal law ⚡507(2)—Witness held not an accomplice.

Where witness listened to proposal of accused to aid in committing robbery, and told him that he would assist, but did not do anything further, his testimony was not required to be corroborated under Penal Code, § 1111, on ground that he was accomplice.

2. Criminal law ⚡507(3)—Witnesses helping accused to escape, who did not know of offense, not accomplices so as to require testimony to be corroborated.

In prosecution for robbery, where witnesses who took accused to another town did not know of his connection with offense, or even that offense had been committed, they were not accomplices so as to require their testimony to be corroborated under Penal Code, § 1111.

3. Criminal law ⚡824(7)—Accused wishing jury instructed in words of statute as to weight of testimony of accomplice has duty to offer such instruction to court.

In prosecution for robbery, if accused wished jury instructed in words of Penal Code, § 1111, defining accomplice, he should have presented such instruction to court.

4. Criminal law ⚡780(3)—Instruction that accused could not be convicted on testimony of accomplice, unless corroborated, held proper.

In prosecution for robbery, where evidence tended to show that only one witness was accused's accomplice, instruction that accused could not be convicted on testimony of accomplice, unless it was corroborated by other evi-

dence tending to connect him with offense, was proper.

5. Criminal law ⚡510½—**Admitting newspaper article in evidence to corroborate testimony of witness as to conversation with accused about it not error.**

In prosecution for robbery, in which witness testified as to admissions by accused in conversation with him concerning newspaper article, admitting such article in evidence was not error, in view of instruction that it was limited to connect testimony of witness with conversation which he claimed to have had with accused.

6. Witnesses ⚡278—**Refusal to permit cross-examination of accomplice as to what kind of gun accused had held not error.**

In prosecution for robbery, where accused's accomplice testified that he did not know whether accused had a gun at time in question, rejecting question by accused as to what kind of gun it was was not error, in view of fact that previous testimony as to gun related to possession of one by another person concerned in robbery.

7. Witnesses ⚡282½—**Sustaining objection to question theretofore asked and answered held proper.**

In prosecution for robbery, sustaining objection to question theretofore asked and answered on cross-examination was proper.

8. Robbery ⚡24(1)—**Evidence held sufficient to sustain conviction for robbery.**

Evidence held to sustain conviction for robbery.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

W. H. Yates was convicted of robbery, and he appeals. Affirmed.

Robert E. Austin, John N. Helmick, and O. V. Willson, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

HOUSER, J. Defendant was convicted on the charge of robbery. He appeals from the judgment and from the order denying his motion for a new trial.

Briefly, the evidence shows that, as a messenger from a station of the Pacific Electric Railway Company located at the city of Sherman approached a bank with approximately \$4,000 in cash in his possession, for the purpose of depositing the money in the bank, he was halted by two men named Hanna and Goslyn, respectively, who ordered the messenger to place the money in an automobile in which the two men had been riding, at the same time telling the messenger that he was "covered" with a pistol by a third man who was standing across the street from the place where the messenger was being robbed. The messenger complied with the order, and the two men, Hanna and

Goslyn, escaped, but were shortly thereafter arrested and subsequently convicted of the crime of robbery.

On behalf of the people, Goslyn testified to the details of the robbery as committed by him and Hanna with defendant, Yates, as the "lookout."

A witness by the name of Moore testified, without objection thereto, that about 15 days before the robbery occurred defendant had tried to induce Moore to assist defendant and a third man (who was not present at the conversation and with whom Moore was unacquainted) in the commission of the crime, but that, while Moore told Yates in effect that he would assist in the contemplated "hold up," he was "just kidding, playing with him, and * * * didn't think he was going to do it, and (Moore) * * * didn't mean anything like that"; that later defendant brought to see the witness the man to whom defendant had referred in their conversation regarding the proposed robbery, which man inquired particularly of Moore regarding the defendant and his occupation—that is, whether or not defendant was a policeman; that on the evening of the day after the robbery had taken place he and defendant had a conversation, including the following:

"He (defendant) said, 'They made the holdup down in Sherman.' I said, 'Yes, who was it?' He said, 'I don't know, but I believe it was this fellow that came over here with me.' I said, 'Yes, how do you think so?' He said, 'Because I told those fellows how to do it, and since the day we came over here I haven't seen that fellow, so I thought that this thing was over.' He said, 'I didn't think that this fellow was going to do it, so I thought I would call it off.' He said, 'I did not see this fellow any more, and I didn't hear anything about this thing, and this fellow, he got somebody else, I guess,' he told me, 'and went and done it himself, and he didn't want to get me with him because maybe he had another best friend than I was,' and he says, 'and wanted to give him the part instead of me.' I asked him, 'Are you sure you wasn't with him?' and he said, 'No.' Then I had to go, and I told him, 'I will be right back.' He said, 'I will be right back, too.' So I told him, 'All right.' He went out and come back in about a half an hour, and he brought a newspaper, and then he told me, 'Come here, Tom.' So I stopped, and I asked him what, and he says—he looked around, and he says, 'I don't like to talk to you right here.' I asked him why, and he said, 'Oh, I feel nervous. Let's go around the back there.' I told him, 'All right.' We went in the corner where the cars were parked. I told him, 'But we can't see the paper here. What is it?' So I lighted the dashlight off of a car and he read the paper for me where it says about the holdup, and then it says on the paper about a fellow with a—wearing a mustache, black suit on, and black hat on, and then the way the paper said I told him, 'That is you, Yates,' and he said, 'Yes, that is me; it can't be anybody else.' Then I looked at him and I

says, 'No, it ain't.' And he says, 'Why? What makes you think so?' I told him, 'Because the paper says the fellow with a black mustache and you haven't got it.' He said, 'Yes; but I shaved it off.' Oh, I laughed, and then he started to get nervous and shaking there, and I told him, 'What was the matter?' And he says, 'Nothing, Tom; I just feel this way because if this fellow pulled off this thing, the one I talked to, he might want to get me into it too.' I said, 'Why, you didn't make the holdup with him?' He said, 'No, but I planned it to him, told him how to make it,' he says. So I told him, 'That don't make any difference, I guess,' but he said, 'Yes, it does,' and I told him, 'Yes, and what do you want to do now?' Then he thought it over and he told me, 'I guess the best thing I could do was to get out of town, to be safe.' I told him, 'Yes; you can do that, too, if you don't feel safe enough here.' Then he told me, then he thought it over again, and he said he had a friend in Sherman, and I told him this way, I told him, 'No, if I would be you I wouldn't go away if I wasn't with him when they done the holdup, if it is that way you say you haven't seen him for fifteen days, I wouldn't go away.' He said, 'Oh, yes, Tom. I got scared. I know I planned this thing, and they will get me in it.' * * * So I told him—then he asked me—then he told me he would like to get out of town anyway. So I told him, 'Where do you want to go to?' He said, 'I would like to go to Riverside,' and I told him, 'Well, why don't you catch the stage?' He said, 'No time for the stage now.' 'The stage runs until 7:20 or 8:30,' he told me, 'and the last stage has done passed,' and he got no time to catch it, 'and then I haven't got no money.' 'Well,' I told him, 'If you want a dollar, I can lend you a dollar.'

That thereafter on that evening the witness lent defendant \$1, procured an automobile, and induced one Tona to take defendant to the city of Riverside, where defendant had said that a brother of his was living.

Tona testified that on that night he took defendant to Riverside, where they arrived at about 2 o'clock a. m. the next day, and that defendant there produced \$1, with which they bought five gallons of gasoline for use in the automobile in which they had ridden from Los Angeles to Riverside.

A witness named Moreno testified that he accompanied defendant and Tona on the trip to Riverside, and that on one or two occasions on the way there, when it became necessary to make some repairs on the automobile, "he (defendant) got out a couple—when we were going out, he got out in a couple of places and hide (hid) over in the trees while we were fixing the machine."

There was also testimony to the effect that on the day when the robbery took place defendant lived in and was familiar with the city of Sherman and with the practice and method adopted by the Pacific Electric Railway Company and its messenger in depositing funds in the manner which was employed or attempted to be employed on the occasion in question, and that defendant had

means of knowledge of the amount of cash likely to be in the possession of such messenger at such times.

Defendant testified that on the day following the robbery he left the city of Sherman and rode on a public bus to the city of Riverside; that on the next day he rode in an automobile with his nephew to Yuma, Ariz., where he boarded a train for El Paso, Tex., which was the place of his residence and where he arrived on the fourth day following the robbery, and at which last-named place he remained until he was extradited and brought back to Los Angeles some two or three months after the robbery occurred.

[1, 2] Appellant's first specification of error is that the trial court erred in refusing to grant a new trial to defendant on the ground of lack of sufficiency of the evidence to sustain a verdict against him. It is urged that Goslyn was an admitted accomplice, and that under the provisions of section 1111 of the Penal Code, before defendant could be convicted of the crime with which he was charged, it was necessary that Goslyn's testimony be corroborated by other evidence which tended to connect defendant with the commission of the offense. In connection therewith appellant contends that Moore, Tona, and Moreno were likewise accomplices, and hence disqualified from furnishing the necessary corroboration of Goslyn's testimony. The record discloses no evidence from which it may be deduced that any one of the corroborating witnesses was an accomplice within the meaning of the statute. The most that may be inferred is that defendant suggested to the witness Moore the feasibility of committing the crime, and intimated that he would like to have him join with defendant and a third man in its perpetration; but the evidence further shows that, while Moore listened to defendant's proposal, and told him that he would assist in the commission of the robbery, Moore was "just kidding, playing with him, * * * and didn't mean anything like that." At any rate, whatever may have been Moore's real intentions, whether he was willing or unwilling to become a partner in the criminal enterprise, is of little consequence in view of the lack of evidence that as a matter of fact he ever actually did anything in furtherance thereof. He may have suspected that defendant was considering the advisability of committing the crime and that he would like to have Moore join with him in its commission; but, if Moore neither actually participated in its commission nor conspired to commit it, he cannot be said to have been an accomplice. Regarding the testimony given by the witnesses Tona and Moreno, the evidence shows that the only knowledge possessed by either of them was that, for some reason of which each of them was ignorant, defendant wished to leave Los Angeles and go to the city of Riverside. So far as the

record shows, at the time to which their testimony relates neither of them had any knowledge whatsoever regarding defendant's connection with the robbery, or even that a robbery had been committed. It necessarily follows that appellant's contention in that connection cannot be sustained.

[3, 4] Appellant also complains that, while the judge of the trial court correctly instructed the jury generally as to the law affecting the admissibility of, and the weight to be accorded to, the evidence given by accomplices, no instruction was given in the language of the statute by which an accomplice is defined as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Section 1111, Pen. Code.

In the first place, it appears that no such instruction was requested by defendant. He must have known that corroboration of the testimony given by Goslyn was essential to the successful prosecution of the case against him. Hence, if he thought it proper or advisable for the protection of defendant's rights in the premises that an instruction couched in the language of the statute should be given to the jury, it was his duty to offer such instruction to the court for the consideration of the jury. Goslyn was an admitted accomplice. On the trial it was not even suggested that either of the other witnesses was an accomplice. In the circumstances of the case there was no compelling reason for such an instruction to be given. However, the court did instruct the jury that the defendant could not be convicted on the testimony of an accomplice, unless such testimony was corroborated by other evidence tending to connect the defendant with the commission of the offense. Judged by the evidence, there was no accomplice other than Goslyn, and the jury was properly instructed with reference to the weight which should be attached to his testimony.

[5] Appellant contends that the trial court erred to the prejudice of defendant in admitting a certain newspaper in evidence over defendant's objection.

The newspaper in question was a copy of the one referred to in the testimony of Moore to which reference has been had. The only part thereof to which the attention of the jury was directed was that it was a "Sports Pink"; that it contained a large-type heading, "Shoot P. E. Bandits," and a paragraph as follows:

"In a statement to police, Hanna, who was wounded in his right arm, said a third bandit had participated in the holdup, and described him simply as wearing a black mustache."

At the time the newspaper was admitted in evidence the judge instructed the jury "that newspaper is being admitted in evidence simply for the purpose of connecting up the testimony of this witness as to the

conversation had with the defendant which he has related, but as to any statements contained in that article they are not to be considered as statements of fact in this case."

The jury was thus plainly told that the newspaper was limited in its effect as evidence to "connecting up" the testimony of the witness Moore with a conversation which such witness testified he had had with defendant. While, for obvious reasons, the value of such testimony was slight, it is possible that it did have a tendency to corroborate the testimony given by the witness regarding his conversation with defendant. With the limitation placed by the trial judge upon the purpose and effect of the evidence, we are unable to perceive that defendant was prejudicially affected by its reception in evidence.

[6] Appellant's next specification of error is that the court erroneously refused to permit defendant to cross-examine the witness Goslyn, who testified in behalf of the prosecution. An examination of the transcript to which appellant refers discloses the fact that the witness was being asked regarding a "gun" which defendant was supposed to have had on his person at the time the robbery occurred, and that the witness had stated that he did not know whether defendant had a "gun" or not. Defendant then asked the witness: "Q. What kind of gun?" to which question an objection interposed by the district attorney thereto was sustained by the court. Taking into consideration the fact that immediately before the quoted question was asked the witness had disclaimed any knowledge regarding any "gun" which defendant was supposed to have had, it is difficult to understand how it would have been possible for the witness to answer the question submitted to him. While preceding the question heretofore set forth the witness had testified in substance that at the time the robbery took place he knew that "the defendant" had a "gun" in his pocket, it is clear from subsequent testimony given by the witness that his testimony with reference to a "gun" did not relate to defendant Yates, but did refer to defendant Hanna.

[7] Another specification of error in the ruling of the trial court relates to the sustaining of an objection to a question asked on cross-examination; the basis of the ruling being that the question had theretofore been asked and answered. The record shows that the trial judge was correct in his conclusion in that regard.

[8] It is finally further contended by appellant that the trial court erred in refusing to grant a new trial to defendant, for the reason that the evidence was insufficient to support the verdict, because of the fact, as claimed by appellant, that the only evidence of defendant's guilt was that contained in the testimony of the witnesses Moore, Tona, and Moreno regarding defendant's flight, and that such circumstance is not evidence of

guilt, but merely tends to show guilt. But, even though solely for the sake of the argument it be admitted that appellant is correct in his statement of the legal principle, and that it is not subject to any limitation or exception (which in fact we are not prepared to do), in view of defendant's manner and his many admissions, including his statement that he had planned the crime, also the additional facts testified to by other witnesses; that defendant was in the vicinity of the scene of the crime at the time it was committed; that he was without funds; and that he left his place of abode so precipitately and under such suspicious circumstances immediately after the robbery occurred, without any apparently satisfactory reason being shown to the jury therefor—we are constrained to hold that appellant's point that the verdict is not sufficiently supported by the evidence is untenable.

It follows that the judgment and the order denying defendant's motion for a new trial should be affirmed. It is so ordered.

We concur: CONREY, P. J.; CURTIS, J.

71 Cal. App. 575

PEOPLE v. FRANK. (Cr. 1198.)

(District Court of Appeal, Second District, Division 1, California. March 7, 1925. Rehearing Denied April 6, 1925. Hearing Denied by Supreme Court, May 4, 1925.)

1. Criminal law §338(7)—Permitting evidence as to defendant going under assumed name held prejudicial error.

In prosecution for burglary and robbery, admission of evidence, disclosing that on three different occasions defendant had gone under assumed name, held prejudicial error.

2. Witnesses §318—Evidence as to credibility of witness not admissible, where credibility not attacked.

Under Code Civ. Proc. § 2053, where credibility of certain witnesses for state had not been attacked, no evidence regarding their credibility could be received, though it consisted of commendatory remarks by judge and deputy district attorney.

3. Criminal law §1163(2)—Prejudicial error conclusively presumed from trial court's misconduct, which might have influenced jury in rendering verdict.

Prejudicial error will be conclusively presumed for any misconduct on part of trial judge, from which it may be rightfully deduced that jury was influenced in rendering its verdict.

4. Criminal law §1186(4)—Reading into evidence commendatory remarks of judge and deputy district attorney as to high standing of state's witnesses held prejudicial error.

The reading into evidence before jury of commendatory remarks made by trial judge and deputy district attorney as to high standing of important state's witnesses, made at

time when defendant was not present, held prejudicial error, requiring new trial, notwithstanding Const. art. 6, § 4½, especially where defendant's identification as perpetrator of crime was dependent on strength of testimony of such state's witnesses.

Conrey, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

George E. Frank was convicted of burglary and robbery, and appeals. Reversed.

Hearing denied; LAWLOR, J. (acting C. J.), and SEAWELL, J., dissenting.

See, also, 193 Cal. 474, 225 P. 448.

Frank W. Allender, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

HOUSER, J. Defendant was convicted on an information in which he was charged with the commission of the crimes of burglary and robbery. He appeals from the judgment and an order denying his motion for a new trial.

Appellant makes the point that the court erred in allowing the deputy district attorney, over defendant's objection, to interrogate witnesses as to whether or not defendant had previously gone under certain assumed names.

An examination of the record shows that, against defendant's specific objection thereto, on three separate occasions the court permitted questions to be asked and answered which disclosed the fact that on each of such occasions defendant had gone under an assumed name, and that on no two of which times had he used the same name. However, as to the use by defendant of one of the assumed names, the judge instructed the members of the jury that they should "purge it from their minds." Regarding the second occasion when defendant used an alias, it was shown in connection therewith that he had been arrested on a bench warrant for his failure to appear for trial and, when taken into custody, was found in a hotel, where he had registered under an assumed name. The third occasion or occasions had to do with a false name used by defendant when first arrested and by his use of the same name at his arraignment both in the justice court and in the superior court. On no one of the occasions when a witness was thus interrogated with respect to the use by defendant of an assumed name was the questioning done under proper cross-examination.

[1] The authorities are numerous which hold that in a criminal action a defendant cannot be held to account for the use by him of an assumed name, and that it is prejudicial error to permit the introduction of evidence thereof. *People v. Fleming*, 166 Cal. 357, 381, 136 P. 291, Ann. Cas. 1915B, 881;

People v. Mohr, 157 Cal. 732, 109 P. 476; People v. Arlington, 123 Cal. 356, 55 P. 1003; People v. Denby, 108 Cal. 54, 40 P. 1051.

When the case against defendant was originally called for trial in the superior court, defendant was not present. At that time and place a Mr. and a Mrs. McPherson, who had given their testimony at the preliminary examination of defendant in the justice court, were in attendance as prospective witnesses. In the absence of defendant and the consequent necessity of a continuance of the hearing of the action, the trial judge suggested the advisability of laying a foundation for the use of the testimony given by such witnesses at the preliminary examination of defendant. Acting upon such suggestion and without the presence of defendant, certain testimony of the two McPhersons was taken. Mr. McPherson was "sworn as a witness on behalf of the people." In answer to questions propounded to him at that time by the deputy district attorney, he testified in substance that he resided at Ft. Worth, Texas.; that he was in the construction business; that he was the husband of Mrs. McPherson "who was just on the stand"; that he was temporarily in Los Angeles for the purpose of testifying in the action; that theretofore he had testified at the preliminary examination when defendant was first charged with the offense of "robbery and burglary"; and that on the next day the witness intended to return to the state of Texas. At the request of the deputy district attorney, Mr. McPherson then submitted exemplars of his handwriting, which were formally witnessed by the clerk, the bailiff and the deputy district attorney, whereupon the following occurred:

"The Court: It (the exemplar) is ordered filed. Now, Mr. and Mrs. McPherson, the court desires to extend to you the thanks of the court for coming out here to be witnesses in this case. We regret the necessity of postponing the case, but we appreciate your being here just the same as though you had testified.

"Mr. Hill (deputy district attorney): May I supplement that—that I think both Mr. and Mrs. McPherson are to be heartily commended for the patriotic duty that they have assumed as American citizens, coming here at their inconvenience and expense merely for this purpose, as there was no power on the part of any officer of this state to have summoned or compelled Mr. or Mrs. McPherson to be here; they were outside the state of California, and the process of the state courts does not extend beyond its borders. We have no power to subpoena, and no other power that could be enforced to have brought Mr. and Mrs. McPherson here against their will; and I say when they have at their great personal inconvenience, made this trip across here for the purpose of testifying in this case, I believe that they should be publicly commended for their act.

"The Court: I am pleased to unite in that commendation. You do not know how much the state is frequently inconvenienced by not

being able to get witnesses, and the unwillingness of witnesses of high standing to come and testify; and, when witnesses do come from a sister state to tell all they know of the facts, it is always a satisfaction to the officers having the responsibility of enforcing the law, and it is always commendable, the patriotism and high standard of citizenship of such persons who are willing to come. We appreciate it very much."

When the case against defendant finally came on for trial, after hearing certain evidence with reference to the absence of the two McPhersons, the judge of the trial court made an order to the effect that the testimony given by such witnesses at the preliminary examination of defendant in the justice court might be read in evidence. Thereafter, in the presence of the jury, over defendant's objection, for the ostensible purpose of "further laying the foundation," the deputy district attorney read into evidence the so-called testimony given by said two witnesses at the time when defendant was not present, including the congratulatory and commendatory remarks made to such witnesses by the judge and the deputy district attorney heretofore quoted herein.

During the reading of the proof preliminary to the introduction in evidence of the testimony given by the said two witnesses at the preliminary examination of defendant, the court declined to accede to defendant's request that the jury be excused from the courtroom. After the testimony of the two McPhersons which had been taken when defendant was not present, together with the commendatory remarks to them by the judge and the deputy district attorney which had been made at the same time, had been read in the presence of the jury, the judge "admonished" the jury that all such proceedings were addressed to the "law side of this case" for the purpose of laying a foundation for the exercise of discretion as to whether or not the depositions of the two McPhersons should be received in evidence. The judge continued:

"It is all preliminary and addressed to the court on the question of the reading of those depositions. When those depositions are read, if they are read, you pay attention to all the things brought out in those depositions, because they will be for you to pass upon. All things prior to that are for the court to pass on, and any questions asked, rulings or comments by the court, or any objections made by Mr. Allender (attorney for defendant), are things that you have nothing to do with.
* * *

[2] While appellant bitterly complains of the conduct of the trial judge in permitting evidence to go to the jury which was received at a time when defendant was not present, the greater part of his criticism is directed against the action of the court and the deputy district attorney in effect testify-

ing to the jury of the "high standing" of the two McPhersons. As the case was presented, the credit which was to attach to the identification of defendant by the two McPhersons was of paramount importance, without which his conviction would have been doubtful, if not impossible. Without considering the question of the possible admissibility at any time of the evidence given by the two McPhersons at a time when defendant was not on trial or even present, in the status of the case at the time the remarks regarding the two McPhersons by the judge and the deputy district attorney were permitted in the hearing of the jury, no such testimony was admissible from any source. The credibility of the witnesses had not been attacked; consequently no evidence regarding their credibility could be received by the court. Section 2053, Code Civ. Proc.; People v. Bush, 65 Cal. 129, 3 P. 590; People v. Cowgill, 93 Cal. 596, 29 P. 228. But even assuming the admissibility of such evidence at a proper time and in proper circumstances, at the time in question neither the judge nor the deputy district attorney had been sworn as a witness in the case, nor had the necessary foundation been laid for the reception of such evidence. In addition thereto, the right of cross-examination of the judge and the deputy district attorney, as such witnesses, had not been accorded defendant's counsel. It may be that there was no intention that either the deputy district attorney or the judge should offer testimony affecting the credibility of the two McPhersons. Their remarks were probably meant only for the purpose of courteously expressing appreciation of the trouble which the two McPhersons had taken in the matter, to say nothing of the expense borne by them which was incident to and connected with their trip from the state of Texas to the city of Los Angeles. However, the intent and purpose of the deputy district attorney and the judge in making such remarks are not controlling factors in the determination of the rights of defendant in the premises. If the effect of their conduct was substantially to prejudice defendant's case in the eyes of the jury, he cannot be said to have had such a trial as is vouchsafed to him under the laws of the land.

[3] The rule, as announced in numerous authorities, is that for any misconduct on the part of the trial judge, from which it may be rightfully deduced that the jury was influenced in rendering its verdict, prejudicial error will be conclusively presumed. In the case of Collins v. State, 99 Miss. 47, 54 So. 665, Ann. Cas. 1913C, 1256, the court quoted with approval the following from the case of Green v. State, 97 Miss. 834, 53 So. 415:

"It is a matter of common knowledge that jurors, as well as officers in attendance upon

court, are very susceptible to the influence of the judge. The sheriff and his deputies, as a rule, are anxious to do his bidding, and jurors watch closely his conduct, and give attention to his language, that they may, if possible, ascertain his leaning to one side or the other, which, if known, often largely influences their verdict. He cannot be too careful and guarded in language and conduct in the presence of the jury to avoid prejudice to either party. 21 Ency. P. & P. 994, 995, and notes. The court will not stop to inquire whether the jury was actually influenced by the conduct of the judge. All the authorities hold that, if they were exposed to improper influences, which might have produced the verdict, the presumption of law is against its purity; and testimony will not be heard to rebut this presumption. It is a conclusive presumption."

In the case of Smith v. Rothschild & Co., 13 Ga. App. 293, 79 S. E. 88, a new trial was granted "solely because of the remark made by counsel for the plaintiff" in the presence of the jury that, if a certain witness on the stand "were let alone, she would impeach herself." In the course of the opinion the court said:

"If the testimony of a witness authorizes the conclusion, an attorney may properly argue that the witness has shown himself to be unworthy of credit on account of the unreasonable and contradictory statements appearing in the testimony; but this is quite a different thing from telling the jury, while the witness is on the stand, that, if he is let alone, he will impeach himself. In harmful effect this may be equivalent to testimony that the witness is of bad character and not worthy of credit; and a witness is impeachable only by legal evidence. In the case of a popular and influential attorney, such as was the counsel who made the remark in this case, an expression of his opinion as to the character of the witness is likely to have weight with the jury and prejudice the adversary's case. * * * The object of all legal investigations is the discovery of the truth; but truth must be discovered by the application of rules of law to competent and relevant evidence, and after a trial in accordance with orderly procedure. The remark made by the counsel in the present case was doubtless inadvertent and not intended to prejudice the adversary's case. But its harmful effect was not removed, either by a withdrawal of the improper remark and explanation by the counsel, or by a rebuke by the court * * * [citing cases]."

In the case of Western Union Telegraph Co. v. Furlow, 121 Ark. 244, 180 S. W. 502, an attorney, in his closing argument to the jury, said that—

"He and Mr. Young had been raised boys together, and had loved each other like brothers ever since, and Mr. Young's veracity was beyond question."

In commenting upon the propriety of such remark and its probable effect upon the minds of the members of the jury, the court said:

"With this assurance, the jury would be more likely to believe Mr. Young than the operator, and its effect would be to induce the jury to disregard the statement of the operator in regard to the notations on the telegram. This attempt to bolster up the evidence of Mr. Young was improper and prejudicial."

[4] If it is reversible error for an attorney to make a derogatory remark regarding a witness in the presence of the jury, or, on the other hand, to vouch for the veracity of a witness, it would seem that the granting of a new trial should result from highly commendatory remarks by the judge and the deputy district attorney concerning important witnesses, as was done in the instant case.

A California case, which in its effect is strikingly similar to the case at bar, is that of *McMinn v. Whelan*, 27 Cal. 300. A statement of the necessary facts, with the ruling thereon is, contained in the opinion of the court, which we quote as follows:

"Johanna Maume was examined as a witness on behalf of plaintiff to prove Mathew Maume's prior possession of the demanded premises. On her cross-examination inquiries were made of her respecting her residence and business. The plaintiff's counsel objected to this course of examination. The objection was overruled, but at the same time his honor, the judge, stated that the witness was one of the most respectable women in his neighborhood. To this remark the defendants' counsel excepted, when the judge further stated that he did not mean to say that she was one of the most respectable, but a woman of respectability. The defendants complain of the conduct of the judge in this particular as an irregularity of sufficient magnitude to authorize the reversal of the judgment.

"From the high and authoritative position of a judge presiding at a trial before a jury, his influence with them is of vast extent, and he has it in his power by words or actions, or both, to materially prejudice the rights and interests of one or the other of the parties. By words or conduct he may on the one hand support the character or testimony of a witness, or on the other, may destroy the same, in the estimation of the jury; and thus his personal and official influence is exerted to the unfair advantage of one of the parties, with a corresponding detriment to the cause of the other. We regret the necessity for an expression of our disapproval of the irregularity of which complaint is made, and, though we do not impugn the expression as designed to aid the side of the plaintiff, we may say we should not hesitate to reverse the judgment because of it, if the same depended in any material degree upon the testimony of the witness whose character and standing was thus indorsed. * * *

On the same point, see the following California cases: *Estate of Blake*, 136 Cal. 306, 311, 68 P. 827, 89 Am. St. Rep. 135; *People v. Conboy*, 15 Cal. App. 97, 101, 113 P. 703; *People v. Pitisci*, 29 Cal. App. 727, 736, 157 P. 502.

In the case of *People v. MacDonald*, 167

Cal. 545, 140 P. 256, the defendant was charged with the commission of the crime of rape. In the course of the trial the judge referred to the prosecuting witness as being "court-ous, kind, and modest." The Supreme Court in condemning the remark by the trial court, said, in part:

"Under a system of law which prohibits judges from charging juries with respect to matters of fact (Const. art. 6, § 19), and which gives to the jury the exclusive power to determine the facts (Pen. Code, § 1126), the trial judge should, as has often been pointed out, use the greatest care to avoid, in the presence of the jury, any utterance which may be construed as an intimation of his opinion on the issues of fact which are to be determined by the jury [citing cases]. * * * Anything said by the judge, indicating that the witness on the stand had, by her demeanor, created a favorable impression on his mind, would naturally tend to lead the jury to give to her testimony greater weight than they otherwise might. * * * Such an intimation constituted an invasion of the jury's province of judging the facts, in the light of the appearance and demeanor of witnesses, and might be highly prejudicial."

It was, however, concluded in that case that the circumstances surrounding the remark by the trial judge were such that it was the duty of counsel for the defendant to direct special attention of the court to the objectionable matter, in order that the court might have had an opportunity to disclaim any intention to express an opinion on the weight of the testimony.

It is further pointed out in the opinion that, while a claim of misconduct on the part of the trial judge cannot ordinarily be considered on appeal unless it appears that at the time of the occurrence the complaining party directed the attention of the court to the alleged impropriety and assigned the criticised action as misconduct, nevertheless if the objectionable remark was of "such a character that the harmful result could not be obviated by any retraction or instruction," the failure to make such assignment of misconduct would not affect the rights of the injured party. In the instant case, although there was no assignment by defendant of misconduct as such, there was no occasion for him to do so. Nor is it urged by respondent that appellant's claim of misconduct by the judge and the deputy district attorney is not allowable because of defendant's failure to take exception thereto and make assignment of error thereon at the time such remarks were made. It will be remembered that the remarks by the trial judge and the deputy district attorney were not originally spoken in the course of the trial of defendant, but occurred at a time when defendant was not present and when a part of the testimony of the two McPhersons was taken for the purpose of establishing the fact that they would be absent from the state

when the case was to be tried. Those remarks by the judge and the deputy district attorney were read in evidence to the jury over the repeated objections by defendant's counsel that such remarks, together with the remainder of the proceedings at that time, were "hearsay * * * incompetent * * * no proper foundation * * * not made in the presence of the defendant * * * prejudicial to the defendant, and necessarily injurious and not involving any issue in this case." But, even though it might be considered that either on the making of the remarks by the judge and the deputy district attorney, or when the same were read to the jury, defendant should have excepted thereto and assigned error thereon, if there had been such special assignment of misconduct, it is apparent that any attempted correction thereof would have but accentuated the error. As was intimated in *Smith v. D. Rothschild & Co.*, 13 Ga. App. 293, 79 S. E. 88, supra, their injurious effect would not have been removed either by a withdrawal of the improper remarks or by an explanation thereof. The "harmful result could not be obviated by any retraction or instruction. In such cases the misconduct will furnish ground for reversal, even though the court may have taken immediate steps to correct any impression improperly conveyed to the jury." *People v. MacDonald*, 167 Cal. 545, 551, 140 P. 256, 259, citing *People v. Derwae*, 155 Cal. 592, 102 P. 226.

The action of the court in admitting evidence regarding the use of false names by defendant could have had but one result, namely, that of discrediting the defendant's testimony. On the other hand, the action by the court in recommending to the jury the "high standing," etc., of the two McPhersons, could have had but the effect of increasing the credibility to be attached to their testimony.

The testimony of the McPhersons, which the jury necessarily believed in order to convict defendant, was in substance that the offense was committed, and the McPhersons identified defendant as the man who had robbed Mr. McPherson, and who also had burglarized their apartment. Defendant denied that at the time the crime was committed he was present at or in the vicinity of the place where the McPhersons were living. The issue as between the defendant and the McPhersons was either that of veracity of the opposing witnesses or that of possible mistake in the matter of identification of defendant by the McPhersons. The matter of credibility therefore was necessarily the determining factor in the evidence. In such circumstances defendant was entitled to have his evidence go to the jury unimpaired and unimpeached by inadmissible testimony regarding the use by him of any assumed name. Considering the extreme importance to the

defendant of the testimony of the McPhersons relating to defendant's identification, the "bolstering up" of their testimony by the judge and the deputy district attorney was likewise most prejudicial to defendant's rights in the premises.

If the evidence presented on the trial of the case had been such that the guilt of the defendant was manifest, it is possible that, under the "saving grace" of section 4½ of article 6 of the Constitution, it might be held that there had been no miscarriage of justice. But, while it cannot be denied that evidence on the part of the prosecution strongly points to defendant's guilt, the "alibi" presented by defendant and several apparently respectable and disinterested witnesses would, if believed, have established defendant's innocence. The question of defendant's identification as the robber and burglar, having been dependent upon the strength of the testimony of the two McPhersons, may have been and probably was solved by the jury and thus determined against defendant because the trial judge threw his judicial weight into the scales and vouched for the "high standing" of such witnesses.

The judgment and the order denying defendant's motion for a new trial are reversed.

I concur: CURTIS, J.

CONREY, P. J. I dissent. I am of the opinion that no prejudicial error was committed in relation to the evidence that on certain occasions defendant had gone under an assumed name. It is true that, when the defendant on cross-examination was asked whether he at one time went under the name of William Mack, an objection to this question was overruled, and defendant answered in the affirmative. But shortly thereafter the court reconsidered that ruling, sustained the objection, struck out the answer, and informed the jury that all questions in regard to the witness going under the name of William Mack, and all inferences to be drawn therefrom, and the answers to such questions, were stricken out, "and the jury instructed to purge it from their minds." With regard to the testimony showing that the defendant, when arrested for the first time under this charge, gave the assumed name of Williamson, and when arrested on a bench warrant after his failure to appear at the trial on July 1, 1924, was found in San Francisco under another assumed name, I think that there was no error in admitting such testimony. In each instance the use of the assumed name was an incident closely connected with and, in substance, a part of the act of flight after the crime was committed. Considered in that light, I think the rulings of the court are not subject to the general rule established by the decisions to the effect that a defendant may not be discredited be-

fore the jury by proof that, on prior occasions entirely disconnected with the action, he has used an assumed name. I understand that, in order that flight may be considered as an element tending to indicate a guilty mind, there must be evidence that the defendant knew that a crime had been committed, and perhaps, also, that he knew that he was charged therewith. 8 Cal. Jur. p. 347. This defendant used the name of Williamson, not only when he was arrested with a part of the stolen property in his possession, but after he had been indicted under the assumed name of Williamson, he pleaded by that name as his true name, although later he gave his true name. And, of course, it cannot be denied that, when he used the name of Herold in San Francisco, he knew of the pendency of this action. On the morning of July 1, 1924, only half an hour before the case was to be called for trial, he was in his attorney's office apparently in preparation for the trial, yet he disappeared before the case could be called, and thereby forced the case from the calendar of that date.

Referring back to the evidence concerning the use of the assumed name William Mack, I think that, since the testimony was stricken out in the manner above stated, there remains no possible ground of complaint by the defendant, unless it be that the district attorney was guilty of misconduct in asking the questions. But the defendant cannot avail himself of that objection, since the record does not show that defendant made any assignment of misconduct in relation to that matter. 2 Cal. Jur., p. 281.

The other important point discussed in the main opinion relates to a matter connected with certain testimony given by the McPhersons, and especially to remarks made by the judge and by the district attorney at the close of the giving of that testimony. Prior to that time certain depositions of the McPhersons had been taken, which were on file in the action. On July 1, 1924, the McPhersons had come from their Texas home to California, in order to testify at the trial of this action. When the abrupt disappearance of the defendant compelled a postponement of the trial, the court, in the absence of a jury, and in the absence of the defendant, took the testimony of Mr. and Mrs. McPherson, showing the fact of their intended immediate return to Texas, and furnished the court a means of identification of their signatures. This was evidence addressed solely to the court as a part of the ground for admission of the depositions in evidence in the event that at the later trial of the case the personal presence of the McPhersons could not be obtained. It was at the close of the giving of this testimony that the judge and district attorney made the remarks referred to in the main opinion. It is clear enough

that there was no intention to make comments upon the credibility or accuracy of the testimony contained in the depositions. But assuming that in some degree the remarks as made amounted to a commendation of the character of those witnesses, I think that there was no error except one in the nature of an unintentional misconduct by the judge and the district attorney. I have searched the record to find any assignment of misconduct made by the attorney of the defendant in connection with this matter, either at the time when the remarks were made, or at the time when the court allowed them to be read, in the presence of the jury at the trial of the action, as a part of the evidence constituting the foundation for admission of the depositions in evidence. Therefore the same rule applies to which I have referred in connection with the questions asked of the defendant concerning the use by him of the assumed name of William Mack. In each of these instances, if there was any misconduct, I think that it was not of such a nature that the court can say that it was beyond cure by means of appropriate instructions. This being so, the rule applies that defendant cannot avail himself of an objection to such misconduct, when he omits to present that objection to the lower court, and only presents it for the first time in the court of appeal.

Inasmuch as I understand that the evidence here very strongly tends to establish beyond a reasonable doubt the guilt of the defendant, I have been unable to agree that the said errors, assuming them to be such, would justify a reversal.

71 Cal. App. 590

PEOPLE v. ONE 1923 OAKLAND SPORT AUTOMOBILE, MODEL 6-44, etc. (ANGLO-CALIFORNIA TRUST CO., Intervener). (Civ. 2848.)

(District Court of Appeal, Third District, California. March 7, 1925.)

Intoxicating liquors ⚡250—**Proof necessary to warrant forfeiture of automobile used to transport intoxicating liquor stated.**

Proceeding to forfeit private automobile used in transporting intoxicating liquor, being one to enforce criminal penalty or judgment of sentence in criminal case, though civil process of court may be invoked, people must show, by direct or circumstantial evidence, that legal owner under conditional sale contract had actual knowledge of such use or intent to so use such property, and fact that such owner might have so discovered by keeping car under constant espionage, without tangible or substantial reason therefor, is insufficient, especially in view of Volstead Act, tit. 2, § 26 (U. S. Comp. St. Ann. Supp. 1923, § 10138-1½mm), made part of Wright Act by reference.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action by the People of the State of California against One 1923 Oakland Sport Automobile, Model 6-44, etc., in which the Anglo-California Trust Company intervened as claimant. From judgment forfeiting automobile, claimant appeals. Reversed as to claimant.

R. G. Hudson, of San Francisco, for appellant.

Arthur W. Hill, Dist. Atty., and J. J. Cairns, Deputy Dist. Atty., both of Eureka, for the People.

HART, J. The intervening claimant, above named, has brought this appeal to this court from a judgment of the superior court in and for the county of Humboldt, condemning and forfeiting to the people of the state of California the defendant automobile, and directing the sheriff of said county to sell the same at public auction, and pay into the treasury of said county of Humboldt the proceeds of said sale, after deducting the expenses in keeping said defendant and the costs of conducting such sale.

In December, 1923, one Charles Dolan had possession of defendant automobile in Humboldt county, and while having such possession, used the car as means for the transportation of intoxicating liquor in said county. On said day he was arrested by an officer of said county, and later was formally charged, under the state Prohibition Enforcement Act (Laws 1921, p. 79) before a justice of the peace, in the city of Eureka, in said county, with the crime of transporting intoxicating liquor. At the same time the said automobile was seized and taken possession of by the officer making said arrest. Subsequently Dolan was tried for and convicted before said justice's court of the crime of transporting intoxicating liquor.

This action was brought by the district attorney of said county of Humboldt, under the provisions of the said Prohibition Enforcement Act to condemn, confiscate, and forfeit to the people of the state said automobile, alleging in his petition that, having been used for the unlawful transportation of intoxicating liquor, said automobile thereupon became a common nuisance, and subject, under the terms of said act, to such condemnation and forfeiture.

These facts were set out in the complaint of the intervening claimant and appellant, and shown by uncontradicted evidence: On the 28th day of July, 1924, J. W. Leavitt & Co., a corporation engaged in the business of selling automobiles in the city of San Francisco, sold the defendant automobile to one Lillian Gernandt under a contract of conditional sale; said contract being in writing. The purchase price of said automobile was \$1,521.13, of which the sum of \$482.58 was paid at the time of the delivery of the auto-

mobile to said Gernandt; the balance to be paid in monthly installments of \$57. After the initial payment of \$482.58, certain of the installments provided for by the contract were paid. Subsequently to the execution of the contract and the delivery of the automobile to Lillian Gernandt, the seller, J. W. Leavitt & Co., sold and assigned the contract and all the rights of the former thereunder to the intervening claimant, Anglo-California Trust Company.

Under the express terms of the conditional sale contract, the legal title to the defendant automobile was to remain in the seller, or its successors or assigns, until all payments should be made and all the conditions of the contract were complied with. Ever since the sale of the said contract to Anglo-California Trust Company, it has been and was at the time of the commencement of this action the legal owner of the automobile and entitled to all payments provided for in said contract; that at the time of the seizure of the car there was, and ever since has been, due the Anglo-California Trust Company on the purchase price of said automobile the sum of \$865.45; that said trust company had no confiscation insurance on said automobile; that Lillian Gernandt, the registered owner of the automobile, "is without property or assets upon which an execution could be levied by the Anglo-California Trust Company, and has no assets or funds from which could be collected the balance due from her upon said contract."

Among the provisions of the contract of sale between Leavitt & Co. and Lillian Gernandt was one to the effect that the purchaser should not use said automobile nor permit it to be used for any unlawful purpose. While of no consequence here, since she has not appealed, it will do no harm to state that Lillian Gernandt also answered the complaint or petition, alleging that she had an interest in the car, and, while admitting that she loaned the automobile to Dolan, of which fact, she alleged, she did not advise the appellant, alleged that she had no knowledge of the fact that Dolan used or intended to use it for the unlawful transportation of intoxicating liquors or for any other unlawful purpose.

The court found that defendant automobile was sold by J. W. Leavitt & Co. to Lillian Gernandt under a conditional contract of sale, in writing, at the time and for the price and on the terms stated in appellant's complaint in intervention; that on the purchase price of the car (\$1,521.13), said Gernandt paid the sum of \$482.50 on the delivery of said automobile to her; that thereafter certain payments were made on said contract by Gernandt; and that, at the time of the trial of this action, the sum of \$865.45 was unpaid on said purchase price. The court further found:

"That the said intervener, Anglo-California Trust Company, at the time said automobile was delivered to said Lillian E. Gernandt did not have personal knowledge or information that said automobile was to be used or was being used in unlawfully transporting liquor, and the court further finds that, by the exercise of reasonable diligence, said intervener could have known, and should have known, that said defendant automobile was being used for the unlawful transportation of intoxicating liquor, and for its failure to exercise reasonable or any diligence in that behalf said intervener was guilty of laches."

The foregoing finding rests entirely upon the doctrine of notice—that is, that the appellant had knowledge or information of such facts as were sufficient to put a prudent person upon inquiry which, if prosecuted with reasonable diligence, would have disclosed to the appellant that it was the intention to use the automobile, or that it was being used, for an unlawful purpose. This, it would seem, is the only permissible theory of the finding upon which the judgment is planted, since the court, as will be noted, expressly found that the appellant "did not have personal knowledge or information that said automobile was to be used or was being used in unlawfully transporting liquor."

The finding by which it is sought to vitalize the decree from which this appeal is taken is wholly insufficient to support a judgment confiscating and forfeiting property employed as means for facilitating the violation of the prohibition enforcement laws. It must be remembered that, while the civil process of the courts may be invoked to enforce the penalty of forfeiture of private property, authorized in proper cases by the Volstead (U. S. Comp. St. Ann. Supp. 1923, § 10138 $\frac{1}{4}$ et seq.) and Wright (St. Cal. 1921, p. 79) Acts, the fact is that, after all, the object of such proceeding, as is that of the present proceeding, is to enforce a criminal penalty or, it may aptly be said, to enforce a judgment of sentence in a criminal case. In substantial effect, it is nothing less than that; hence, wisely, the law contemplates that, when a party has been charged with and convicted of committing any offense under the prohibition enforcement law, and it develops that, in committing such offense, he has used as an agency therefor certain property, the legal title to which is in another, and it clearly appears that such owner has not himself actually participated in the commission of the crime, before the legal owner can be deprived of his property by the people of the state through proceedings of forfeiture, based upon the fact of the use of such property for such illegal purpose, it is incumbent upon the people to show by sufficient evidence that such owner had actual knowledge that the intention was to use such property, or that it was being used, as an instrumentality for consummating the

commission of such crime. Of course, the fact of knowledge by the legal owner of the property that the intention was to use the property, or that it was being used, as in aid of or an agency for the commission of the crime may be proved, as may any other ultimate fact, by circumstantial evidence, but the circumstances must go further in their probative effect than merely to show, as seems to be the extent of the showing here, that the owner, though having no tangible or substantial reason for so proceeding, might discover that the car was being used for an unlawful purpose, if he would at all times, and wherever it might be taken or driven, keep it under espionage. Such a duty certainly is not imposed upon dealers in automobiles. If it were, there would be few, if any persons of law-abiding proclivity who would engage in such business.

The above views coincide with the provisions of section 26 of title 2 of the Volstead Act (U. S. Comp. St. Ann. Supp. 1923, § 10138 $\frac{1}{2}$ mm), also by reference made a part of the state enforcement law known as the Wright Act (Traffic Truck Sales Co. of California et al. v. Justice Court, 192 Cal. 377, 220 P. 306; People v. Buttulia [Cal. App.] 233 P. 401), as that section has been construed by the courts. Said section provides that, where intoxicating liquors are transported illegally, the same, together with the vehicle being used for that purpose, shall be seized and taken possession of by an officer, who shall at once proceed against the person arrested, etc.—

"but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts."

There could be nothing clearer than that the meaning of said section is that, where the legal owner of an automobile in the possession of a conditional vendee can and does satisfactorily show, in the case of the seizure of such automobile under the Wright Act, that he had no knowledge that the car

was to be used or was used or being used by the conditional vendee or any other party for the illegal transportation of intoxicating liquor, he then establishes the "good cause" which the statute intends will operate as a perfect defense against the confiscation and forfeiture of the seller's interest therein. It has, indeed, been plainly so held in *Jackson v. United States* (C. C. A.) 295 F. 620, and in the very recent case of *People v. One 1924 Studebaker Sport Automobile* (Cal. App.) 234 P. 856. In the case first named, one Bostick, conditional purchaser of the automobile therein involved, was convicted of the unlawful transportation of intoxicating liquor by means of said automobile. The court found as a fact that the intervening claimant, who was the seller of the car, and in whom the legal title was to remain until the payment in full of the agreed purchase price, which price had not been paid at the time of the trial, had no personal knowledge that the automobile was to be used, or was in fact used, by Bostick in the unlawful transportation of liquor, but, nevertheless, denied his petition for the return of the machine, and directed its sale without any right of the petitioner to any of the proceeds thereof. The Circuit Court of Appeals held, in effect, that the finding was insufficient as a matter of law to uphold the decree, as it denied the right of the legal owner of an automobile expressly given him by the Volstead Enforcement Act, to save his rights in the property by a showing that the car had been used by the conditional vendee for the unlawful purpose without his knowledge, consent, or acquiescence. The trial court, in an opinion filed in that case, among other things, declared:

"An owner may show 'good cause' if he show that the car was taken and used without his knowledge or consent; but, where he turns it over to another for a price, giving absolute control to such other, he is not in a position to show 'good cause' against a forfeiture, if the car be seized while unlawfully used in the transportation of liquor, by asserting that such use was without his knowledge."

To which the Circuit Court of Appeals made answer:

"If, as the court there says, the owner may show the 'good cause' referred to in the statute, by showing that the vehicle was taken and used by the purchaser without his knowledge or consent, we are unable to see why that right is necessarily defeated by the fact that, by the terms of its conditional sale, its purchaser was given the absolute control of it within a certain designated territory, and so long as he complied with all of the terms of the sale. If that be so, no conditional sale of such personal property could be made with any security to the seller except by his paying for a policy of insurance. We agree with Judge Thomas in the case of *United States v. Sylvester* (D. C.) 273 Fed. 253, that 'it is apparent that the Congress intended to penalize

only the wrongdoer,' and not the innocent party or parties to the transaction. As said by the court in that case:

"When a defendant is arrested for transporting intoxicating liquor, and the vehicle is seized, what is to be done with it depends upon what interest the defendant has in it. If he had no interest—that is, if he had stolen it, or had borrowed it from its real owner, who neither knew nor could be presumed to have knowledge of the illegal purpose for which it was to be used—manifestly the wrongdoer had no interest to forfeit, and it logically follows, under the provisions of the act, that the vehicle should be returned to its rightful owner, by order of court. If, on the other hand, the wrongdoer had an interest in the vehicle, his interest should be confiscated and the vehicle ordered sold. What, then, is to become of the interest of the conditional vendor or the interest of the mortgagee? Are such persons to lose their interest in the vehicle or the value of their property right? The answer is a negative one, and is found in the provisions of section 26, which guard against such loss, so far as possible."

Very much the same views are expressed in the case last above named—*People v. One 1924 Studebaker, etc., Automobile*—by Presiding Justice Langdon of the First Appellate District. The finding upon which the judgment in that case was grounded is in precisely the same language as is the finding by which it is sought to support the judgment in this case. Speaking of said finding, it is said by Judge Langdon that:

It "cannot have any legal force or effect and is immaterial here because it cannot be seriously contended that a seller of automobiles is bound to be 'reasonably diligent' to ascertain the use to which each car he sells is put or suffer a penalty of forfeiture of his interest in the same. No provision of the Wright Act nor of the National Prohibition Enforcement Act (U. S. Comp. St. Ann. Supp. 1923, §§ 10138¼ et seq.) is authority for this position, and, certainly, no general rule of law would warrant it."

Again, in the same case, it is said:

"It is admitted by the respondent that no penal provision contained in the Volstead Act authorizes the judgment, and that, on the contrary, said act expressly provides for reimbursement of lienholders in the event of the sale of property used in transportation of intoxicating liquor, where such lienholders had no knowledge of the illegal use. It is settled that the Wright Act adopted only the penal provisions of the Volstead Act [*People v. Butulia*, 46 Cal. App. Dec. 61]. Respondent contends that the method provided in the Volstead Act for disposition of the proceeds of a sale is a procedural provision, and is not a part of the Wright Act. We think this reasoning is 'beside the mark.' The situation merely presents a case where it is sought to enforce an extreme penalty against an innocent owner of an automobile, which penalty is not only not provided in the Volstead Act, but is expressly denied therein, and, consequently, is not a penalty under the Wright Act."

The district attorney, in his brief, declares that the true rule applicable in cases of the forfeiture of property arising under the Volstead or Wright Act is as it is stated and applied in *Goldsmith, Jr.-Grant Co. v. United States*, 254 U. S. 505, 511, 41 S. Ct. 189, 65 L. Ed. 376. That case arose over the violation of a federal statute which provided for the forfeiture of goods or commodities upon which a tax was imposed, and such goods or commodities were removed, deposited, or concealed in any place, with the intent to defraud the government of such tax, and further provided that every boat, cart, wagon, or other conveyance and all horses and animals, used in such removal, shall also be forfeited to the government. Under that statute, a libel was filed against a Hudson automobile, charging that it had been used by certain named persons in removing, for deposit and concealment, a quantity of distilled spirits, upon which a tax was imposed by the United States, and which had not been paid. The owner of the automobile intervened, alleging and proving that he had no knowledge of the use of the car for the unlawful purpose charged. The court held, in effect, that the fact that the owner had no knowledge of the illegal use to which the automobile had been put and was innocent of all wrong in connection with the illicit transaction, was not a consideration material to the decision of the case; that the statute, without qualification, declared that the property so used should be forfeited and sold, and the proceeds of the sale turned over to the government, and that therefore there was no other legal alternative but to order a forfeiture of the property. The reasoning by which that conclusion was reached need not be repeated herein. It is enough to say that there is no ground for a difference of opinion as to the soundness of the conclusion therein announced, unless we deny the right of Congress to authorize a forfeiture of privately owned property in such a case and under such circumstances, and this cannot successfully be done. But there is a broad and clear ground of distinction between the statute involved in the *Goldsmith-Grant* decision and the statute with which we are now dealing, in that, in the former there was no "saving clause," so to speak—no provision affording means by which the legal owners of automobiles, having no knowledge of the unlawful use of their property, may protect their rights therein—while here, as has been shown, there is a provision expressly declaring that the legal owner, where he himself has not been a party to the crime, may intervene in the forfeiture proceedings and so protect and preserve his rights in the premises.

The foregoing considerations are decisive of this case. Still it is not improper to sug-

gest that, if the theory of the finding upon which it is sought to rest the decree entered herein were maintainable, there is not a particle of evidence which lends the slightest support to that finding. In other words, the evidence does not show a single fact or circumstance which would have conveyed to the seller of the defendant automobile the slightest intimation or suggestion that the automobile was to be used, or at any time was being used, in the unlawful transportation of intoxicating liquor. In a word, the record is absolutely silent as to any reason why the seller "could have known and should have known" that the automobile was to be used, or was being used, for the illegal purpose mentioned. But, as stated, these considerations, in view of the conclusion first above declared, are of no consequence in the decision of this case.

The judgment as to the appellant is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

71 Cal. App. 601

PEOPLE v. ONE 1923 BUICK COUPE AUTOMOBILE, MODEL 23-36, etc. (McKEON et al., Interveners). (Civ. 2920.)

(District Court of Appeal, Third District.
California. March 7, 1925.)

Intoxicating liquors ⇄250—Proof necessary to warrant forfeiture of automobile used to transport intoxicating liquor stated.

Proceeding to forfeit private automobile used in transporting intoxicating liquor, being one to enforce criminal penalty or judgment of sentence in criminal case, though civil process of court may be invoked, people must show, by direct or circumstantial evidence, that legal owner under conditional sale contract had actual knowledge of such use of, or intent to so use, such property, and fact that such owner might have so discovered by keeping car under constant espionage, without tangible or substantial reason therefor, is insufficient, especially in view of Volstead Act, tit. 2, § 26 (U. S. Comp. St. Ann. Supp. 1923, § 10138½mm), made part of Wright Act by reference.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action by the People of the State of California against One 1923 Buick Coupe Automobile, Model 23-36, etc., in which Helen McKeon and another intervened, as claimants. From a judgment forfeiting the automobile, claimants appealed. Reversed as to claimants, with directions.

P. H. Ryan, of Eureka, for appellant McKeon.

Nelson & Ricks, of Eureka, for appellant National Surety Co.

Arthur W. Hill, Dist. Atty., and J. J. Cairns, Deputy Dist. Atty., both of Eureka, for the People.

HART, J. The district attorney of Humboldt county, purporting to act under the state prohibition law, known as the Wright Act (St. 1921, p. 79), instituted this action in the name and on behalf of the people of the state of California, against the defendant automobile, to secure a decree declaring and adjudging it to be a common nuisance, and directing the sale thereof, by the sheriff of Humboldt county at public sale, "and that the proceeds of such sale be applied to the payment of the costs of this action * * * and the balance thereof be disposed of as provided by law," etc.

It appears from the complaint that, at all times mentioned therein, Helen McKeon was the registered owner of said automobile, and that Airth Automobile Company of Eureka, Cal., was the legal owner thereof; that on the 17th day of November, 1923, in the county of Humboldt, one C. La Chappelle had possession of said automobile, "and then and there willfully and unlawfully used and employed said defendant for the transportation of intoxicating liquor, to wit, whisky"; that at said time and place and on the date stated, said La Chappelle, while so using said automobile, was arrested, and said automobile seized by a detective connected with the office of the district attorney of Humboldt county; that, on the same day, a complaint was filed in the justice's court of Eureka township, charging said La Chappelle with unlawfully transporting intoxicating liquor by means of said automobile; that thereafter he was arrested, appeared before said justice's court, entered a plea of guilty to said charge; and that, subsequently, and upon said plea, judgment of conviction and sentence was entered against and imposed upon him by the justice of said court.

Both Helen McKeon, as the registered owner, and National Surety Company, as the legal owner of the defendant automobile, filed complaints in intervention, each of said complaints alleging, among other things, that the intervener had an interest in said automobile (describing such interest), and that the intervener had no knowledge of the unlawful use of the defendant automobile, as charged, or that it was the intention so to use it at the time mentioned in the district attorney's complaint or at any other time.

Upon a trial of the issues as thus framed, the court entered its decree condemning said automobile, and forfeiting it "to the people of the state of California," and directing the sheriff of Humboldt county to sell the same at public auction, and, after deducting necessary costs and expenses from the proceeds of such sale, to pay the sum remaining into the treasury of Humboldt county.

The interveners appeal from said decree.

The court found that neither the intervenor Helen McKeon, the registered owner, nor Airth Automobile Company, the legal owner of defendant, at the time La Chappellee was

using the automobile, "had personal knowledge or information that said defendant would be used for the transportation of liquor, or that it would be used to transport liquor from San Francisco to Eureka," but found that, by the exercise of reasonable diligence, said Helen McKeon and said Airth Automobile Company could have known and should have known that said defendant automobile was used and being used for the unlawful transportation of intoxicating liquor, and that, for failure to exercise reasonable or any diligence in that behalf, said Helen McKeon and said Airth Automobile Company were guilty of laches. It was further found that the allegations of Helen McKeon's complaint in intervention that she purchased the automobile from the Airth Automobile Company for the sum of \$1,535, that at the time of the seizure thereof there was unpaid on the contract price the sum of \$609, that, since said seizure she has paid on account of said contract the sum of \$87, "and that the sum of \$522 of said purchase price is now unpaid," were true. The court also found that the National Surety Company has succeeded to all the rights of said Airth Automobile Company in and to said defendant and the contract evidencing the sale thereof.

This case, in the facts and the legal points, parallels the case of *People v. One 1923 Oakland Sport Automobile* (Civil No. 2848) 236 P. 194, in which an opinion has this day been filed in this court. The findings in both cases are exactly the same. Upon the authority of that case and the authorities therein considered, the judgment in this case must be reversed. It may, with no impropriety, be stated, however, that, if it were true that the findings upon which the judgment as to both Miss McKeon and Airth Automobile Company proceeded were sufficient in law to support a judgment in a proceeding under the *Volstead* (U. S. Comp. St. Ann. Supp. 1923, § 10138¼ et seq.) or *Wright* (St. Cal. 1921, p. 79) Acts, looking to the forfeiture of property used in violating any of the provisions of said acts, still there is no evidence that supports those findings. In other words, there is no evidence showing or reasonably tending to show that either of the parties named had knowledge of any fact or facts or circumstances which would have put them, as prudent persons, upon inquiry which, if pressed with reasonable diligence, would have brought to them actual knowledge that the defendant would be used or was used or being used in the unlawful transportation of intoxicating liquor, and that, having failed to exercise that degree of diligence, they were guilty of laches which charged to them actual knowledge of the fact. But since, as we have said, the findings referred to are without legal force, and therefore impart no life to the judgment, it is not necessary that we should further pursue the present consideration.

The finding that the parties named at no time had personal knowledge or information of the unlawful use to which the defendant automobile was put, or was intended to be put, by La Chappelle conclusively establishes the invalidity of the judgment.

The judgment as to both of the appellants is reversed, with directions to the trial judge to enter judgment on the findings in favor of both appellants.

We concur: FINCH, P. J.; PLUMMER, J.

71 Cal. App. 671

McCONNELL v. QUINN. (Civ. 2870.)

(District Court of Appeal, Third District, California. March 14, 1925.)

1. Highways $\S$ 184(2)—**Burden on plaintiff to prove collision caused by, and injuries sustained as direct result of, defendant's negligence.**

In action for injuries to driver of wagon struck by defendant's automobile, burden was on plaintiff to prove that collision was caused by defendant's negligence, and that plaintiff suffered some injury or damage directly caused by such negligence.

2. Highways $\S$ 184(3)—**Whether collision was caused by, and injury sustained as direct result of, defendant's negligence held for jury.**

Whether collision between wagon driven by plaintiff and defendant's automobile was caused by defendant's negligence, and whether plaintiff suffered any injury or damage directly caused by such negligence, held for jury.

3. Appeal and error $\S$ 1001(1)—**Jury's conclusion on facts binding, unless testimony, as matter of law, does not support verdict.**

Jury's conclusion on facts is binding on appellate court, unless testimony compels conclusion, as matter of law, that it affords no support to verdict.

4. Damages $\S$ 185(1)—**Implied finding that plaintiff's injuries were minor and temporary held warranted by testimony.**

Physician's and parties' testimony, in action for injuries to driver of wagon struck by defendant's automobile, held to support jury's finding, implied from verdict for defendant, that plaintiff's injuries were minor and temporary, and did not appreciably interrupt or interfere with performance of his usual duties.

5. Appeal and error $\S$ 932(1)—**Presumed, in support of verdict for defendant, if latter was negligent, that jury regarded damages as only nominal.**

It must be presumed, in support of verdict for defendant, if latter was negligent and plaintiff entitled to some damages, though injuries were slight and temporary, that jury regarded amount as nominal only and not more than amount paid by defendant for medical treatment of plaintiff.

6. Damages $\S$ 185(1)—**Implied finding that automobile driver's conduct was not wanton, malicious, or in conscious disregard of other's rights held warranted.**

Evidence held to warrant implied finding that automobile driver's act in suddenly turning to right and striking wagon after starting to pass it from rear, was not wanton or so reckless as to evince malice or conscious disregard of another's rights so as to justify exemplary or punitive damages.

7. Damages $\S$ 91(3)—**Proof necessary to warrant exemplary or punitive damages stated.**

To justify exemplary or punitive damages in personal injury suit, defendant's conduct must have been wanton or so reckless as to evince malice or conscious disregard of others' rights.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by J. H. McConnell against Mary H. Quinn. Judgment for defendant, and plaintiff appeals. Affirmed.

J. A. Chase, of Visalia, and O. O. Collins, of Los Angeles, for appellant.

D. E. Perkins and Power & McFadzean, all of Visalia, for respondent.

HART, J. This action is for damages for personal injuries. The case was tried before a jury, who found for the defendant, and judgment was entered in accord therewith. A motion for a new trial by the plaintiff was denied, and he appeals from the judgment and said order.

In the forenoon of the 26th day of April, 1921, the plaintiff, driving a team of horses hitched to a four-wheel delivery wagon, was traveling in a northerly direction upon a paved highway in Tulare county, and when near Traver, a railroad station in said county, the defendant, driving an automobile in the same direction upon the same highway, and rearward of plaintiff, ran her car into and so collided with the rear of plaintiff's wagon. The impact caused the horses attached to the plaintiff's wagon to jump, with the result that the plaintiff fell from the seat of the wagon to the pavement and received certain injuries.

The second amended complaint describes the injuries suffered by plaintiff by reason of the collision, and alleges that they were directly or proximately caused by the negligence of the defendant.

The answer consists entirely of specific denials of the material allegations of the complaint.

The contention of the plaintiff is that the evidence, as a matter of law, shows that the defendant was guilty of negligence which proximately caused the injuries he received as a result of the collision, and that, therefore, the court erred in refusing the request of plaintiff for a directed verdict in his fa-

vor; that the verdict is not supported by the evidence and is against law. On the other hand, the defendant contends that the question of negligence was for the jury, but that, even if it be assumed that the evidence upon its face shows that she was guilty of negligence which was the proximate cause of the injury, the verdict and judgment are supported by evidence that plaintiff suffered no damage other than that for which he was compensated by the defendant.

The defendant's story of how the collision occurred is, in substance, as follows: That she was driving at a rate of speed of between 25 and 30 miles an hour in a northerly direction over the paved highway mentioned above; that, immediately in front of her, at a distance of about the width of an ordinary street, another party was driving a Dodge roadster at approximately the same rate of speed at which she was traveling; that at or near a curve in the highway, near Traver station, the driver of the Dodge roadster swerved to the left and passed the wagon of the plaintiff; that she started to follow the Dodge car, was in the act of driving to the left of the plaintiff's wagon, and had proceeded but a few feet when she observed a large truck in the highway traveling towards her, going in a southerly direction, and at the same instant of time she saw another car turn from the rear and to the left of the truck and into the center of the highway, traveling in a southerly direction or towards her, at a rapid rate of speed. At once realizing that she could not pass the plaintiff's wagon before either said other car or the truck reached the point where the wagon then was, she suddenly turned her car to the right, and, in doing so, struck the rear end of plaintiff's wagon. The defendant testified that the force of the impact by reason of the collision was hardly noticed by her, and in this she was corroborated by a young lady riding with her and occupying the front seat of the car at the time the collision happened. The bumper on her automobile was slightly bent and the front wheels thereof thrown out of alignment as a result of the collision. The noise of the impact seemed to have frightened the horses, and this made them lurch forward, causing the plaintiff to be thrown from the wagon to the ground as above stated. The horses started to run, and did run, for a short distance, when, in making a sudden turn, they in some manner became detached from the wagon, and ran some distance, when they were stopped by the driver of the truck referred to, who "tied them" to a fence. The wagon and the harness were damaged to some extent.

The defendant, immediately following the collision, alighted from her car, and started to the spot where the plaintiff had fallen. Before she reached that spot the witness Rice, the driver of the Dodge roadster, had

stopped and turned and driven back to where the plaintiff was lying on the pavement and assisted him to his feet. Blood was flowing from a wound on his head. Rice stated that at first plaintiff appeared to be somewhat dazed, but within a few minutes seemed to recover himself and insisted on getting his wagon and team and proceeding on. He was, however, urged by those present, including the defendant, to go to a doctor and receive treatment. As to this matter and what followed the visit to the doctor, the defendant testified:

"He had this cut on his head which was bleeding, and I felt that it ought to be cleansed, so I said to him, 'I would like to take you to a doctor and have that cleansed.' He said he had never been in a doctor's office before, and he was not hurt much, and he did not wish to go. But, in spite of his protesting, I insisted that he go. I took him in my car and took him to Dr. Gillespie at Kingsburg. Dr. Gillespie dressed this wound on his head, this cut, and just felt of the head in—just felt of him in a general way. I remember a scratch on his elbow. I do not remember that he said a word about his neck or his hip or anything else when we were in Dr. Gillespie's office. And after that was done we took him on to Fresno, which was his destination. We piled all of his things into our machine, and took him on to Fresno, because he said that was where he was going and where he wanted to go. We took him to his home in Fresno.

"Q. When you were talking to him there before you put him in your car did he complain anything about suffering from pain? A. No; he said he was not hurt very much. He said his harness and wagon were all right, he could drive the team.

"Q. And after you got him in the car, between that time and the time you got to Dr. Gillespie's office, did he complain of any pain? A. No; not a word.

"Q. After Dr. Gillespie had dressed his wound and you started with him to Fresno, did he complain of anything? A. I do not remember that he said a word about any pain. I do not remember that our conversation was about that. We talked and visited, just as friendly as any person ever visited. I never dreamed of his suing me.

"Q. When did you next see him? A. I did not see him again until—it was some time before Christmas of that same year.

"Q. Where did you see him then? A. He came to my house to see me.

"Q. Did you have any conversation with him at that time? A. Yes, sir.

"Q. Do you remember the substance of it? A. Yes; I think I do. He came to see me. see what I was going to do about that accident, and I told him I was not going to do anything, that I did not feel that I owed him anything, and we talked about it. And I said that 'I took you to the doctor in Kingsburg to have that cut in your head dressed because I thought it was a kind thing to do; and you did not want to go to the doctor.' And I said, 'Wouldn't you have done that for me, if I had been the injured one?' He said, 'Yes, I would.' Then I said that day he had every appearance of being a very poor man, and the damage to his

wagon and harness seemed to mean a great deal to him, and I told him that I would fix up the wagon and harness for him."

A. W. Quinn, husband of defendant, testified that, some time after the date the accident happened, the plaintiff called on him at the bank with which he (Quinn) was connected at Exeter, Tulare county, and "stated he had a bill against me for some damages that was done by this accident out north of Traver. And I asked him what they were, and he said—I can't remember the exact amount, but it was a dollar or two for his repairing his wagon, it seems to me, and a doctor bill of \$3 or \$4, something like that. I don't remember the exact amount." The witness gave plaintiff a check for the amount. The check was produced, was identified by the witness as the one he gave to plaintiff, and was introduced in evidence. It called for the total sum of \$19.75, payable to plaintiff. On the back of the check, in the handwriting of the witness, was this indorsement: "Wagon repair, \$15; doctor bill, \$4.75." The witness stated that that indorsement was written on the back of the check before he delivered the check to plaintiff. The witness stated that, before delivering the check to plaintiff, the latter made no complaint of having suffered any personal injuries other than those already spoken of, and made no claim to damages other than those for the injury to his wagon and the bill of the doctor for medical treatment. After receiving the check, though, the plaintiff, so the witness testified, said that—

"He would want something for personal injury. I do not know whether he used 'personal injury' or not, but that was the sum and substance of it. I asked him in what way he was damaged. Well, he said he did not know, but since the injury he had not been able to do much of anything, he felt he was injured, and that he would want something for it. I asked him what he thought he was damaged, and he said he did not know, and that was about all of the conversation we had.

"Q. Did you decline to pay him anything? A. He did not state what he wanted. I told him I did not know anything about it, that I was not there, and if he felt he was injured in any way to go and see my wife. And later he did call upon my wife. In substance that is about all I can remember of the incident at that time."

Dr. J. A. Gillespie, to whom the defendant took the plaintiff for treatment immediately after the accident, testifying for the plaintiff, stated that, because the plaintiff at the time he treated him immediately following the accident, "did not seem to be very badly hurt," he took and preserved no notes of the nature of the injuries. He stated that at that time he found on the top of plaintiff's head "a little injury, not much," and also "a few scratches upon his body. * * *

The only injury I treated was on the top of

his head at that time." Subsequently plaintiff called at the doctor's office two or three times, and "if I remember correctly he complained of his back or neck or something. It has slipped my memory, because it has been so long ago. Q. Did you render any treatment to any other portions of his body? A. I do not know whether I gave him something to—or strapped it or what I did. I have forgotten what I did do—not much. Q. You do not recollect of putting a plaster on his body any place? A. Well I may have strapped it, that is, put some adhesive on it like I often do in cases, * * * Q. You do not recollect how many times Mr. McConnell came to your office? A. Oh he was backwards and forwards between Fresno and Goshen Junction two or three times. Q. And he came to your office that many times, you recollect? A. He would stop, yes."

The plaintiff, after telling what he remembered as to the manner in which the collision was brought about, which varied little, if any, from the defendant's description of the way that it occurred, testified that he was stunned and for an instant of time dazed as a result of his fall to the pavement. He said that the defendant insisted on taking him to a doctor, and recalled saying to her and others present that he "did not think he was hurt bad," but that he got in defendant's car and was by her driven to Kingsburg and to Dr. Gillespie's office; that the doctor dressed a wound on the top of his head; that no stitches were taken in the wound, but that the doctor cleansed the wound with some medicinal preparation, and then covered it with cotton, over and upon which he put an adhesive plaster. Plaintiff was not certain whether the doctor examined his neck, back, and hip at that time, but that subsequently he did; that he had no recollection of what the doctor said at any time as to the condition of his back, neck, and hip; that he was then "suffering pretty badly with my neck," but "not so much with my hip"; that he could not say whether on that occasion he told Dr. Gillespie that his hip "was bothering him." Plaintiff then told of having been taken to his home in Fresno by the defendant; that he was not certain that he and defendant talked about or discussed his injuries while they were on their way from Kingsburg to Fresno, or whether he stated to her "how he felt." Plaintiff called on Dr. Gillespie, so he testified, on the 28th day of April, 1921, two days after the accident. At that time, he said, the doctor put a plaster on his hip; that that was the first time that the doctor had so treated his hip; that the plaster remained on his hip until the 25th of May, 1921, when he, assisted by members of his family, removed it. In the meantime, he said, he consulted and was given treatment by a Dr. Edwards, a chiropractic, at Fresno, and later, he further said, he was treated

by a Dr. Gass, an osteopath, residing at Visalia. A few days prior to the beginning of the trial a Dr. Morehouse, an osteopathic physician at Visalia, examined the hip, back, and neck of plaintiff. (Neither Dr. Edwards nor Dr. Gass was called as a witness. Dr. Morehouse testified for the plaintiff.) The plaintiff, continuing, said that, from the time of the accident to the time of the trial, his neck was swollen; that this "swelling would pass off at times, went down." On cross-examination he stated that, when a young man, some forty years prior to the date of the accident, he suffered occasionally from rheumatism in his back and in the regions of his hips, but that it had been years since he had so suffered. He further stated that he had never consulted "any physician or surgeon for the purpose of ascertaining whether the pain he complained of came from any other cause than this collision that he had at Traver." Further, on cross-examination, he stated that, before the collision involved herein, he had met with "different accidents"; that a horse once "hit me on the wrist. * * * Q. Did that hip that you complain of being in pain now, did it ever receive an injury before—ever fall on it before? A. Well, I might have fell sometimes, probably did." On redirect he stated that he had suffered continuously from pain due to the injuries received by him, "until the present time, unless when I was asleep it might have stopped."

Dr. Morehouse testified that he found, on his examination of plaintiff, "a vertebra loose in his neck." This defect, the doctor said, was not a dislocation; that it was produced by some cause external to the body. He could not say when the wound or injury was produced. The doctor also found, so he said, that there was a disorder in the region of the hip. The latter condition, he explained, could have been produced by different causes. "Riding in a car will do it," he said, "simply riding in an automobile will do it, or a blow applied there will do it. Sometimes it follows an infection of the teeth or tonsils." He stated that this condition may last for a long period of time, unless it is corrected; that he had known it to last "four or five or six years." Such a condition, he stated, was a source of pain, constant in most cases, to the patient. He said that he did not examine the teeth and tonsils of plaintiff. As to the swelling in or about the neck, the doctor stated that it "was caused by a lesion occurring by a trauma" (external violence of some sort). There are "so many conditions that could cause that, though. I have had cases where persons have been jounced and their head hit against the top of the machine, and that caused it; where a person has gone over a rough bump." He stated that a large proportion of the people that he has treated

are afflicted with the same ailment in the neck.

Members of the family of plaintiff testified that the latter's physical condition had been bad continuously from the time that the collision occurred down to the date of the trial. Some of them stated that the wound on his head consisted of a gash over four inches long; that he had suffered great pain in the region of his hip and back almost incessantly.

Dr. A. W. Preston, a practicing physician and surgeon at Visalia, was called in rebuttal by the defendant as a medical expert. He testified that he listened to and heard the plaintiff describe the examination to which he had been subjected by the chiropractic above named, as follows: "That he (the chiropractic) felt over my neck and felt a place he said was out of place, and he tried to put them back in place." The witness said that a condition so described and the pain attending it would mean a dislocation of a vertebra, and would be very serious; that such a dislocation "would be attended by serious disarrangements of other bodily functions." In order to determine, said Dr. Preston, the cause of such a pain, it would be necessary to make a complete physical examination of all the functional organs--the kidneys, the heart, blood pressure, the reflexes of the nervous system. He expressed the opinion, from the description of the hurt in or about the neck, that the pain which the plaintiff said he had suffered in that region of his body was not the result of the dislocation of a vertebra or any other kind of dislocation. As to the alleged injury in the region of the hip, the doctor said that, ordinarily, a bruise of such a description, or a swelling of the parts produced from such a bruise or injury as the plaintiff stated he had suffered and as the latter described it, would heal "in a few weeks--perhaps from three to six weeks. * * * No ordinary injury would cause any swelling that would last from" the month of April, 1921, down to the date of the trial. On cross-examination Dr. Preston declared that it would not be possible for "the man to have a cracked vertebra and still continue about his business and not know it was cracked for some time." To clarify the opinion previously given by him relative to the condition of a person injured as the plaintiff said he had been by falling from the wagon, Dr. Preston explained, on cross-examination:

"My supposition and proposition is this: That, if Mr. McConnell received an injury to his back or hip two and a half years ago, and still has a swelling in the region of that injury in his side, hip or back, that it is still present, that his injury at the time must have been very severe, and that the man would have been in a very critical condition during the two and a half years," and that "he would be in that same critical condition at the present time."

The above statement embraces an accurate as well as a comprehensive conspectus of the important testimony presented by both sides.

[1-5] Obviously, as in all personal injury cases, it was incumbent on the plaintiff to prove these two general propositions of fact, to wit: (1) That the collision and its consequences to plaintiff were caused by the negligence of the defendant; (2) that, by reason of such negligence, the plaintiff was damaged—that is, that he suffered some injury or damage which was directly caused by such negligence. And it was for the jury to determine whether the plaintiff established those propositions by sufficient evidence. It is also true and, indeed, so much a commonplace as a legal proposition in this state as to render its statement superfluous, that the conclusion of the jury upon the facts is binding upon a Court of Appeal, unless the testimony is of such a character as to compel the conclusion that, as a matter of law, it affords no support to the verdict. As seen, the plaintiff contends that the defendant's own testimony, which, as to the circumstances under which the collision was caused, is not contradicted but supported, upon its face, or, as a matter of law, shows that she was guilty of negligence in running her car into the wagon of the plaintiff, and that such negligence constituted the direct cause of the injuries inflicted upon him and his wagon. The defendant while resisting that position, insists that, conceding it to be sound, the verdict must nevertheless still be permitted to remain undisturbed, for the reason that it is sufficiently supported by the testimony bearing upon the question of the nature and extent of the damage suffered by the plaintiff as the result of the collision. To this proposition the plaintiff has offered no reply, and we think none can successfully be interposed. It must be said that the evidence as to the nature and the extent of the damage suffered by the plaintiff is in conflict, and it may therefore be granted that, had the verdict been for the plaintiff, the conclusion of the jury that the plaintiff had received physical injuries of a more serious character than Dr. Gillespie's testimony indicates that they were might stand immune from disturbance by this court; but the testimony of that doctor, corroborated by the testimony of the defendant and the expert testimony of Dr. Preston, and, indeed, in a noticeable degree by the testimony of the plaintiff himself, sufficiently supports the implied finding of the jury that the physical injuries inflicted upon the latter were of a minor and temporary character, and in no way or to any appreciable extent interrupted or interfered with the performance by him of his usual or ordinary duties. If

it be said that, conceding the negligence of the defendant, the plaintiff was entitled to recover some damage, even though the injuries were slight and their effect not permanent, the reply would be that we must presume that the jury regarded the amount of the damages to which he might be entitled would be nominal only—indeed, not in excess of the amount which the defendant paid for the medical treatment administered to plaintiff by Dr. Gillespie.

[6, 7] It is not claimed, nor does the evidence appear to justify such a claim, that the plaintiff was entitled to recover anything more or further than compensatory damages; for defendant testified that, seeing the Dodge roadster which was a short distance ahead of her turn to the left and pass the wagon, she assumed that she could safely do likewise, and so attempted to follow the roadster around the wagon; that, on making the turn, she discovered that a large truck and an automobile were approaching, and so near where the wagon was that it appeared to her that there would be great danger of a collision between her car and either the approaching automobile or the truck, and she thereupon suddenly swerved to the right and struck the rear of plaintiff's wagon. Thus it is clear that, if the defendant was guilty of culpable negligence, it was because she failed, before attempting to pass the wagon, to take the precaution to ascertain whether the highway before her was clear of vehicles approaching from the opposite direction and so near the wagon as to make it perilous to attempt to pass around it. So it is manifest that the jury could have found, and the implication from the verdict is that they did find, that the act of defendant in turning suddenly to the right as she started to pass the wagon was, according to her best judgment, formed under the circumstances as indicated, necessary to protect herself against serious injury, and that it was therefore not wanton or the result of "such recklessness * * * as evinces malice or a conscious disregard of the rights of others" (Lyles v. Perrin, 119 Cal. 264, 51 P. 332), and this must be shown in an action for personal injuries to justify the imposition of exemplary or punitive in addition to any compensatory damages which may be assessed.

The foregoing views and the conclusion necessarily following therefrom make it unnecessary to consider herein whether, as the plaintiff contends, the verdict, in so far as it may concern the question of the defendant's alleged negligence, is contrary to the undisputed evidence and the legitimate inferences to be deduced therefrom.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

71 Cal. App. 744

(236 P.)

Ex parte EWELL. (Cr. 1243.)

(District Court of Appeal, First District, Division 1, California. March 20, 1925.)

1. Habeas corpus ☞22(1)—Facts and matters adjudicated in judgment, under which petitioner imprisoned, cannot be impeached.

On habeas corpus facts and matters adjudicated in judgment under which petitioner is imprisoned, cannot be impeached, but must be taken as true.

2. Contempt ☞27—Sending of letter to judge designed to change his views upon law and facts expressed by him held contempt of court.

The sending to a judge of a letter designed to change his views upon the law and facts expressed by him, at a time when the judge still had before him the duty of exercising judicial functions in the case, held a contempt of court.

3. Contempt ☞27—Petitioner's dictation of contemptuous letter, and aiding and abetting another in sending it to judge, rendered him culpable without his signature.

Attorney's dictation of contemptuous letter, and his aiding and abetting another in sending it to a judge, rendered him as culpable as if he had personally signed the letter.

4. Contempt ☞6—Attorney held guilty of contempt committed in presence of court.

Conduct of attorney, in asking for production in evidence, on hearing of motion, of a contemptuous letter addressed to the trial judge, the sending of which petitioner, instigated, held to render him punishable as for contempt committed in the presence of the court, in view of Code Civ. Proc. § 282.

Application by Raine Ewell for writ of habeas corpus to secure his release from custody on a commitment under a judgment adjudicating him in contempt of court. Judgment affirmed, writ discharged, and petitioner remanded.

Raine Ewell, of San Francisco, for petitioner.

R. M. J. Armstrong, of San Francisco, for respondent.

John J. Goldberg and E. F. Treadwell, both of San Francisco, for Sheriff of City and County of San Francisco.

KNIGHT, J. [1] Petitioner was adjudged guilty of contempt of court and sentenced to imprisonment in the county jail for a period of 24 hours by the superior court of the state of California in and for the city and county of San Francisco, department 16 thereof, Hon. Louis H. Ward presiding. The return of the sheriff to said writ sets forth a copy of the commitment embodying the judgment of contempt. Incorporated in said judgment are the facts upon which the adjudication of contempt is based. The return, we think, is legally sufficient in form

and substance, and we do not agree with petitioner that in a habeas corpus proceeding a petitioner may go behind the judgment and offer evidence to impeach the facts and matter adjudicated therein; those facts must be taken as true. In re Shortridge, 5 Cal. App. 371, 90 P. 458; Ex parte Ah Men, 77 Cal. 198, 19 P. 380, 11 Am. St. Rep. 263.

Petitioner also filed and presented a petition for a writ of certiorari whereby he seeks to have said judgment of contempt reviewed and annulled. The circumstances leading up to the contempt proceedings are fully set forth in the latter petition and in the copies of the documents and pleadings thereto attached and made a part thereof. Those circumstances may be briefly stated as follows: During the latter part of the year 1923 an action in interpleader came on for trial in department 16 of said court before Hon. Claude F. Purkitt, judge of the superior court of Glenn county, presiding. One of the cross-defendants in said action was Kenneth M. Mays, who, according to the record before us, was an unfortunate drug addict, and either at the time of the trial of said action was, or soon thereafter became, a prisoner in the state penitentiary. The petitioner, who is a licensed member of the bar, was also a cross-defendant, having acquired an interest in the subject-matter of said litigation by assignment from said Mays. Petitioner also appeared in said action as the attorney for Mays. Owing to the apparent conflict between the interests of these two cross-defendants, Judge Purkitt made an order appointing attorney J. A. Brown to protect the rights of Mays. Brown thereupon caused an amended answer to be filed on behalf of Mays, alleging that the assignment from Mays to petitioner was fraudulent. On or about December 19, 1924, Mays was released from prison. On December 31, 1924, Judge Purkitt filed a written opinion and order for judgment in said action, in which it was held, among other things, that petitioner, as assignee of Mays, was entitled to receive a sum of money less than the amount called for by the terms of said assignment. After said opinion had been filed, and before findings were prepared or signed, to wit, on January 4, 1925, Mays mailed a seven-page typed letter signed by him, but dictated by petitioner, to Judge Purkitt, insinuatingly criticizing the manner in which the case had been decided, vigorously assailing the integrity and faithfulness of Attorney Brown, impugning the honesty of the successful cross-defendants, praising the value of the services and sincerity of purpose of petitioner, and insisting that petitioner's assignment be recognized and enforced to the full extent of the terms thereof. In said letter

it was further stated that Mays had filed notice of motion to substitute petitioner as his attorney, and request was made that no further steps be taken in the action until after the hearing of said motion. Said motion came on for hearing before Judge Ward, then presiding in department 16 of said court, on January 16, 1925. Mays was sworn as a witness in his own behalf. During the examination of said witness petitioner called for the letter of January 4, 1925, which Judge Purkitt had forwarded to the clerk of the court, and which was then in the possession of Judge Ward, and, upon its production, offered the same in evidence. Mays testified that said letter had been dictated by petitioner, and that the statements contained therein were not his but were petitioner's. The court then interrogated petitioner as follows:

"The Court (addressing Mr. Ewell): You dictated this letter to this gentleman?"

"Mr. Ewell: So far as the language was used. I put it in proper English for him."

"The Court: Yes."

"Mr. Ewell: And corrected the spelling for him, but as to the wording of that letter, that letter was at the will of Mr. Kenneth Mays. Now I want to show by examination—"

"The Court: Well let me say this to you Mr. Ewell."

"Mr. Ewell: Yes, sir."

"The Court: You made statements here this morning accusing very reputable gentlemen of crookedness, didn't you?"

"Mr. Ewell: I did not accuse them of crookedness; I accused them of perjury in this answer, yes, sir."

A moment later the court said:

"Now this letter is in a sense an attack upon Judge Purkitt."

"Mr. Ewell: I think it is; yes, sir."

The court thereupon adjudged petitioner guilty of contempt of court upon the ground that said letter was an attack upon the honor and integrity of the court; that petitioner's part in dictating said letter, having it written by said witness, presenting it to Judge Purkitt through the mail, and afterwards injecting it into proceedings on the hearing of said motion, coupled with the language used by petitioner during the hearing of said motion, was contemptuous; and petitioner was thereupon sentenced accordingly.

[2, 3] Aside from the question of whether the innuendoes arising from the language employed in said letter were defamatory of the court and the judge thereof, we believe that the contents of said letter show without doubt that the manifest purpose of preparing the same and sending it at that particular time to the judge who tried the case was to create a feeling of resentment toward and prejudice his mind against those whom he had indicated in his opinion should be successful in said litigation, and thus,

by such improper means, attempt to persuade the judge, if possible, to change his views upon the law and the facts as expressed by him in said opinion and to decide the case favorably to the interests of Mays and petitioner. The sending of such a letter under those circumstances to a judge who still had before him the duty of exercising judicial functions in the case was, we think, clearly an unlawful interference with the proceedings of the court and an attempt to obstruct the course of justice, and therefore a contempt of court. The fact that petitioner dictated said letter and abetted in the sending the same to the judge rendered him as culpable as if he had personally signed the letter.

[4] The situation presented is not one wherein an attorney representing a party to the action, in good faith, calls attention of the judge, by letter, after mailing a copy to opposing counsel, to some inadvertent statement of law or fact set forth in the judge's written opinion. The letter here was made up principally of charges involving the moral turpitude of the other parties to the action in reference to which neither the writer of the letter nor any one else would have been allowed to testify in court. Moreover, the writing of the letter cannot be said to have been intended as an application for a new trial, because petitioner, as an attorney, was familiar with the code provisions to the effect that such application could be legally made only upon notice, after findings and judgment have been entered; neither can said letter be construed as a request for substitution of attorneys, because the law makes adequate provision for such substitution by motion, upon notice, at the hearing of which motion proof, either oral or documentary, may be introduced in support thereof.

When the petitioner afterwards, at the time of the hearing of said motion, without legal justification, asked that said letter be produced and offered it in evidence, with the obvious purpose of exploiting and emphasizing in public the charges of collusion and unlawful practices therein contained, and when, in the same discussion, or a part thereof, he declared that said letter was also an attack upon the judge who tried and decided the case, we think that petitioner was remiss in his duty, as an attorney and an officer of the court, "to maintain the respect due courts of justice and judicial officers" (Code Civ. Proc. § 282), and that his conduct in the respects mentioned was an aggravation of the contempt he had already committed by instigating the sending of said letter, and rendered him liable to punishment for contempt committed in the presence of the court.

The judgment of contempt is therefore sustained; the writ is discharged, and the petitioner remanded to the custody of the

sheriff holding the commitment; and it is ordered that upon the reapprehension of petitioner under said commitment, or his voluntary surrender in obedience thereto, the bail heretofore given by petitioner be exonerated.

We concur: TYLER, P. J.; CASHIN, J.

71 Cal. App. 800

RAINE EWELL, Petitioner, v. Hon. Louis H. WARD, Judge of the Superior Court of the City and County of San Francisco, Respondent. (Civ. 5150.)

(District Court of Appeal, First District, Division 1, California. March 20, 1925. Rehearing Denied April 18, 1925. Hearing Denied by Supreme Court May 18, 1925.)

Certiorari to Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Raine Ewell, of San Francisco, for petitioner.

KNIGHT, J. The matters presented by the petition filed herein for a writ of certiorari are discussed and decided in the opinion in *Ex parte Raine Ewell*, Crim. No. 1243, 236 P. 205, this day filed, and for the reasons therein stated the petition for the writ of certiorari is denied.

We concur: TYLER, P. J.; CASHIN, J.

72 Cal. App. 10

WAUGAMAN v. RICHARDSON et al.
(Civ. 2942.)

(District Court of Appeal, Third District, California. March 25, 1925.)

Appeal and error ⇐772—Relief from default for failure to file brief within time denied.

Where appellants did not file brief within 30 days after filing of transcript, affidavit of one of appellants' attorneys, stating that his associate is district attorney and affiant is deputy district attorney, and that they have been extremely busy with official business of county, and have been giving such time to preparation of brief as was possible, and did not believe that respondent's attorney would move to dismiss appeal without giving some notice, without stating any reason why brief was not filed or application made for extension, held not to warrant relief from default.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by A. L. Waugaman against A. L. Richardson and others. Judgment for plaintiff, and defendants appeal. On respondent's motion to dismiss appeal for failure to file

brief within required time, in which appellants applied for relief from their default. Application for relief from default denied, and appeal dismissed.

Henry S. Lyon, of Placerville, for appellants.

Thomas Maul, of Placerville, for respondent.

FINCH, P. J. The transcript on appeal herein was filed in this court on the 29th of December, 1924. March 7, 1925, the respondent filed notice of motion to dismiss the appeal on the ground that appellants had failed to file their points and authorities within 30 days after the filing of the transcript. Appellants' brief was thereafter filed on the 21st of March. Respondent's motion was heard and submitted March 23d. At the hearing the appellants applied for relief from their default. In support of the application for relief the affidavit of one of the attorneys for appellants was presented. Affiant therein states that his associate is district attorney of El Dorado county and the affiant is deputy district attorney; that "during all of the time since the filing of the said transcript on appeal both affiant and his said associate have been extremely busy with official business of said county of El Dorado, but had not neglected the preparation of appellants' brief, but had given to it such time as was possible between the performance of acts of official duty; that at the time their period of time for the filing of appellants' opening brief expired said attorneys were both busy with official duties, and the time was inadvertently allowed to pass without an application for an extension of time, but said attorneys did not believe that respondent's attorney would move to dismiss the appeal without giving some notice to them that he intended to insist that the brief should be immediately filed, or filed within some given time." No reason is stated why the brief was not prepared and filed or an application made for an extension of time during the five weeks succeeding appellants' first default. Neglect of the character of that stated in the affidavit has never been held sufficient ground for relieving a party from his default. *Weinmann v. Factor*, 63 Cal. App. 592, 219 P. 461; *Berendsen v. Babdaty*, 62 Cal. App. 185, 216 P. 385, and cases cited. Appellants' application for relief from their default is denied, and the appeal is dismissed.

We concur: HART, J.; PLUMMER, J.

71 Cal. App. 694

PEOPLE v. NELSON. (Cr. 837.)

(District Court of Appeal, Third District, California. March 16, 1925.)

1. Bastards $\S$ 17½—Evidence held to show defendant's failure to provide for his illegitimate child.

Evidence held to show a failure by defendant to provide for his illegitimate child, within meaning of Pen. Code, § 270.

2. Bastards $\S$ 17½—Agreement for support of illegitimate child is admission of parentage, and that defendant is willing to pay a certain sum.

Agreement for support of an illegitimate child is an admission of parentage, and that defendant is willing to pay certain sum, but is not evidence that such sum has been paid, or that agreement had been kept, or that amount stipulated to be paid is sufficient or within ability of defendant to pay.

3. Bastards $\S$ 17½ — Weight and effect of agreement for support of illegitimate child is for jury.

Weight and effect of an agreement for support of an illegitimate child is for jury.

4. Bastards $\S$ 17½—Instructions held to cover defendant's theory that his agreement for support of illegitimate child constituted a complete defense.

In prosecution for failure to support an illegitimate child, instructions held to cover fully defendant's theory that his agreement for support of such child and negotiations attendant thereon constituted a complete defense.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

William Nelson was convicted of unlawfully failing to provide for an illegitimate child, and he appeals. Affirmed.

Charles Kasch, of Ukiah, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was indicted for unlawfully failing, without legal excuse, to furnish necessary food, clothing, etc., for an illegitimate child, and thereby violating the provisions of section 270 of the Penal Code. Judgment of conviction followed, and the defendant's motion for a new trial being denied, the matter is now before this court upon the defendant's appeal. The judgment entered in this cause provided, first, that the defendant should be confined in the county jail of the county of Mendocino for a period of two years; secondly, that execution of judgment should be suspended, and the defendant placed upon probation, conditioned upon his paying forthwith to the mother of the illegitimate child the sum of \$326.50, on account of arrears in monthly payments, at the rate of \$25 per month, and

that the defendant, beginning with the 1st day of January, 1925, during said period of two years, deposit in the Savings Bank of the county of Mendocino the sum of \$25 per month during each and every month of said two years' period, said money to be deposited to the credit of the mother of the illegitimate child involved, to be used by her for its support and maintenance. The record shows that the initial payment required by said judgment was complied with, and the defendant was thereupon allowed his liberty, subject to the provisions of the probationary order of said court as to future payments.

The record further shows that during the course of the trial there was introduced and read in evidence the following agreement:

"Agreement.

"This agreement, made and entered into this 28th day of August, 1923, by and between Inias Wilkinson, party of the first part, and William Nelson, party of the second part, both unmarried and both of Ukiah, California, witnesseth:

"That whereas, a male child was born to the party of the first part at the Langland Hospital at Ukiah, California, on the 25th day of August, 1923, with Dr. S. L. Rea as attending physician, and whereas the parties hereto are the mother and father respectively of said child, and the said parties are not husband and wife:

"Now, therefore, it is hereby agreed that for and in consideration of the payment by the party of the second part to the party of the first part of the sum of \$460 the receipt whereof is hereby acknowledged by the party of the first part, and for and in consideration of the covenants and agreements hereinafter contained to be performed by the respective parties hereto, the party of the first part hereby releases the party of the second part from any and all claims which the party of the first part individually may now have or hereafter acquire against the party of the second part resulting from or growing out of the birth of said child as aforesaid, or from any sexual relations between the parties hereto.

"It is further agreed that the party of the second part shall pay monthly to the party of the first part as and for payment for the custody, care, education, maintenance, and support of said minor child the sum of \$25 per month until such time as such sum shall be insufficient for said purposes, and thereafter the party of the second part will pay to the party of the first part such additional sum as may be necessary for such purposes, said payments to begin at the date hereof, and thereafter to be paid on the 28th day of each and every calendar month until such time as said minor child shall be legally adopted, or until such other time as the party of the second part shall be freed of his obligations to said child by operation of law.

"It is further agreed that the party of the second part does hereby consent to the adoption of said minor child by any person or persons to whom the consent of the party of the first part shall be given for such adoption.

"This agreement is executed in duplicate, and time is the essence hereof.

"In witness whereof, the parties hereto have set their hands the day and year first hereinabove written. Inias Wilkinson, Party of the First Part. William Nelson, Party of the Second Part."

The defendant, in support of his appeal, alleges that the evidence is insufficient to show that the failure of the defendant to support his minor child was willful, or that such failure was without legal excuse, and that the court erred in refusing to give certain instructions asked by the appellant. In the appellant's brief we find the following statement: "The crime with which the appellant was charged was under consideration by this court in the recent case of *People v. Swiggy*, 232 P. 174. This particular section of the Penal Code having been so recently under consideration by this court, it will not be necessary for appellant to refer to any other decisions;" the contention of the appellant apparently being that the execution and introduction of the above agreement constitutes an answer to the charge of willful failure on the part of the defendant.

[1] After the execution of the agreement which we have hereinbefore set forth, it appears that the defendant paid the sum of \$460, and thereafter paid the further sum of \$119.50, and that for a period of some eight months preceding the finding of the indictment herein, nothing had been paid by the defendant for the support and maintenance of the minor child referred to in the agreement. During this period of time there appears to have been considerable negotiations between attorneys representing the defendant and parties representing the mother of the minor child relative to the sums which should be paid. The circumstances surrounding this case show that, owing to the premature birth of the child, a considerable expenditure of money was involved, and the appellant's defense was apparently based, more or less, upon the theory that the charges connected with and attendant upon the birth of the child were unnecessarily excessive, and the figures showing the amount of money expended by the defendant are presented to this court and considerable argument based thereupon. These were all matters, however, to be addressed to the jury, and whether due to the high cost of living, or to the high cost of sin, the finding of the jury thereon is conclusive upon this court. The fact remains that, notwithstanding the payment of such charges during the period of months which we have mentioned, nothing was advanced by the defendant toward the further support and maintenance of the minor child. The defendant also sets forth that the money to make the initial payment made by him was borrowed from one of his relatives. The amount of money earned by

the defendant during the period of time was also shown to the jury. The complaining witness testified as to her efforts to obtain support for the child, and to the sacrifices she made for the support of the infant, and of the moneys necessarily expended by her. The theory of the prosecution was, and the testimony introduced tended to show, that the negotiations being carried on by the defendant were adopted as a means of avoiding payment, while on the part of the defendant, it was insistently contended that he was desirous of fixing, or coming to an agreement, as to some exact amount that should be paid monthly for the support of the minor child, and that such sum should be within his ability to pay.

Without setting forth the evidence in detail, it is sufficient to say that there was a failure on the part of the defendant, within the terms of the statute, if the jury believed the testimony introduced by the prosecution, notwithstanding the fact that the testimony introduced on the part of the defense, if accepted by the jury for its face value, would have warranted a verdict in his favor.

[2, 3] The argument presented to us on this appeal, based upon the case of *People v. Swiggy*, supra, does not appear to us to be well founded. The *Swiggy* Case did not decide that the execution of the agreement between the father and mother of the minor child constituted a complete defense to a charge based upon the provisions of section 270 of the Penal Code. That case was intended to and does decide only that an agreement such as appears in the record of the instant case is admissible in evidence to be considered by the jury, along with other testimony, for the purpose of determining whether or not the defendant is the parent of the illegitimate child, and whether or not there has been any willful failure on his part to support the same. Such an agreement is merely a piece of evidence to be considered by the jury for whatever it may be worth. In the case at bar, it amounts to an admission of parentage, and that the defendant is willing to pay a certain sum, or was, at the time of the execution of the agreement, but it is not evidence that such sum has been paid, or that the agreement has been kept, or that the amount stipulated to be paid is sufficient for the purposes, or within the ability of the defendant to pay. The *Swiggy* Case goes no further than to hold that such testimony is admissible. Its weight and effect are for the jury.

[4] The appellant finally complains that the court erred in refusing instructions based upon the theory that the agreement to which we have referred and the negotiations attendant thereupon constituted a complete defense. The instructions of the trial court, however, cover these points fully and completely, and were couched in such clear and

concise language that we set them forth herein as a complete answer to the appellant's contentions:

"The omission, however, must be willful, which means with a deliberate intention or set purpose. Willfulness is a vital ingredient of the crime, and implies upon the part of the defendant knowledge and purpose to do wrong. In other words, before you would be warranted in finding defendant guilty, you must be satisfied to a moral certainty that he knowingly and with a purpose to do wrong failed to provide for his said child. If, therefore, you find that the defendant offered to support the child within his means by paying a reasonable sum for that purpose, taking into consideration his earnings, leaving to Miss Wilkinson, the complaining witness, the right to fix such amount, and Miss Wilkinson failed or neglected so to do, then and under such circumstances, I charge you that the element of willfulness in his omission to furnish such support is wanting, and the defendant is entitled to an acquittal. In order to convict the defendant in this case, the evidence must satisfy you beyond a reasonable doubt of the following facts: (1) That the defendant is the father of the child. (2) That defendant did not support the child, within the means of the defendant. (3) That defendant's failure to support the child was with the knowledge and purpose to do wrong, and with an evil intent or set purpose to do so. (4) That defendant's failure to support the child was without lawful excuse, as defined in these instructions.

"All four of the foregoing elements must be established by the evidence, and if you have any reasonable doubt as to whether any one of them has been established, you must give the defendant the benefit of such doubt and find him not guilty.

"In determining whether the omission of the defendant to provide for the minor child was with the purpose to do wrong, the jury should take into consideration all of the actions and conduct of the defendant and his statements, if any, and his offers to perform, if any, and his promises to perform, if any such promises were made.

"Gentlemen of the jury, a contract purporting to have been entered into between Miss Wilkinson and the defendant has been introduced in evidence in this case. I charge you that the defendant should not be convicted of the crime charged because he did not fulfill the terms of that contract. Whether the defendant failed to pay or offer to pay \$25 per month under that contract is wholly immaterial. Generally speaking, a person is not guilty of a criminal offense for failure to live up to the terms of his contract. The charge here is failure to provide for a minor child, and the question of the guilt or innocence of the defendant must be determined by you independent of any written contract. Any liability under the contract is to be determined in a civil and not in a criminal action, such as this. I charge you that in such cases as this, inability to pay is a lawful excuse. If you find from the evidence that defendant borrowed \$460, or any part thereof, to make an initial payment to Miss Wilkinson, the defendant is under a legal obligation to repay this loan. While there is a legal obligation on a parent to support his child, a failure so to do

is not criminal if the parent has not the financial ability. I charge you that if you find from the evidence that the defendant, or some person authorized in his behalf so to do, offered to pay Miss Wilkinson a reasonable sum monthly for the support of the child, leaving Miss Wilkinson to state such reasonable amount, and Miss Wilkinson refused to accept such amount, then the defendant is excused from making such payment, and your verdict should be not guilty."

The judgment and order of the trial court are affirmed.

We concur: FINCH, P. J.; JONES, Justice pro tem.

71 Cal. App. 492

MARYLAND CASUALTY CO. v. FIDELITY & CASUALTY CO. OF NEW YORK.
(Civ. 4893.)

(District Court of Appeal, First District, Division 1, California. March 4, 1925. Hearing Denied by Supreme Court May 2, 1925.)

1. Contracts $\S$ 136—Contract, void as against public policy, cannot be treated as valid by invoking estoppel to assert its validity.

Contract, void as against public policy, cannot be treated as valid by invoking estoppel to assert its validity.

2. Contracts $\S$ 136—Party to contract void as against public policy cannot waive right to set up defense of illegality.

Party to contract void as against public policy cannot waive right to set up defense of illegality in action thereon.

3. Contracts $\S$ 138(1)—Relief will be denied in suit or contract void as against public policy, and parties will be left as they were found.

In suit on contract void as against public policy, relief will be denied, and parties will be left where they were found.

4. Contracts $\S$ 108(2)—Contract of insurer, liable for careless treatment by hospital to pay insurance carrier of employer expenses incurred through mistake in treatment of injured workman, held not void as against public policy.

Agreement of insurer of hospital, which was liable for carelessness and negligence of employees, to pay insurance carrier of employer expenses incurred because of extra treatment, made necessary through mistake of hospital employee in treating injured workman, in return for keeping such mistake secret, was not void as against public policy, and insurance carrier may recover thereon.

5. Constitutional law $\S$ 70(1) — Courts may declare void as against public policy contracts which, though not specifically forbidden by legislation, are clearly injurious to society.

Although it is primarily Legislature's prerogative to declare what contracts shall be unlawful, courts, following spirit and genius of law, written and unwritten, of a state, may declare void as against public policy contracts

which, though not in terms specifically forbidden by legislation, are clearly injurious to society.

6. Contracts ⇨108(1)—In determining what is public policy, recourse may be had to enacted law, and to decision of courts of last resort.

In determining whether contract is against public policy, recourse may be had, not only to enacted law, but also to decisions of courts of last resort.

7. Contracts ⇨108(1)—Before court refuses to recognize contract stipulating for nothing *malum in se* or *malum prohibitum*, it should be satisfied that advantage to public from its holding is certain and substantial.

Before court holds void as against public policy contract made in good faith and stipulating for nothing *malum in se* or *malum prohibitum*, it should be satisfied that advantage to accrue to public from its holding is certain and substantial, not theoretical or problematical, and based on certain economical or sociological problems.

8. Contracts ⇨108(1)—Power to invalidate agreements on ground of public policy should be used, only where dangerous tendency clearly and unequivocally appears on contract itself.

Power to invalidate agreements on ground of public policy should be used, only where dangerous tendency clearly and unequivocally appears from contract itself.

9. Champerty and maintenance ⇨9—At common law, intermeddling was defined as champerty and maintenance, and was punishable by fine and imprisonment.

At common law, intermeddling in suits was defined as champerty and maintenance, and was punishable by fine and imprisonment.

10. Contracts ⇨108(2)—To render promise to keep silent mistaken treatment of patient illegal, it must have been for sake of gain.

To render promise by employer's insurance carrier to keep secret mistake in hospital's treatment of injured workman illegal, as against public policy, it must have been made for sake of gain.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by the Maryland Casualty Company against the Fidelity & Casualty Company of New York. From the judgment for defendant, plaintiff appeals. Reversed.

Hearing denied; **LAWLOR, J.** (Acting C. J.), and **SHENK, J.**, dissenting.

John Ralph Wilson and Charles B. Morris, both of San Francisco, for appellant.

Chickering & Gregory, of San Francisco, for respondent.

TYLER, P. J. Action to recover money paid out by plaintiff at the instance and request of defendant.

The material facts disclose the following situation: Plaintiff was the insurance carrier of a certain company under a workmen's compensation policy. While this indemnity policy was in full force and effect, one of the company's laborers suffered an injury, arising wholly by accidental means and in the course of his employment, by which he was ruptured, and he was thereupon conveyed at plaintiff's expense to a hospital for the purpose of having his injuries treated. During that process an employee of the hospital, in the performance of his duties, delivered to a surgeon attending the injured man a certain chemical preparation to be hypodermically injected into the patient's body. Through the negligence or carelessness of this attendant a different substance was substituted for this preparation, the injection of which caused pain and suffering to the patient and aggravated his injury, resulting in delay in his eventual recovery and an additional expense of \$1,000, the amount here sued for. The hospital carried an indemnity policy of insurance against liability for negligence of its employees with defendant. Both plaintiff and defendant knew of the mistake which had been made, and that in consequence thereof delay would result in the injured man's recovery. The latter knew nothing whatever concerning the matter. Defendant thereupon represented and stated to plaintiff that, if it would not inform the patient of the injurious effects of the injection of the wrong preparation, and would pay the sum by which the expenses of the treatment had been increased in the hospital, defendant would reimburse plaintiff for such additional outlay. Plaintiff agreed to this arrangement, and, after it had made payment to the injured employee of all moneys due from it as the insurance carrier of the employer, it paid the further sum of \$1,000 in settlement of the additional expense arising in the manner above stated. It was upon this promise of reimbursement by defendant that the complaint is predicated.

A demurrer to the complaint was sustained upon the ground that the contract was against public policy and good morals and therefore unenforceable. In rendering its decision upon this point, the learned trial court expressed its views in writing, and respondent has favored us with a transcript thereof. It relies for an affirmation of the judgment upon the reasons therein given, namely, that the contract upon which the action is based is so mischievous in its tendency as to merit judicial proscription.

Before entering into a discussion of this subject, it is perhaps as well to dispose of a preliminary objection which plaintiff interposes to the right of defendant to invoke the defense that the agreement is against

public policy. It is contended by it that it would be a reproach to the law if respondent should be permitted by its trick and device to evade an obligation which it incurred to appellant by procuring from it the very favor which it now seeks to disavow under the pretext of the illegality of its promise.

[1-3] It has not seemed satisfactory to some able and just minds that courts should hold that, where parties to a contract are in *pari delicto*, they will leave the delinquents where they find them, because such a rule permits one to plead his own wrong or infamy, as the case may be, and thereby obtain an unconscionable advantage over his adversary through being relieved of an obligation for the assumption of which he has received a valuable consideration. Courts, however, are not called upon to settle any question of conscience between the parties, but are interested only in the higher duty of protecting society from the effect of contracts made in disregard of its interests. While, therefore, the defense advanced may be one which ill lies in the mouth of defendant to assert, nevertheless, if public policy requires it, the plea will be permitted even if it allows one to retain an advantage without rendering the stipulated return. Estoppel does not apply in such a case. A contract, void as against public policy, cannot be treated as valid by invoking such principle; nor can a party thereto waive his right to set up the defense of illegality in an action thereon brought by the other party. *Millett v. Aetna Trust Co.*, 70 Ind. App. 451, 122 N. E. 344. In a suit brought upon such a contract relief will be denied and the parties left where they are found. *Napa Valley, etc., Co. v. Calistoga, etc., Co.*, 38 Cal. App. 477, 176 P. 699.

[4] The sole question, therefore, with which we are concerned, is the validity or invalidity of the agreement as it is presented to us. As above indicated, the trial court was of the opinion that the agreement was void as being against public policy, in that it tended to violate a trust. It was further of the opinion that it might be classed with those agreements made for the purpose of hindering or defeating the collection of an indebtedness by a creditor of one of the parties, and therefore void.

In support of the trust theory, it is argued that ordinarily an injured man places himself unquestionably and trustingly under the care of those whom his employer or the employer's insurance carrier selects, and that this being so, the employer owes to his injured employee the duty of providing, directly or through the insurance carrier, reasonably good medical care and attention; that he becomes for the time being a sort of trustee of the injured employee's body for the purpose of restoring his health and vigor, and the hospital and attending physicians are agents for that purpose; and that, if through

the negligence of such agents the injuries are aggravated or restoration retarded, then not only is there a grievance sustained by the employee himself, but there results also an impairment in some degree of the state industrial energy, as the agreement leads to a lessening of the care and watchfulness due to an injured employee, contrary to the interests of society.

It may be that an agreement which is calculated to induce dereliction or laxity in the performance of a public or private duty is hostile to the interests of society, but the facts of this case do not in our opinion present such a situation. Plaintiff had paid out and without question a sum of money that it was bound to pay under its indemnity policy. It had further agreed at the request of the defendant to advance an additional sum for which the latter was solely responsible for the reason heretofore stated, upon the understanding that the injured employee should be kept in ignorance of the arrangement. This understanding, however, in no manner affected the patient's rights, and we fail to see how vice was imported into the transaction by reason thereof, or how the arrangement was in any manner controlled or affected by public policy.

[5] An exact definition of public policy would be difficult to formulate. One that has been frequently approved is that adopted by Lord Brougham, namely, that no one can lawfully do anything which has a tendency to be injurious to the public welfare. The application of the principle to a given state of facts is not always easy, though it admits of some degree of latitude. Public policy often changes as the law changes. It is manifest, therefore, that there can be no single or fixed standard governing it. The question, what is public policy in a given case, is as broad as the question of what is fraud. It is primarily the prerogative of the Legislature to declare what contracts and acts shall be unlawful; but courts, following the spirit and genius of the law, written and unwritten, of a state, may declare void as against public policy contracts, which, though not in terms specifically forbidden by legislation, are clearly injurious to the interests of society. When the fact is called to the attention of a court that a contract sought to be enforced is illegal, it will refuse the plaintiff any relief, and will generally leave the parties where it finds them.

[6-8] In determining what is public policy in a given jurisdiction, recourse may be had, not only to enacted law, but also to the decisions of the courts of last resort. In considering this question, many courts have cautioned against recklessness in condemning contracts as being against public policy. Thus, it has been said by an English judge that public policy is an unruly horse astride of which one may be carried into unknown

paths. A similar caution is one to the effect that, before a court refuses to recognize a contract which is made in good faith, and which stipulates for nothing which is malum in se or malum prohibitum, it should be satisfied that the advantage to accrue to the public from its holding is certain and substantial, not theoretical or problematical, and based upon certain economic or sociological problems. The power to invalidate agreements on the ground of public policy is so far reaching and so easily abused that it should be called into action only in case where the dangerous tendency clearly and unequivocally appears from the contract itself. Courts are reluctant, therefore, to declare a contract void as against public policy, and will refuse to do so, if by any reasonable construction it may be upheld.

[9] As above intimated, the mere agreement of the parties not to disclose their arrangement to the injured employee, to our minds, in no manner encouraged a relaxed responsibility or a lessening of the care and watchfulness due to him, contrary to the interests of society, which would justify its denouncement. The plaintiff owed no duty to the employee to divulge to him the fact that his recovery had been delayed through carelessness. That was a matter between the patient and the institution employed to care for him, but which did not concern the plaintiff. The policy of the law is and always has been against intermeddling in suits or stirring up strife or litigation, and the quieting of disputes and the adjustment and settlement of litigation have always been and always should be favored (2 Elliott on Contracts, § 731); and at common law intermeddling was defined as champerty and maintenance, and was punishable by fine and imprisonment.

[10] If, then, the insurance carrier owed no duty to the injured employee to divulge to him the arrangement it had entered into for the purpose of paying the additional expense of his illness, there certainly could be no relation of trust existing between them, and, consequently, no violation of such relation. It must be remembered that the employee is not here complaining of any injustice which he has suffered. The plaintiff has discharged its full liability under its indemnity policy, and in addition all amounts due (so far as it here appears) by reason of the delay in the patient's recovery attributable to the negligence of the hospital attendant. No confidential relation of any kind was breached, even assuming that such relation existed. And, we may add, to render a promise of the character here involved illegal, it must have been for the sake of gain. *Ward v. Allen*, 2 Mete. (Mass.) 53, 35 Am. Dec. 387.

Nor can the agreement, as claimed, be properly classed with those condemned upon the ground of public policy which are entered

into for the purpose of hindering or delaying the collection of an indebtedness by a creditor of one of the parties. While such agreements are inimical to the social policy, no question of that kind is here involved. There was no attempt to hinder or delay the collection of any sum due the injured employee. On the contrary, the arrangement insured to him, so far as the complaint shows, everything to which he was entitled.

The cases relied upon for an affirmance of the judgment do not support respondent's contention. The case of *Bliss v. Matteson*, 52 Barb. (N. Y.) 348, involved the validity of an agreement to control the action of the directors of a corporation in voting to pay plaintiff's claim irrespective of its legality. It was there held that an arrangement which is designed, or which in its nature or effect tends to lead persons charged with the performance of trusts or duties for the benefit of others to violate or betray them, is contrary to public policy. There is no question concerning the correctness of this rule.

Johnston v. Fargo, 184 N. Y. 379, 77 N. E. 388, 7 L. R. A. (N. S.) 537, 6 Ann. Cas. 1, involved the validity of an agreement whereby an employer sought to abridge by contract his common-law liability, and it was held that he could not do so as such an agreement was void as against public policy. The same may be said as to the application of the doctrine to this case. 2 Elliott on Contracts, § 769 et seq.

Church v. Muir, 33 N. J. Law, 320, merely holds that a contract, the purpose of which is to protect a debtor against just claims of creditors, is void.

Neville v. Dominion of Canada News Co. (L. R. 1915, 3 K. B. 560) was a case where a newspaper for a consideration agreed to refrain from commenting upon a fraudulent scheme. The contract, having its inception in fraud, was very properly condemned.

In *Eggleston v. Pantages*, 103 Wash. 458, 175 P. 34, it appears that an action had been instituted for the appointment of a receiver by certain stockholders without the filing of a complaint (as, it seems, may be done in the state of Washington). After the papers had been served, a contract was made between the parties, whereby, in consideration of a promise to pay a certain sum of money, the plaintiff agreed to withhold the complaint from the files and give no information to any one concerning the same or the commencement of the suit, thereby preventing those interested from learning the true state of facts. Here was a clear attempt to conceal judicial proceedings and to obstruct justice for the purpose of wronging others interested. Agreements of this character are clearly against public policy. 2 Elliott on Contracts, § 716.

In conclusion, it may be said that it seems clear to us that there is nothing in the agree-

ment here involved that in any manner condemns it, and that the plaintiff, having parted with his money in reliance thereon, is entitled to recover it.

This conclusion renders unnecessary a discussion of the further question raised by appellant that it is possible for it to prove its execution without regard to the promise of secrecy, and that this being so, the complaint in any event states a cause of action.

For the reasons given, the judgment is reversed.

I concur: KNIGHT, J.

71 Cal. App. 730

PEOPLE v. HENDRICKS. (Cr. 839.)

(District Court of Appeal, Third District, California. March 19, 1925. Hearing Denied by Supreme Court May 18, 1925.)

1. Criminal law § 742(1)—Truth of contradictory testimony is for jury.

Which of two officers correctly related what occurred when defendant was asked about stolen articles was question for jury on trial for burglary.

2. Criminal law § 510—Testimony of accomplice must be corroborated.

Under Pen. Code, § 1111, testimony of accomplice must be corroborated by other evidence tending to connect accused with commission of offense.

3. Criminal law § 407(2)—Refusal of accused to explain presence of stolen articles found in his garage was an admission of guilt.

Refusal of defendant to answer when asked about stolen articles found in garage, part of which was occupied by him, was in nature of admission of guilt.

4. Criminal law § 511(7)—Misrepresentations, contradictions, or silence of accused will have effect of confession or admission in corroborating accomplice.

Misrepresentations, contradictions, or silence of accused, when asked about incriminating evidence against him, will usually have same effect as a confession or admission in corroborating accomplice, as required by Pen. Code, § 1111.

5. Criminal law § 511(1)—Evidence corroborating testimony of accomplice sufficient to sustain conviction.

In prosecution for burglary, where accomplice testified to guilt of accused, corroborating evidence held sufficient to sustain conviction.

6. Criminal law § 780(3)—Refusal to instruct that testimony of accomplice is to be viewed with distrust not error.

Refusal to instruct that testimony of accomplice is to be viewed with distrust is not error.

7. Criminal law § 829(1)—Refusal of instructions fully covered by others given not error.

Refusal of requested instructions fully covered by other instructions given is not error.

8. Witnesses § 274(2)—Cross-examination as to whether character witness had ever discussed facts as to accused's connection with auto accessory thieves, not improper.

In prosecution, for breaking into garage with others and stealing automobile accessories, cross-examination of character witness as to whether he had ever discussed with any one connection of accused with theft of automobile accessories held not improper.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

H. H. Hendricks was convicted of burglary in the second degree, and he appeals. Affirmed.

Peter J. Wilkie, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of burglary of the second degree. He prosecutes this appeal from the judgment of conviction and the order denying his motion for a new trial.

At the time of the alleged burglary the defendant and his wife resided in Sacramento. He was in the employ of a construction company, and his wife was working in a cannery. His wife's brother, Charley Hagerty, a boy of the age of 15 years, lived with them. In the year 1923, at the town of Gridley, the defendant had a speaking acquaintance with Raymond Cherry, of the age of 20 years, an accomplice in the alleged burglary. They later worked in a cannery at Palermo, but their acquaintanceship there was not intimate. In June, 1924, the defendant rented half of a double garage in which to keep his Oakland automobile. On the 8th of July Cherry and a lifelong friend and chum, Bob Webb, a boy of the age of 17 or 18 years, came to Sacramento and secured employment in the cannery in which the defendant's wife worked. On their arrival here the defendant introduced Cherry to the owner of the aforesaid garage, and Cherry rented the half of the garage not occupied by defendant's automobile, and thereafter kept his Ford automobile therein. The garage consisted of but one room with space therein for two machines.

Cherry testified that during the night of August 11th he and the defendant broke into a garage in which a Ford automobile was stored and stole therefrom a storage battery, a pump, and a sun visor, and carried them to the garage in which they kept their automobiles. The defendant denied that he in any manner participated in the burglary or was present at its commission.

The defendant further testified that during the evening of August 18th he took cer-

tain persons to a place near Florin, his wife, Cherry, and Webb accompanying him; that on his return he reached home about 10 or 10:30 o'clock; that he left his wife there and then drove to the corner of Twentieth and F streets, where he parked his automobile, arriving there about 10:45, Cherry, Webb, and Haggerty accompanying him; that he and Cherry then went to the alley between Nineteenth and Twentieth streets to look for a man to take the defendant's place with the construction company the next day; that he did not know where this man lived, except that the man had told him that he lived on that alley; that he did not find the man he was looking for; that he and Cherry had "just come to the car" on their return from the alley when police officers arrived and took them all into custody; that on his return from the alley to the automobile Webb was in the machine with an automobile jack which he said he had taken from an automobile that night. The defendant also testified that he did some repair work on Cherry's automobile on the evenings of August 11th and 12th, and that he first saw the stolen sun visor in their garage in the evening of the latter day.

[1] One of the police officers testified that on the 18th of August the defendant's car was parked at the corner of Twentieth and F streets, in front of a vacant lot, at 11:30 at night, when the officers discovered it and took the occupants into custody. The defendant and Cherry were placed in the county jail, and on the following day Cherry was taken to their garage, where the officers found the stolen battery installed in Cherry's automobile. The pump was in his machine and the sun visor was in front thereof, leaning against the wall. The officers returned to the jail and asked defendant about the stolen articles. One of them testified that defendant refused to answer their questions. Another testified that defendant said he "knew nothing about them." It was for the jury to determine which officer correctly related what occurred. The owner of the stolen articles testified that his garage had been broken into and the enumerated articles taken therefrom.

[2-5] According to his own testimony, Cherry was an accomplice. The conviction cannot be upheld, unless his testimony is corroborated by other evidence tending to connect the defendant with the commission of the offense, and "the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Pen. Code, § 1111. If the defendant told the officers that he knew nothing about the stolen articles, then his statement was false, because he testified that he saw the sun visor in the garage on the 12th of August. If he refused to make any reply when he was asked about the incriminating evidence

against him, then his silence was in the nature of an admission of guilt. "Misrepresentations, contradictions, or silence of defendant when accusing statements are made usually will have the same effect as a confession or admission as corroborative of the accomplice." 16 C. J. 707; *Holt v. State*, 28 Ga. App. 758, 113 S. E. 49; *Ettinger v. Commonwealth*, 98 Pa. 338. "When a defendant, under conditions which fairly afford him an opportunity to reply, stands mute in the face of an accusation of crime, the circumstance of his silence may be taken against him as evidence indicating an admission of guilt." *People v. Bringhurst*, 192 Cal. 748, 752, 221 P. 897, 898; *People v. Ong Mon Foo*, 182 Cal. 697, 703, 189 P. 690; *People v. Byrne*, 160 Cal. 217, 234, 116 P. 521; *People v. Amaya*, 134 Cal. 531, 533, 66 P. 794. In connection with defendant's silence or his false statement, as the fact may be, relative to knowledge of the articles which were stolen, the jury probably attached some importance, and reasonably so, to the fact that the stolen articles were found in the garage occupied by defendant. The evidence of what occurred during the evening of August 18th was admitted without objection; the greater part thereof being the defendant's own testimony. It cannot be said that the corroboration is insufficient.

[6, 7] Appellant contends that the court erred in refusing to instruct the jury that "the testimony of an accomplice is to be viewed with distrust." In answer to the contention it is sufficient to cite the case of *Hirshfeld v. Dana*, 193 Cal. 142, 223 P. 451, where the question is exhaustively considered and decided adversely to appellant's contention. Complaint is made of the court's refusal to give another instruction proposed by defendant. Every proposition of law contained in the proposed instruction is fully covered by other instructions which were given.

[8] Complaint is made of the latitude allowed the district attorney in the cross-examination of character witnesses produced in behalf of defendant, and who testified that his reputation for honesty was good. One of such witnesses was asked questions as follows:

"Did you ever discuss anything with anybody in Sacramento about him being connected with a band of automobile accessory thieves? Did you ever discuss with anybody the fact that he was connected with two young men of the ages of 17 to 20, and that they had stolen an automobile jack and wrenches from a man's car, the owner's name being Mr. Pierce, of 1701 G street, and that they took some tools from a White truck belonging to a man named Roslyn, that they took a pair of side wings from a car at Del Paso Park, belonging to Mr. Harry P. Leach, and that they took a motor meter from a car belonging to a man named W. N. Aldrich?"

The questions were answered in the negative. It was not error to overrule defendant's objections to the questions. *People v. Stennett*, 51 Cal. App. 370, 197 P. 372; *People v. Burke*, 18 Cal. App. 72, 122 P. 435.

The judgment and the order are affirmed.

We concur: PLUMMER, J.; JONES, Justice pro tem.

71 Cal. App. 668

A. C. BLUMENTHAL & CO., Inc., v. CRYER et al. (Civ. 4629.)

(District Court of Appeal, Second District, Division 1, California. March 14, 1925.)

1. Municipal corporations ⇨601—Zoning ordinances authorized.

Zoning ordinances establishing strictly private residence districts are within police power, delegated to municipality by Const. art. 11, § 11, and authorized by St. 1917, p. 1419.

2. Municipal corporations ⇨625—That inclusion of property in zone depreciates value not controlling on question of validity of zoning ordinance.

That inclusion of property in zone, wherein construction of apartment houses is forbidden by ordinance, depreciated its value is not of controlling significance on question of validity of such ordinance.

3. Municipal corporations ⇨601—Zoning ordinance may permit existing uses.

Zoning ordinance permitting continuation of existing uses of property held not void, power to zone not being limited to protection of established districts.

4. Municipal corporations ⇨11(4)—Validity of severable provision of zoning ordinance authorizing exceptions not considered, in absence of exception made affecting particular case.

Provision of zoning ordinance, authorizing council to make exceptions to restrictions established, held severable from rest of ordinance, which would be unimpaired even if such provision were invalid, so that question of its validity need not be determined, in absence of exception made affecting merits of particular case.

Original application by A. C. Blumenthal & Co., Inc., for writ of mandate to compel George E. Cryer, Mayor of the City of Los Angeles, and others, as Members of the City Council and Board of Public Works, to issue a building permit. Writ denied.

Milton M. Cohen, of Los Angeles, and Jerome H. Kann, for petitioner.

Jess E. Stephens, City Atty., and Lucius P. Green, Asst. City Atty., both of Los Angeles, for respondents.

CONREY, P. J. This is a proceeding in mandamus to compel respondents, and particularly the Board of Public Works of the

city of Los Angeles, to issue to petitioner a permit for the construction of a class A fireproof apartment house upon certain property owned by petitioner. The application of petitioner for such permit was denied by the board of public works, upon the ground that petitioner's property is situated within the territory described as zone A in ordinance No. 42666 (N. S.) of said city, as amended by ordinance No. 43779 (N. S.), which ordinances provide that "no building, structure or improvement shall be erected, constructed, established, altered or enlarged in the A zone which is designed, arranged or intended to be occupied or used for any purpose other than a single family dwelling. * * *" The building proposed to be erected by petitioner would contain many apartments.

Petitioner contends that the act of the Legislature of 1917 authorizing municipalities to divide cities into zones for regulation of property uses, and the zoning ordinance of the city of Los Angeles prohibiting multiple residence buildings in residence districts, are obnoxious to the Constitution of California and the Constitution of the United States, and are therefore void; that the said act of 1917 (Stats. 1917, p. 1419), and the said zoning ordinance are unreasonable, arbitrary, and oppressive in conferring upon the city council and the planning commission a wide and unregulated discretion in controlling the use of private property; that the said zoning ordinance, in permitting the continuation of prior use of improvements and penalizing a similar use thereafter, and also in authorizing the city council to make exceptions to the restrictions established by the ordinance, renders said ordinance discriminatory and void. The argument for petitioner, in support of its objections to the ordinance, includes a statement of the principles governing the exercise of the police power, and reviews many decisions of the courts in this state and elsewhere applying to the particular subject now before the court.

[1] Two recent decisions of the Supreme Court of California have definitely passed upon all of the questions involved in this action. *Miller v. Board of Public Works*, (Cal. Sup.) 234 P. 381; *Zahn v. Board of Public Works* (Cal. Sup.) 234 P. 388. The Zahn Case affirms the validity of the same ordinance to which petitioner's objections herein are directed. In the Miller Case the court declared that the power to pass zoning ordinances is conferred upon municipalities in California by the fundamental law of the state (Const. of Cal., art. 11, § 11), and by a legislative enabling act (Stats. 1917, p. 1419). The validity of the enabling act was assumed by the court. After reviewing many decisions on the subject of zoning ordinances the court said:

"This brings us naturally to the question of whether or not there may be legally established, as a part of a comprehensive zoning plan, strictly private residential districts from which are excluded and absolutely prohibited general business enterprises, apartments, tenements and like structures. We are of the opinion that it may be done; that the establishment of such districts as a part of a systematic and carefully considered and existing zoning plan is a legitimate exercise of the police power delegated to the municipality. * * * There are some decisions which do not uphold the validity of a zoning ordinance establishing strictly residential districts. We are of the opinion, however, that the better-reasoned cases are in favor of the validity of comprehensive zoning which establishes strictly private home districts and that the most which can be said of the cases to the contrary is that they merely show that this is a question upon which reasonable minds may differ."

[2, 3] In the Zahn Case the court held that the fact that the inclusion of the petitioner's property in zone B rather than zone C depreciated its value, was not of controlling significance. Citing *Spector v. Building Inspector of Milton (Mass.)* 145 N. E. 265, 267. The court further said:

"As to the objection that the ordinance was not retrospective, but permitted the continuance of existing uses, it will suffice to say that for the purpose of zoning it is not necessary that existing uses shall be removed. *Spector v. Building Inspector of Milton*, supra. The ordinance was enacted for the purpose of directing the present and future development of the city and no attempt was made to remold its past development. * * * The power of the city council to zone is not limited in our opinion to the protection of established districts."

[4] Upon the point relating to section 4 of the ordinance, giving power to the council to make exceptions relieving any particular property from the restrictions of the district in which it is situated, it was held in the Zahn Case that such provision of the ordinance is severable, and, even if invalid, would leave the remainder of the ordinance unimpaired. Therefore it was deemed to be not necessary to determine the question, as there had not been any such exception made that could affect the merits of the instant case. The same is true in the case at bar.

The particular circumstances of location of petitioner's property, and of the character and condition of adjacent properties, with respect to improvements and uses of property, are in no respects better calculated to show discrimination against petitioner than were the circumstances considered by the Supreme Court in the Zahn Case. That case and the Miller Case have so thoroughly covered the subject and established the law that there is practically nothing for this court to

do other than to recognize their authority and apply them to the case in hand.

The petition for a peremptory writ of mandate is denied.

We concur: HOUSER, J.; CURTIS, J.

71 Cal. App. 609

PEOPLE v. TIBBITTS. (Cr. 1161.)

(District Court of Appeal, Second District, Division 2, California. March 17, 1925.)

1. Criminal law ⚡213—Objections to preliminary complaint, after examination and commitment, too late.

Objections to preliminary complaint, provided, under Pen. Code, § 806, only as a basis for warrant of arrest, must be taken while accused is being held under warrant, and, after preliminary examination and commitment, are too late.

2. Indictment and information ⚡147—Grounds of demurrer to information statutory.

Only legal grounds of demurrer to an information are specifically enumerated in Pen. Code, § 1004, and are want of jurisdiction of offense charged, nonconformity to requirements of sections 950-952, that more than one offense is charged except as permitted by section 954, that facts stated do not constitute public offense, or that it contains matter which, if true, constitutes justification, excuse or bar to prosecution.

3. Indictment and information ⚡148—Demurrer to information must specify particular respect in which information fails.

Demurrer must specify particular respect in which information fails.

4. Indictment and information ⚡148—Demurrer to preliminary complaint does not constitute demurrer to information.

A demurrer purporting to set up fatal defects in preliminary complaint, after waiver of preliminary examination and filing of information, does not constitute demurrer to information; there being no provision therefor under Pen. Code, § 1004.

5. Indictment and information ⚡122(1)—Variance between complaint and information not grounds of demurrer.

Where information set forth in *hæc verba* the newspaper article published by defendant, alleged to contain libel, but preliminary complaint, which alleged same facts as information, did not, there was no charge of another or different offense, and variance between complaint and information held not grounds for demurrer.

6. Criminal law ⚡211(1)—Preliminary complaint need not charge all elements of offense with technical nicety of information.

Preliminary complaint need not charge all elements of offense with technical nicety of information.

7. Criminal law ⚡639(1)—Prosecuting attorney, swearing out preliminary complaint, not disqualified to prosecute.

That preliminary complaint for libel was signed and sworn to by prosecuting attorney, who was subject of alleged libel, held not an objection to his prosecuting the case.

8. Indictment and information ⚡39, 51(2)—Deputy district attorney may sign and file informations.

Deputy district attorney may sign and file informations.

9. Indictment and information ⚡147—Objection that prosecuting attorney had sworn out complaint not grounds for demurrer.

In prosecution for alleged libel of district attorney, who signed and swore to preliminary complaint, any objections to his prosecution of case could not be taken by demurrer to information.

Appeal from Superior Court, San Bernardino County; Jesse Olney, Judge.

John K. Tibbitts was prosecuted for libel. From an order sustaining his demurrer to the information, the People of the State of California appeal. Reversed.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and George H. Johnson, Dist. Atty., of San Bernardino, for the People.

O. N. Hilton, of San Francisco, and Otto Christensen, of Los Angeles, for respondent.

CRAIG, J. The respondent was the owner and publisher of a newspaper in the county of San Bernardino, known as the Labor Journal, which criticised the conduct of George H. Johnson, who was district attorney of said county. Respondent was arrested upon a preliminary complaint filed by Johnson with the justice of the peace of San Bernardino township, charging respondent with libel, a high misdemeanor. A preliminary examination was expressly waived by respondent, whereupon the committing magistrate bound him over to the superior court, and in due time a deputy district attorney filed with the latter court an information embodying the alleged libelous article. Respondent demurred, setting up as grounds thereof fifteen different asserted defects in the preliminary complaint, and as another ground he alleged that the information was based upon another and different offense from that charged in the complaint. His demurrer was sustained by the trial court, and this ruling forms the basis of the appeal here presented.

The demurrer, although demanding that "the complaint and information be set aside and held for naught," does not assign any ground upon which the information could be susceptible to demurrer under the provisions

of section 1004 of the Penal Code. It alleges that the preliminary complaint failed to charge that a public offense had been committed; that it did not set forth the alleged libelous words according to their tenor; that the words alleged in said complaint to have been written and published were privileged, were not libelous per se; and that the superior court had no jurisdiction to try or determine the matter presented by said complaint.

[1] The preliminary complaint in a criminal proceeding is merely an allegation in writing, signed by a person who knows the facts, charging that another has committed a designated offense. Section 806, Pen. Code. It is intended only as a basis for a warrant of arrest, and objections thereto must be taken while the defendant is being held under such warrant; and, if taken after preliminary examination and commitment, they come too late, since the complaint is then functus officio. *People v. Warner*, 147 Cal. 546, 82 P. 196; *People v. Lee Look*, 143 Cal. 216, 76 P. 1028; *People v. Cole*, 127 Cal. 545, 59 P. 984; *People v. Storke*, 39 Cal. App. 633, 179 P. 527.

[2, 3] The only legal grounds of demurrer to an information are those specifically enumerated in the statute. *People v. Schmidt*, 64 Cal. 260, 30 P. 814. Said grounds are that the court has no jurisdiction of the offense charged in the information; that the information does not substantially conform to the requirements of sections 950, 951, and 952 of the Penal Code; that more than one offense is charged, except as provided in section 954, Penal Code; that the facts stated do not constitute a public offense; or that it contains matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution. Pen. Code, § 1004. And the demurrer is required to specify the particular respect in which the information fails.

[4] It is too obvious for argument that a demurrer which purports to set up alleged fatal defects in the preliminary complaint, after waiver of preliminary examination and the filing of an information, does not constitute a demurrer to such information, since there is no provision therefor under the terms of section 1004 of the Penal Code.

[5, 6] The information filed in the case at bar alleged the same facts that were presented by the complaint, though setting forth in *hæc verba* and fully the newspaper article which admittedly was published by the respondent. This did not, however, constitute another or different offense, and the asserted variance between the complaint and the information is not one of the grounds of demurrer specified in the statute. It is not necessary that a complaint shall charge the elements of an offense with all the tech-

nical nicety of an information. *People v. George*, 121 Cal. 492, 53 P. 1098.

[7-9] Since the complaining witness and the district attorney were one and the same person, it is argued that he should not have attempted to prosecute the case. It appears that Johnson signed and swore to the preliminary complaint in the justice's court as an individual. We are cited to no provision of the law, and know of none, which would prohibit him from taking such action. It would doubtless be his duty to do so if he believed that a public offense had been committed, either against himself or some other citizen. The information was signed by a deputy district attorney. Such an officer has authority to sign and file informations. *People v. Etting*, 99 Cal. 577, 34 P. 237; *People v. Griner*, 124 Cal. 19, 56 P. 625. Under any circumstances, this objection is not one which could properly be the ground of a demurrer.

No valid objection to the information appears to have been presented to the superior court in this case, and its action in attempting to nullify the proceedings before it upon the strength of this so-called demurrer, which merely alleged defects in an extinct pleading over which the superior court had no jurisdiction, was void and ineffectual.

The judgment on order sustaining the demurrer is reversed.

We concur: FINLAYSON, P. J.;
WORKS, J.

72 Cal. App. 16

WRIGHT & HOGAN, Inc., v. HEIDE et al.
(Civ. 5018.)

(District Court of Appeal, Second District,
Division 1, California. March 26, 1925.)

Appeal and error  417(1)—Notice that defendant desires, intends to, and has appealed held sufficient to give appellate court jurisdiction.

A notice of appeal that "defendant hereby gives notice that he desires, intends to appeal, and has appealed to the District Court of Appeal," though it might have been more explicit, is sufficient to give appellate court jurisdiction.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by Wright & Hogan, Inc., against Charles H. Heide and others. Judgment for plaintiff, and defendants appeal. On motion to dismiss appeal. Denied.

William A. Spill of Pasadena, for appellants.

MacDonald & Thompson, of Los Angeles, for respondent.

CURTIS, J. Motion to dismiss appeal on the ground that no notice of appeal has been filed. In support of said motion the respondent has cited the following decisions of the Supreme and appellate courts of this state: *Boling v. Alton*, 162 Cal. 297, 122 P. 461; *Marcucci v. Vowinkel*, 164 Cal. 693, 130 P. 430; *Michelson v. City of Sacramento*, 173 Cal. 108, 159 P. 431; *Eddy v. Hunter*, 46 Cal. App. 370, 189 P. 291. These cases, it will be observed, were all decided under section 941b, Code of Civil Procedure, prior to its repeal in 1921. This section required that a notice of appeal given thereunder "shall state that the person giving the same does thereby appeal" from the judgment or order, and the cases cited by respondent hold that under said section a notice like that in the present action was not sufficient, and gave the court no jurisdiction to entertain the appeal. The notice in the present appeal states that:

"The defendant hereby gives notice that he desires, intends to appeal, and has appealed to the district court of appeal from the findings, conclusions and judgment."

This notice was practically the same as that considered by the court in the case of *Anderson v. Standard Lumber Co.*, 60 Cal. App. 445, 213 P. 65. The appeal in this last-named case was taken after the repeal of said section 941b, and the court there held that the notice was sufficient, and denied a motion to dismiss. In said action the court stated that:

"The disposition of the courts is to hear appeals upon their merits, and the sections of the code relating to the subject should be liberally construed with a view of promoting such purpose."

We are in accord with these views of the court, and we think the following language, used by the court in said action, is applicable in the present one:

"While it would be more satisfactory if the notice had been more explicit, * * * it must be held sufficient to give the appellate court jurisdiction."

Motion to dismiss denied.

I concur: CONREY, P. J.

HOUSER, J., absent.

72 Cal. App. 11

SMITH v. RICHARDSON. (Civ. 4916.)

(District Court of Appeal, First District, Division 1, California. March 26, 1925.)

Appeal and error ⇐1071(6)—**Omission of finding on issue which would necessarily be against defendant if finding made thereon not prejudicial to defendant.**

In action on note, in which defendant alleged false representations as to a tractor for which note was given, and rescission by defendant, where every allegation of fraud on which right of rescission was premised was found against defendant, and a general finding was made that none of allegations of answer were true, *held*, that omission of finding on rescission was not prejudicial to defendant, as the finding on such issue would necessarily be against him.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by F. E. Smith against Eri H. Richardson. Judgment for plaintiff, and the defendant appeals. Affirmed.

Samuel Hamburg and J. R. Cunyningham, both of San Francisco, for appellant.

Chas. W. Humphreys, of San Francisco, for respondent.

TYLER, P. J. Plaintiff prosecutes this action upon a promissory note executed by the defendant for the sum of \$428.50. Defendant by answer admitted the execution of the note, but by way of affirmative defense alleged that at the time of its execution plaintiff and defendant entered into a conditional sales contract for the purchase and sale of a certain tractor, and that the note was given in payment thereof. It is then charged that at that time certain representations were made concerning the engine which were false, and that upon discovery of this fact defendant gave notice of rescission, and offered and did return everything of value. Judgment went for plaintiff, and defendant appeals.

It is here claimed that the court below failed to make a finding upon the issue of rescission, for which reason, it is urged, the judgment should be reversed.

Every allegation of fraud and misrepresentation upon which the right of rescission was premised was found against appellant. The findings are full and complete upon the subject. There is also a general finding that none of the allegations of the answer are true. While there is no express finding upon the question of rescission, still, the findings are specific against defendant's claim of fraud upon which he predicated his right to rescind. The mere omission, therefore, of a finding upon the question of rescission did not prejudice appellant.

Where a finding is omitted upon an issue

which would necessarily be against appellant if a finding were made thereon, appellant is not injured thereby. Here the court found upon issues that ultimately and necessarily determined the case, and they support the judgment. This being so, other issues became unimportant, and failure to find thereon in no manner prejudiced the defendant, nor does it constitute grounds for reversal. *Morrison v. Stone*, 103 Cal. 94, 37 P. 142.

Judgment should be affirmed. It is so ordered.

We concur: **KNIGHT, J.; CASHIN, J.**

196 Cal. 141

HILDEBRAND v. BECK. (L. A. 7406.)

(Supreme Court of California. May 4, 1925.)

- 1. Escrows §14(1)—Where money deposited by vendee with escrow agent to be applied on account of vendor when escrow secured a title guaranty for vendee, no title passed by delivery by agent who had embezzled money.**

Where escrow agent was instructed by vendor that deed to property was to be delivered to vendee on payment to escrow agent for account of vendor of purchase price required, and vendee authorized escrow agent to use money deposited by him when escrow agent secured a title guaranty, money deposited by vendee was not deposited with escrow agent for account of vendor at time deposit was made, but was to be applied when escrow agent could secure a title guaranty, and if, before title guaranty was secured by escrow agent, such agent embezzled vendee's deposit, it was money of vendee that was embezzled, and escrow agent had no authority to deliver the deed and title guaranty to vendee, and no title passed by such delivery.

- 2. Escrows §8(1)—Vendee's money deposited with escrow agent was embezzled when latter's bank account was overdrawn.**

Under escrow agreement, by which escrow agent was authorized to deposit to its own account money placed in its hands by vendee and to return money to vendee if terms of escrow were not fulfilled by a check on such bank account, escrow agent was required at all times to keep in its bank account sufficient money to cover such deposit, and, when its account was overdrawn so that there did not remain sufficient money to cover such deposit, money of vendee was at that time embezzled.

- 3. Escrows §14(2)—Delivery of deed by escrow agent to vendee not ratified by vendor's suit against escrow for purchase price.**

Where vendor instructed escrow agent to deliver deed to vendee on payment of purchase price, and vendee authorized escrow agent to apply deposit made by him to account of vendor when a title guaranty was secured, and escrow agent embezzled vendee's deposit before delivering to vendee deed and title guaranty, vendor *held* not to have ratified such delivery by commencing suit against escrow agent for the purchase price, where vendor was not aware that, on date title guaranty was secured, vendee's deposit had already been embezzled.

- 4. Principal and agent §166(1)—Principal not bound by ratification of unauthorized act of his agent.**

Under Civ. Code, § 2310, a principal is not bound by ratification of an unauthorized act of his agent, unless he had previous knowledge of all the material facts.

In Bank.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by Rodney Hildebrand against George H. Beck. Judgment for defendant, and plaintiff appeals. Affirmed.

Kemp & Clewett and H. S. Clewett, all of Los Angeles, for appellant.

Hocker & Austin, of Los Angeles, for respondent.

LENNON, J. In this action of ejectment the undisputed facts of the case as disclosed by the pleadings and proof are these: The defendant and respondent, hereinafter referred to as the vendor, was the owner of certain property in the city of Los Angeles which he listed with the Eshleman Realty Company for sale. The plaintiff and appellant, hereinafter referred to as the vendee, agreed to purchase the property for the sum of \$1,800. The vendee was also to assume certain incumbrances. The vendee paid to the Eshleman Realty Company \$100 deposit on the purchase price, and subsequently on January 31, 1921, filed escrow instructions with said Eshleman Realty Company relative to the remainder of the purchase price. The material parts of the escrow instructions of said vendee are as follows:

"Escrow No. 4164.

"Los Angeles, Jan. 31st, 1921.

"H. B. Eshleman Realty Co., Escrow Dept.: I have handed the H. B. Eshleman Realty Co. \$100 (sales deposit receipt) and hand you herewith my check for the further sum of \$500.00 and will hand you the further sum of \$1,200.00 within ten days from date hereof all of which you are authorized to use in connection with your Escrow No. 4164 when you can secure for me a title Guarantee on the property and premises situate at No. 1118 Orange Drive in the city of Los Angeles, according to the legal description thereof which will show that the record title to said property is vested in Rodney Hildebrand, a married man, as his sole and separate property free from incumbrances. * * * If you are unable to comply with the instructions within 30 days from this date said money and instruments shall thereafter be returned to me on my written demand, and in the absence of such demand you will proceed to comply with these instructions as soon as possible thereafter. * * * All disbursements may be made by check of H. B. Eshleman Realty Company."

On February 1, 1921, the vendor signed and deposited with the Eshleman Realty Company escrow instructions which were in part as follows:

"Escrow No. 4164.

"Los Angeles, Feb. 1, 1921.

"H. B. Eshleman Realty Co., Escrow Dept.: I will hand you a deed executed by myself, George H. Beck, a widower, to Rodney Hildebrand, * * * which you are authorized to deliver to the said Rodney Hildebrand or his

representatives upon payment to you within 30 days hereof for account of myself the sum of eighteen hundred dollars (payable by check of the H. B. Eshleman Realty Co.) from which you may deduct your escrow charges, \$7.50, * * * and from which you may deduct the sale commission of the H. B. Eshleman Realty Co. for \$250.00.

Thereafter each of the parties complied with the requirements of the escrow on his part to be performed; the money being paid by the vendee, February 1, 1921, and deposited to the account of the H. B. Eshleman Realty Company, February 3, 1921, as shown by the bank's indorsement on the checks, the deed being delivered to the escrow holder by the vendor on February 12, 1921. On February 26, 1921, the deed was recorded, and a certificate of title was thereupon issued by a title insurance company showing title was vested in the vendee. The purchase price, however, was never paid to the vendor of the property. The evidence shows, and it is not disputed, that the money was not paid for the reason that H. B. Eshleman, sole owner of the Eshleman Realty Company, who carried on the business under the name of Eshleman Realty Company, absconded some time between February 28 and March 2, 1921, leaving a deficiency of over \$40,000 in the escrow account of the Eshleman Company. An examination of the business affairs of the Eshleman Realty Company disclosed the fact that there was on hand on February 26, 1921, but \$1,656.20 with which to meet all of the outstanding obligations of the company. An analysis of the bank statement of the company for the month of February disclosed the fact that on February 5, 1921, the bank account of the company was overdrawn to the extent of \$41.10. Thereafter various sums of money had been deposited to the credit of the account and various other sums withdrawn therefrom. The evidence also shows the deficiency of \$40,000 in the escrow account of the Eshleman Realty Company as distinguished from its bank account on February 23, 1921.

Demand was made by the vendee upon the vendor for the possession of the property in controversy, and upon the refusal of the vendor to give up possession this suit was commenced by the vendee to quiet title to the property and to obtain possession thereof. The judgment of the trial court was for the vendor. The findings of the trial court upon which the judgment was predicated, relative to the deposit of the money by the vendee, and the failure of the Eshleman Company to apply such deposit to the purchase of the property in controversy, are to the effect that the vendee placed in the custody of the H. B. Eshleman Realty Company, as escrow agent, the sum of \$1,800 and directed said company to use said money in said escrow when said company could procure a title guaranty covering the title to the property,

showing said title vested in the vendee; that said money was received by the said company for the account of the vendee herein; that immediately thereafter the money so deposited by vendee was embezzled and has never been returned either to the said company or to either of the parties thereto; that at the time of the delivery of the deed said company did not have on hand and had not received for the account of the vendor the sum of \$1,800, or any other sum at all, and the delivery of said deed was unauthorized and void and conveyed no right, title, or interest in and to the aforesaid property to plaintiff.

It is the contention of the vendee that inasmuch as the vendor was entitled to receive from the Eshleman Realty Company, upon the completion of the escrow, but \$1,537, less the cost of the title guaranty, and that there was in the bank balance of the Eshleman Realty Company on February 26, 1921, the day on which the deed to the property was recorded and the certificate of title issued by the title company, \$1,656.20, the conditions of the escrow had been fulfilled, and that therefore the title to the property had passed from the vendor to the vendee.

With this contention we cannot agree.

[1] According to the escrow instructions of the vendor, the deed to the property was to be delivered to the vendee by the escrow company "upon the payment to you * * * for account of myself, the sum of \$1,800." According to the escrow instructions of the vendee, the money deposited by him with the Eshleman Company was authorized to be used in connection with escrow No. 4164 [the escrow in controversy] "when you can secure for me a title guaranty." It is at once apparent that the money deposited by the vendee with the escrow company was not deposited with the company for the account of the vendor at the time the deposit was made, but that it was to be so applied when the Eshleman Realty Company could secure for the vendee "a title guaranty." Pending the procurement of the title guaranty the Eshleman Realty Company held the money in trust for the vendee and the vendor had no claim to it. In other words, the Eshleman Realty Company never had any money paid to it for the account of the vendor until the very instant that the company procured for the vendee "a title guaranty." If, in the interim between the deposit of the money with the company and the securing of the "title guaranty" by the company, the money was embezzled, then it was the money of the vendee that was embezzled, and the Eshleman Realty Company would have no authority to deliver to the vendee the title guaranty for the reason that at the instant of time when the title guaranty had been secured no money had been paid to the company for the account of the vendor.

As before indicated, the finding of the trial

court was that the money deposited by the vendee was embezzled shortly after its deposit. If this finding is supported by the evidence, it follows that the money embezzled was the money of the vendee, and that as a result the Eshleman Realty Company, when delivering the deed and title guaranty to the vendee, was acting without its authority. The finding of the trial court that the property was embezzled shortly after its deposit and prior to the securing by the Eshleman Realty Company of the title guaranty is supported by the admitted fact that on February 5, 1921, the bank balance of the company was overdrawn and the further admitted facts that some time between February 28 and March 2, 1921, the sole owner of the company absconded.

[2] One of the provisions of the escrow instructions of the vendee, as previously indicated, is to the effect that if the Eshleman Realty Company was unable to comply with the instructions of the escrow within 30 days said money should be returned to the vendee upon his written demand. "All disbursements may be made by check of H. B. Eshleman Realty Co." This last provision gave the right to the Eshleman Realty Company to deposit the money to its own account. It cannot be said, however, that by that provision the vendee loaned the company the use of his money until the terms of the escrow should be fulfilled. The vendee had no intention by such provision of creating between himself and the escrow company the relation of creditor and debtor. Such provision did no more than authorize the Eshleman Realty Company to deposit the money to its own account and to return the money to the vendee if the terms of the escrow were not fulfilled by a check on such bank account. If the relation of creditor and debtor was not intended to be created by the vendee, it follows that the escrow company was under an obligation to keep within its bank account sufficient money to cover this deposit. It was not necessary by reason of this provision that the company should keep the amount deposited in a separate account, but it was necessary that at all times it should keep in its bank account sufficient money to cover this deposit. It follows that when on February 5, 1921, the account was overdrawn so that there did not remain in the bank balance of the escrow company sufficient money to cover this deposit, the money of the vendee was at that time embezzled. It is of no importance in determining the date of the embezzlement that the embezzler may have, at the time he embezzled the money, intended to return it. *People v. Jackson*, 138 Cal. 462, 71 P. 566.

The money of the vendee having been embezzled on February 5, 1921, there was no money of the vendee's in the hands of the company on February 26, 1921, when the certificate of title was issued by the title in-

insurance company, to be applied to the account of the vendor. This being so, no title passed to the vendee, and the vendor is entitled to retain possession of the property.

[3, 4] The fact that, shortly after the discovery that H. B. Eshleman had absconded, the vendor commenced suit against the company for the purchase price of the property, does not militate against the conclusion heretofore reached that the title had not passed, upon the theory that by the institution of such suit the vendor ratified the delivery of the deed to the vendee. It is admitted by the stipulations of the parties that at the time of the institution of the suit the vendor had no knowledge of the fact that Eshleman had become short in his accounts, or that he did not have money enough on hand to cover all escrow agreements. In other words, he was not aware of the fact that on the date of the securing of the title guaranty for the vendee the money of the vendee on deposit with the escrow company had already been embezzled. A principal is not bound by a ratification of an unauthorized act of his agent unless he had previous knowledge of all the material facts. Section 2310, Civ. Code; *Brown v. Rouse*, 104 Cal. 672, 38 P. 507.

The judgment is affirmed.

We concur: MYERS, C. J.; SEAWELL, J.; SHENK, J.; RICHARDS, J.; WASTE, J.; LAWLOR, J.

196 Cal. 161

CITY OF SIGNAL HILL v. LOS ANGELES COUNTY et al. (L. A. 8464.)

(Supreme Court of California. May 14, 1925.)

1. Municipal corporations $\S$ 36(4)—Highway taxes collected from road district included in municipality cannot be disbursed in absence of provision for payment thereof to municipality.

In view of Pol. Code, $\S\S$ 2639, 2651, in absence of provision, such as section 2656, providing that, when a road district or part thereof is included in newly created municipality, proportionate unexpended amount collected from such annexed district must be paid to municipality, no disbursement of such moneys for highway purposes in territory from which it was collected could take place.

2. Statutes $\S$ 184—Ambiguous statute liberally construed to accomplish its apparent objects and purposes.

If terms of the statute are ambiguous, doubtful, or susceptible of different constructions, such liberality of construction is justified, within a fair interpretation of its language, as will accomplish its apparent objects and purposes.

3. Municipal corporations $\S$ 36(4)—Municipality held entitled to proportionate amount of highway taxes of included road district, notwithstanding no "general road fund" created.

The term "general road fund" in Pol. Code, $\S$ 2656, providing that, where a road district or part thereof is included in a newly created municipality, the proportionate amount of unexpended moneys in general road fund or highway taxes must be ascertained by county board of supervisors and paid to municipality, when construed in light of sections 4 and 326, does not refer to technical general road fund authorized by section 2651, which might, or might not, exist at option of county board of supervisors, but refers to general road "funds" or "taxes," and newly incorporated municipality is not to be deprived of highway taxes because board of supervisors failed to create a general road fund.

4. Constitutional law $\S$ 68(1)—Whether Legislature has accomplished intended purpose by phraseology employed judicial question.

How much of the unexpended taxes of a road district included in a newly created municipality should go to the municipality is a political question, but, when the Legislature has acted, whether it has accomplished intended purpose by particular phraseology employed is judicial question.

In Bank.

Application for writ of mandate by the City of Signal Hill against the County of Los Angeles and others. Writ granted.

Don G. Bowker, City Atty., of Los Angeles (Clarke & Bowker, of Los Angeles, of counsel), for petitioner.

Edward T. Bishop, County Counsel, of Los Angeles, for respondent.

Paul G. McIver, of Montebello, and Hunsaker, Britt & Cosgrove, of Los Angeles, amici curiæ.

SHENK, J. This is an application for a writ of mandate to compel the respondents to pay to the petitioner certain tax moneys collected and in the course of collection for county highway purposes. Upon the return of the alternative writ the matter was submitted on a demurrer to the petition for want of sufficient facts. The proceeding involves the scope and effect of section 2656 of the Political Code added as a new section in 1907 (Stats. 1907, p. 63). The enactment is entitled "An act to add a new section to the Political Code, to be numbered section 2656, and relating to the division of general road funds, upon the incorporation of municipalities, or annexation to municipalities." The section reads as follows:

"Whenever any territory is included in a city, or incorporated town, or city and county, either at the original incorporation of such city, incorporated town or city and county, or by annexation thereto subsequently, and such territory shall have constituted a road district, or a part of a road district, it shall be the duty of the county board of supervisors, as soon as

practicable after such incorporation or annexation, to ascertain how much of the unexpended moneys in the general road fund or of the highway taxes of all kinds then levied and in the course of collection, is derived from property situate or persons residing in such territory; and they shall cause the amount so ascertained to be paid to the proper officers of such city, incorporated town, or city and county, as soon as practicable after it shall have come into the general road fund. The sum or sums so paid over to such city, incorporated town, or city and county, shall become part of the general fund of such city, incorporated town, or city and county."

The petition alleges that the city of Signal Hill is a municipal corporation duly incorporated as such on the 7th day of April, 1924, and situated within the county of Los Angeles; that the respondents are the county of Los Angeles, a body politic and corporate, and the board of supervisors of said county; that the territory included within the corporate limits of the petitioner at the time of its incorporation constituted a part of a road district within the county of Los Angeles; that all property within the territorial limits of the petitioner was duly assessed for highway purposes and highway taxes were regularly levied and collected thereon, and were in course of collection at the time of the incorporation of the petitioner; that on the 26th day of May, 1924, the respondents "ascertained and determined that the amount of unexpended moneys of the highway taxes of all kinds levied for the fiscal year 1923-1924 and in the course of collection was the sum of \$18,998.75, which is derived from the property situate in said territory embraced within the territorial limits of said city of Signal Hill"; that for the fiscal year 1923-24 no general road fund as provided for by section 2651 of the Political Code was established by the respondents, and that respondents contend that not having established such general road fund for said year they are not required to pay petitioner any sum whatsoever under the provisions of said section 2656; that prior to the commencement of this proceeding demand was made upon respondents to pay or to take the steps necessary to provide for the payment to the treasurer of the petitioner the said sum of \$18,998.75 so ascertained, but that the respondents have refused to comply with the demand.

The principal contention of the respondents is that the words "general road fund" used in section 2656 refer to the general road fund provided for in section 2651 of the Political Code, and that, as the respondents did not establish a general road fund for the fiscal year 1923-24, and as there is no such fund in existence, the respondents are relieved of all duty to comply with said section 2656, and that a peremptory writ must

be denied. Said section 2651 provides in part as follows:

"The board of supervisors may, at the meeting at which they are required to levy the property tax for road purposes, establish a general road fund and order to be apportioned thereto an amount not exceeding thirty-five per centum of the aggregate road tax collected from all sources."

Secondarily, it is contended by respondents that under the language of section 2651 it is optional with the board of supervisors to create a general road fund. As to this contention the petitioner replies that, if the creation of such a fund be necessary to enable the respondents to comply with section 2656, the provision for the establishment of such fund is mandatory. But, in view of our conclusion as to the intent and effect of section 2656, it is unnecessary to determine that question. For the purposes of this proceeding it will be assumed that the establishment of a general road fund pursuant to section 2651 is optional with the board of supervisors.

[1] Even a casual reading of section 2656 impels the conclusion that the sole purpose of the enactment was to render available to newly incorporated territory, whether as a new city, or as newly annexed to an existing city, all highway taxes unexpended or levied and in course of collection and derived from property and persons located within the territory comprising the new city or the newly annexed territory, to the end that such highway tax moneys may be expendable for the benefit of the territory from which the same was levied and collected. When the section is complied with the said tax moneys would be expended on the authority of the municipal corporation having jurisdiction over the newly incorporated territory. In the absence of such provision for payment to the city or of compliance with such provision no disbursement of said moneys for highway purposes in the territory from which the same was collected could take place. See Pol. Code, §§ 2639, 2641; *Miller v. Kern County*, 137 Cal. 516, 70 P. 549.

It was the obvious intention of the Legislature that the newly created municipality should be entitled to and should have paid to its proper officers without unnecessary delay the tax moneys described in the section. The statute is plain on that subject. The uncertainty or ambiguity suggested arises by reason of the reference to the "general road fund," which admittedly is an authorized particular and technical fund, but not in existence in the fiscal plan and policy of the respondent county. But it seems clear that the main and only purpose of the act should not be frustrated and set at naught by any application of the words "general road fund" which would entirely defeat its purpose if a construction may be placed thereon which is

reasonable and would result in the effective operation of the section. By the requirements of the Code of which section 2656 is now a part we are directed to apply to that section a liberal construction with a view to giving effect to its plain purpose and intent. Pol. Code, §§ 4, 326. "It is indispensable to a correct understanding of a statute to inquire first what is the subject of it, what object is intended to be accomplished by it. When the subject-matter is once clearly ascertained and its general intent, a key is found to all its intricacies—general words may be restrained to it, and those of narrower import may be expanded to embrace it to effectuate that intent. When the intention can be collected from the statute, words may be modified, altered or supplied so as to obviate any repugnancy or inconsistency with such intention. * * * Words or clauses may be enlarged or restricted to effectuate the intention or to harmonize them with other expressed provisions. * * *

The particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense they were intended to be used as they are found in the act. The sense in which they were intended to be used furnishes the rule of interpretation, and this is to be collected from the context; and a narrower or more extended meaning is to be given according to the intention thus indicated." 2 Lewis' Sutherland Stat. Cons. §§ 347, 376. As was said by this court in *In re Reineger*, 184 Cal. 103, 193 P. 81:

"A statute should always be so construed, if reasonably possible, as to give each part thereof the meaning and effect which, from the act as a whole, appears to have been intended. A narrow or restricted meaning should not be given to a word, if it would result in an evasion of the evident purpose of the act, when a permissible, but broader, meaning would prevent the evasion and carry out that purpose." See, also, *Barber v. Galloway* (Cal. Sup.) 231 P. 34.

[2] It is well settled that, if the terms of a statute be ambiguous or doubtful or susceptible of different constructions or interpretations, such liberality of construction is justified as within a fair interpretation of its language will accomplish its apparent objects and purposes. *Felton v. West*, 102 Cal. 266, 36 P. 676.

[3] When the terms of section 2656 are considered in the light of the foregoing rules, it must be concluded that the use of the words "general road fund" was not intended as referring to the technical "general road fund" authorized by section 2651, which might or might not exist at the option of boards of supervisors, but rather in the sense of general road "funds" or general road "taxes." The title of the act adding the new section and above quoted would also seem to so indicate, for it de-

clares that said section relates to the division of general road funds upon the incorporation of municipalities. It cannot be assumed that the Legislature intended that newly incorporated cities in counties wherein the board of supervisors might perchance have created a general road fund, as contemplated by section 2651, should be entitled to the tax moneys described in the new section, and that new cities in those counties where no such fund was created should be denied them. Such an absurd result cannot be held to have been contemplated by the Legislature. It was never intended that a board of supervisors should have the power to deny to a newly organized municipality the funds described in section 2656 by merely failing to create a general road fund.

The respondents admit that the territory embraced within the corporate limits of the petitioner was a portion of a county road district, and that they have ascertained and determined the amount of unexpended moneys of highway taxes of all kinds levied for the fiscal year in question and in course of collection. They must also concede that the said moneys are entirely within their control, and that payment thereof on their order may be made. But they say in effect to the petitioner:

"The money which you claim to be entitled to is on hand or in course of collection and within our power to disburse but you are not entitled to the payment thereof because we have not exercised our option to create a general road fund as authorized by section 2651."

They might also say:

"If we should create a general road fund the amount of taxes for road purposes to be apportioned to said fund is entirely optional with us so long as said amount does not exceed thirty-five per cent. of the aggregate road taxes to be collected from all sources. In the exercise of our discretion we will apportion to said fund a small fraction of one per cent. of said revenues."

[4] Notwithstanding the mandate of the statute the respondents could thus entirely defeat the purpose of the law by failing and refusing to establish a general road fund or by establishing such fund and reducing the moneys payable to the fund to a negligible quantity. True, as respondents contend, the question of whether or not and how much of said tax moneys is to be paid to a new city is a political question to be decided in the first instance by the Legislature. But, when the Legislature has acted, the question whether it has accomplished the intended purpose by the particular phraseology employed is a judicial question. In the determination of that question as applied to the present case we find no difficulty in concluding that it was, and is, the duty of the respondents to ascertain without delay the amount of general road tax moneys derived

from the property and persons in the territory in question and unexpended at the time of the incorporation of the new city, and the amount of highway taxes then levied and in course of collection and so derived and to pay the same to the proper officer of the petitioner as soon as practicable. The respondents do not question the correctness of the amount alleged in the petition to have been ascertained by them. They simply take the position that under the law and the facts above set forth they are not required to make any payment whatsoever. They cannot be justified in their refusal to comply with the statute.

Let a peremptory writ issue, requiring the respondents to ascertain and pay to the treasurer, or other proper officer of the petitioner, the amount of unexpended highway tax moneys under their control on April 7, 1924, derived from property situate and persons residing in the territory of the petitioner, and also to ascertain and pay to the petitioner the amount of highway tax moneys of all kinds levied for the fiscal year 1923-24, and collected or to be collected since April 7, 1924, and likewise derived, such amounts to be ascertained without delay, and such payments to be made as soon as practicable after the amounts thereof are ascertained.

We concur: LAWLOR, Acting Chief Justice; SEAWELL, J.; RICHARDS, J.; LENNON, J.; WASTE, J.; HART, Justice pro tem.

196 Cal. 131

GREAT WESTERN POWER CO. OF CALIFORNIA v. CITY OF OAKLAND.
(S. F. 10925.)

(Supreme Court of California. May 4, 1925.)

1. Taxation ☞373—Mimeographed copy of report of operative properties held substantial compliance with statute requiring "duplicate."

Report of its operative properties, sent by public utilities corporation to local assessor, pursuant to Const. art. 13, § 14, and Pol. Code, §§ 3665(c), and 3666, which was a mimeographed copy of report sent to state board of equalization, and which particularly specified and classified property as operative and non-operative, held a substantial compliance with section 3665(c), requiring company to furnish a "duplicate" of report to assessor of city in which property is located.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Duplicate.]

2. Taxation ☞373—Information given to local assessor as to nonoperative property of public utility company need only apprise assessor of intention of company to claim property as operative.

In matter of taxing property of a public utility company, under Const. art. 13, § 14, and

Pol. Code, §§ 3665(c) and 3666, no further information is required to be given a local assessor than as will apprise him of intention of company to claim that such property or some part of it is operative, and to give him opportunity to make claim before state board of equalization that property is nonoperative, and therefore within his jurisdiction for assessing purposes.

3. Taxation ☞373—Local assessor held charged with notice that public utility company was claiming described property as operative property.

Where communication sent by public utility company to local assessor as to its operative property, pursuant to Const. art. 13, § 14, and Pol. Code, §§ 3665(c) and 3666, was accompanied by maps and other papers showing location of property, and informing assessor that it was identical with that sent to state board of equalization, it was sufficient to charge assessor with notice that company was attempting to comply with section 3665(c), and was actually claiming that property described was operative property.

4. Taxation ☞373—Assessor failing to comply with statutory requirements on claim as to operative property held without jurisdiction to assess it as nonoperative property.

Where communication sent by public utility company to local assessor as to its operative property, pursuant to Const. art. 13, § 14, and Pol. Code, §§ 3665(c) and 3666, was sufficient to charge assessor with notice that company was claiming such property as operative property, but assessor did not, as required by section 3666, take steps to have correctness of claim heard and determined, he thereby acquiesced in claim that such property was in fact operative property, and hence was without jurisdiction to assess it as nonoperative property.

Shenk, J., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Action by the Great Western Power Company of California against the City of Oakland to recover taxes paid under protest. Judgment for defendant, and the plaintiff appeals. Reversed.

See, also, 189 Cal. 649, 209 P. 553.

Guy C. Earl, W. H. Spaulding, and Chaffee E. Hall, all of San Francisco, for appellant.

Leon E. Gray, City Atty., and Markell C. Baer, Asst. City Atty., both of Oakland, for respondent.

WASTE, J. The appellant brought an action against the city of Oakland to recover taxes alleged to have been illegally levied and collected, and paid under protest. A general demurrer to the complaint was interposed by the respondent city, and sustained. Plaintiff did not amend. Judgment was entered against it, and reversed on appeal, with instructions to the trial court to

overrule the demurrer. *Great Western Power Co. v. City of Oakland*, 189 Cal. 649, 209 P. 553. Thereupon the city answered. After trial by the court, sitting without a jury, judgment was rendered for the defendant, and plaintiff has appealed.

Plaintiff is a corporation engaged in the sale and transmission of electricity, and belongs to the class of corporations set apart by the Constitution (section 14 of article 13) for taxation solely by the state upon their operative properties, on the basis of a percentage of gross receipts. The tax by the state on the property of such companies, used exclusively in the operation of their business in this state, is in lieu of all other taxes, state, county, and municipal, except as provided in the section noted. During the month of March, 1920, appellant filed with the state board of equalization the report required by section 3665 (c) of the Political Code, showing all of its property in the state which came under the definition of operative property. The report specified, among other things, all the property owned by appellant in the city of Oakland, and particularly specified and classified such property as operative and nonoperative. In the list of operative property, appellant included two steam generating plants and their equipment.

At the time of filing the report with the state board of equalization, appellant mailed to the assessor of the city of Oakland, and the assessor received, several sheets of paper upon which had been mimeographed the same description of property that was included in the report of appellant to the state board of equalization. With these papers were certain maps descriptive of and showing the location of appellant's real property described in its report, among other property being the two steam generating plants and equipment referred to. The maps and papers were in the same inclosure with a letter, directed to the assessor, signed by the appellant by its tax agent, and reading as follows:

"Herewith please find statement of operative property of Great Western Power Company of California and California Electric Generating Company, within your jurisdiction. You will also find maps enclosed showing in red the operative property of said companies within your jurisdiction. The said statement of property and said maps are identical with the statement and maps sent by us to the state board of equalization, covering your district, and we are sending the enclosed statement and maps to you at the request of the state board of equalization."

Notwithstanding the receipt by him of the papers, maps, and communication from the Power Company, the Oakland city assessor assessed the two steam generating plants as nonoperative property, and on the assessment thus made the tax was levied and collected by the city over the protest of the appellant. The question on the appeal arises

as to the proper construction of the requirement of section 3665 (c) of the Political Code, which directs that a public utility company, making an annual report, shall, at the same time that it files its report with the state board of equalization, "furnish a duplicate of the report covering so much of said property as is located in any * * * municipality * * * to the assessor of the * * * city * * * in which such property is located." The board of equalization may require the filing in its office of maps descriptive of all the operative property of the company making the report, and may require that similar maps descriptive of the operative property within a municipality shall be filed in the assessor's office of the city in which the property is located. The contention in the court below hinged upon the proper construction to be given to the word "duplicate" found in the requirement that, at the time the company files its annual report with the board of equalization, it shall also furnish a "duplicate" of the report covering so much of the property as is located in a municipality to the assessor of the city in which the property is located.

The trial court found that the matter set forth on the sheets of paper comprising the "statement of property," sent by appellant to the assessor, did not identify the property or state the purpose for which the papers were sent. It further found that they were not signed or sworn to by any person or officer connected with the plaintiff, or any person at all, and contained no information advising the assessor that the matter sent was a "duplicate" of the report required by the section of the Code, and contained no information or statements charging the assessor with notice that the Company was attempting to comply with the provisions of the Code, or was claiming before the state board of equalization that the property described was operative property. The court therefore held that it was within the province of the city assessor to assess the property as "nonoperative," and that the tax levied in pursuance of the assessment was property levied and collected.

The reason for the provision in section 3665 (c), *supra*, that the utility company must furnish the local assessor with information concerning the property within the jurisdiction of that official, is to be found in the succeeding section of the Code (section 3666), which provides that if the assessor finds in the report of property in his municipality, claimed to be operative, any piece or parcel of property which he regards as nonoperative property, or partially operative and partially nonoperative, he shall, within 30 days after receiving such report, notify the state board of equalization thereof, and give the reasons for his opinion. A copy of the notice must be mailed to the company whose prop-

erty is involved. The state board of equalization, upon an investigation of the property and its use, and providing an agreement between the board or assessor and company as to the proper classification of the property cannot be reached, must provide for a hearing before it, at which hearing it must determine whether such property is operative or nonoperative. The decision of the board in such matters is binding upon all parties, the state, the municipality, and the company, unless set aside by a court of competent jurisdiction, and the assessor must assess the property according to such decision.

The report required by section 3665 (c), *supra*, must show in detail many matters which cannot, under any possible contention, interest the local assessor, or in any way relate to his action in determining whether or not he will assess property claimed by the company to be operative. Counsel for the respondent say in the city's brief that they do not contend that a complete duplicate of the entire report sent to the state board of equalization must be furnished to each local assessor, but that the duplicate of the report which is required shall be in all material respects like the original, but covering only so much of the property as is located in the municipality to which the duplicate is furnished. It should contain, it goes on to say, "at least so much of the information as will identify its purpose, disclose the names of the companies and its subsidiaries, the nature of their business, accurately describe the property in detail located in his jurisdiction, inform the assessor as to the claims of the taxpayer in respect to local property, and particularly charge him with the notice which the statute intends to give. It must be sufficient, in any event, to furnish the basis for an intelligent protest by him and hearing before the board as provided in section 3666 of said Code."

The word "duplicate," as used by the Legislature, respondent argues, must be given a strict and technical meaning, and, thus construed, it means neither a "copy," nor an "abstract," nor a "mimeographed copy," nor "excerpts from the report." Had the Legislature, it says, intended to permit the use of a "copy," or an "abstract," or a "mimeographed copy," or "excerpts from the report," it could readily have said so. But, by the use of the words "duplicate of the report," it meant "something of much greater dignity and solemnity than the unidentified mimeograph copies of a mere part thereof sent to the assessor."

[1] The word "duplicate," it has been held, construing certain written instruments, means "that which is double, or twice made; an original instrument repeated. A document which is defined to be the copy of a thing; but, though generally a copy, a dupli-

cate differs from a mere copy in having all the validity of an original." Burrill's Law Dict., 1859 Ed., p. 526. "The double of anything. A document which is essentially the same as some other instrument." Bouvier's Law Dict. See, also, *Grand Lodge A. O. U. W. v. McFadden*, 213 Mo. 269, 287, 111 S. W. 1172; *Grant v. Griffith*, 40 App. Div. 18, 56 N. Y. S. 791; *Lorch v. Page*, 24 A. L. R. 1209; 19 Cor. Jur. p. 836, cited by respondent. Respondent argues that the statement sent to the Oakland city assessor was not a "duplicate" within the definition of these authorities, and, not being sworn to, or in any way verified, the assessor could not be expected to give serious consideration to any claim that certain property of the corporation described therein was operative property, and no duty was cast upon him by the law to investigate a frivolous unverified claim, or to ascertain its purpose. Of course, if the claim was frivolous, no duty would be cast upon the assessor thereby; but we are not persuaded that such was the effect of the appellant's action in this case. The trial court does not find that the claim made by appellant was not made in good faith, or that it was frivolous. No authorities, based on facts like those here considered, have been cited. There can, of course, be no quarrel with the "summing up" of the rule that "where the law requires the taxpayer's list to be verified by oath or affidavit, an unverified list is of no effect—it does not bind the assessors, and does not benefit the property owner." 37 Cyc. p. 994, g. The cases cited by respondent (*Bessolo v. City of Los Angeles*, 176 Cal. 597, 169 P. 372; *Henne v. Los Angeles County*, 129 Cal. 297, 61 P. 1081; *Weyse v. Crawford*, 85 Cal. 196, 24 P. 735), merely hold, on the point to which they are cited, that when the law requires certain demands or statements under oath, the law must be complied with. Unless respondent is correct in its contention regarding the proper construction to be given the phrase "duplicate of the report," as used in the section, there is nothing in the law governing this matter that requires a sworn or verified statement to be furnished to the local assessor. It was shown at the trial that the matter appearing on the eleven sheets of paper sent to the Oakland city assessor, descriptive of the appellant's operative property within the state, was first "typewritten on stencil sheets and run off on the mimeograph, * * * many copies run off from each sheet, including one for the state board of education and one for each local assessor," and that the mimeograph copies so made are duplicates of the same respective pages actually sent to the state board.

Substantially, if not literally, the appellant furnished the city assessor with a duplicate of the report covering so much of said

property as was located in the city of Oakland. It was stipulated by the city that the sheets were a copy of the report of appellant's operative properties sent to the state board for the year 1920, and were attached to the letter received by the assessor, and the trial court found that the report filed with the state board "particularly specified and classified" the property described as operative and nonoperative, "and included the property which it claimed was operative in said county of Alameda, and described the same as follows, to wit: Great Western Power Company of California Operative Property Generating Plants—Electric March 12, 1920. County or City—Description of the water sources, water rights, canals, ditches, flumes, aqueducts, conduits, rights of way, dams, reservoirs, power plants, land, buildings and other property constituting part of the generating or central plant." Then follows a description of various properties in Plumas and Butte counties. On page 2, the property in Alameda county is set forth, and this item occurs:

"Two steam generating plants of Great Western Power Company of California and equipment, including oil tanks, being all of the personal property of Great Western Power Company of California at its plant in Realty Syndicate Building, Oakland, Alameda county, California, and at its plant in St. Marks Hotel, Oakland, Alameda county, California."

That is the property which appellant contends was illegally assessed.

[2] It does not appear to us that any further information is required to be given to a local assessor, in the matter of taxing the property of a public utility company, than such information as will apprise him of the intention of the company to claim that such property, or some part of it, is operative, and to give him opportunity to make a claim before the state board of equalization that, as a fact, the property is nonoperative, and therefore within his jurisdiction for assessing purposes.

[3, 4] From the evidence in the record, we are convinced that the assessor of the respondent city was in position to, and must have derived sufficient information from the communication sent him by the appellant, accompanied as it was with the maps and other papers, to charge him with notice that the appellant was not only attempting to comply with the section of the Code, but was actually claiming before the state board of equalization that the property described was operative property. The contrary view of the trial court, reflected in its findings, is not supported by the evidence. The assessor was expressly told that the maps and papers were sent to him as a statement of operative property of the appellant within his jurisdiction, and that the maps showed the location of such property. He was also informed

that the statement of property and the maps were identical with the statement and maps sent by the Company to the state board of equalization covering his district, and that the statement and maps were sent to him at the request of the state board. It therefore became his duty, under section 3666 of the Code, supra, to take steps to have the correctness of the claim made by the appellant heard and determined in the manner provided by the statute. Failing to do that, he must be held to have acquiesced in the claim of appellant that the two steam generating plants in the city of Oakland were, in fact, operative property. As he did not take the steps provided by law whereby he might have subjected the property in question to assessment for local purposes, if it were in fact not operative property of the appellant, he was without jurisdiction to make an assessment thereon. *Pacific Electric Ry. Co. v. Rolkin*, 164 Cal. 154, 128 P. 20. It follows, therefore, that the city was without jurisdiction to levy and collect any tax based upon such invalid assessment. This last conclusion we take now to be the law of the case, for it was in effect held on the former appeal in this case (*Great Western Power Co. v. City of Oakland*, supra, at pages 657, 658 [209 P. 553]), that the procedure prescribed by the Code not having been followed, the attempt of the assessor to subject the property to local taxation was utterly void.

In view of the conclusion we have reached that the city assessor had no jurisdiction to make any assessment in the premises, the question whether the two steam heating plants maintained by appellant in the city of Oakland in 1920 were, or were not, operative property within the meaning of the Constitution becomes immaterial.

The judgment of the lower court is reversed.

We concur: MYERS, C. J.; RICHARDS, J.; LAWLOR, J.; LENNON, J.; SEAWELL, J.

SHENK, J. I dissent. It is not disputed that the report to be filed with the state board of equalization must be signed and sworn to in accordance with the requirements of section 3665 (c) of the Political Code. It seems to me that unless the report be under oath it does not constitute a report as required. When a duplicate of the report covering so much of the appellant's property as is located in the city is required to be filed with the local assessor, it was undoubtedly the intention of the Legislature that such report be attended with the same formality as the report filed with the state board of equalization. In other words, it was intended that the report to be filed with the city assessor should be the same in all respects,

that is, a duplicate, as the report filed with the state board, except that it should include only such property as was located within the city. This construction is entirely in line with other provisions of our tax laws, which require individuals to file statements of their property under oath with the local assessor such as is provided in section 3633 of the Political Code. The purpose of requiring a statement under oath is, of course, plain, as affording assurance to the assessor that the taxpayer has included in his statement all of the property owned by him in the locality in which the particular assessor has jurisdiction.

It is alleged in the complaint that on the 9th day of March, 1920, the plaintiff filed with the state board of equalization a report as required by the statute, setting forth, among other things, the description of the property operative and nonoperative located in the city of Oakland, and owned by the plaintiff at the time designated. It is further alleged that on the 10th day of March, 1920, "a full, true, and correct duplicate of said report so made to, and filed with, the said state board of equalization was furnished to the assessor of said city of Oakland." The latter allegation was properly traversed in the answer, and the court found said allegation to be untrue. The evidence was undisputed to the effect that the only documents submitted to the assessor of the city of Oakland were mimeographed copies of descriptions of property located in the said city, and maps showing in red the location of said property. These documents were submitted to the city assessor with an ordinary letter of transmittal. The appellant does not claim, and it is not the fact, that the mimeographed sheets and maps were authenticated by the oath of any person whatsoever. Under these circumstances I think that the finding of the trial court to the effect that a duplicate of the report of appellant to the state board of equalization was not filed with the city assessor was not only justified, but compelled by the evidence. In my opinion, the judgment should be affirmed.

71 Cal. App. 500

PEOPLE v. POWELL et al. (Cr. 814.)

(District Court of Appeal, Third District, California. March 4, 1925.)

1. Insurrection and sedition ⚡2—Membership cards and credentials, taken from accused on arrest, sufficient to show membership in organization.

In prosecution for violation of Criminal Syndicalism Act, § 1 and section 2, subd. 4, membership cards and delegate credentials, bearing names and signatures of accused, and signed by general secretary of I. W. W., taken

from persons of accused on arrest, *held* sufficient evidence to warrant conclusion that they were members of organization, notwithstanding officers who arrested them could not identify each by name.

2. Insurrection and sedition ⚡2 — Evidence that accused was I. W. W. member sufficient.

In prosecution for criminal syndicalism, where accused was arrested at local headquarters of I. W. W. organization with other defendants while sitting around a table with documents, purporting to be minutes of meeting of organization, and which referred to accused by name, evidence *held* sufficient to show membership in organization, notwithstanding no membership card was taken from him.

3. Criminal law ⚡444—Papers, purporting to be minutes of I. W. W. meeting, competent in criminal syndicalism prosecution.

In prosecution for criminal syndicalism, papers purporting to be minutes of I. W. W. meeting, signed by secretary, whose signature was proven, and who was one of those arrested, *held* sufficiently proved to be official minutes, in absence of countervailing showing, to be competent to identify accused, who was mentioned therein, as member.

4. Insurrection and sedition ⚡2 — Evidence sufficient to support finding that I. W. W. advocated and practiced acts of criminal syndicalism.

In prosecution for criminal syndicalism against members of the I. W. W. organization, evidence *held* sufficient to support implied finding of jury that organization taught, advocated, and practiced acts of criminal syndicalism to further its purpose.

5. Insurrection and sedition ⚡2—Evidence of practices of organization before Criminal Syndicalism Act held competent to show unlawful character of organization.

In prosecution for criminal syndicalism of members of the I. W. W. organization, evidence showing teachings and practices of organization before passage of Criminal Syndicalism Act *held* competent to show unlawful character of organization.

6. Criminal law ⚡1159(3)—Verdict on conflicting testimony cannot be superseded by that of appellate court.

Verdict of jury on issue on which evidence is conflicting cannot legally be superseded by that of appellate court.

7. Insurrection and sedition ⚡2—Declaration of I. W. W. officer implying incendiary work properly admitted.

In prosecution for criminal syndicalism against members of the I. W. W. organization, declarations of the secretary and delegate of a branch organization, who was invested with full authority to secure recruits and to declare, interpret, and advocate adjective and substantive laws and principles of organization, implying that certain fire was incendiary work of organization, and sanctioning that work, *held* properly admitted as tending to show unlawful character of organization.

8. Criminal law §402(2)—Parol proof of contents of letters written to branch of I. W. W. organization proper.

In prosecution for criminal syndicalism, contents of letters, written to branch organization of I. W. W., which prosecution had requested of counsel for defendants, and which they denied having, could be shown by parol, in view of Code Civ. Proc. § 1855, allowing parol proof on failure of opponent to produce writings in his possession after notice, which in instant case would have been futile, especially since production could not be required under subpoena duces tecum as incriminating persons subpoenaed as coconspirators.

Appeal from Superior Court, Humboldt County; Warren V. Tryon, Judge.

Henry Powell and others were convicted of criminal syndicalism, and they appeal. Affirmed.

R. W. Henderson, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendants were jointly charged with and tried for and convicted of the crime of criminal syndicalism in the superior court of Humboldt county. Each made a motion for a new trial, and the same was denied, and each appeals from the judgment of conviction and the order denying him a new trial.

The offense with which the accused are charged and of which they were convicted is that so denounced by subdivision 4 of section 2 of the Criminal Syndicalism Act (St. 1919, p. 281), which makes it a felony for any person to inaugurate or assist in inaugurating, or is or knowingly becomes a member of, any organization, society, group, or assemblage of persons, organized or assembled to advocate, teach or aid and abet criminal syndicalism, as that crime is defined by section 1 of that act.

Seven of the defendants were, on the 14th day of October, 1923, arrested by the sheriff of Humboldt county, assisted by several deputies, in a room in a building designated and known as "218 D street," in the city of Eureka, in said county. The defendants so arrested were Powell, Bryan, McRae, Allen, French, Taylor, and Beavert. The defendant Nicholson was arrested at a subsequent time at some other place in Humboldt county. Longstrath was arrested in the latter part of October, 1923, on a date subsequent to the day on which the seven defendants above named were arrested. He was found by the officers with another man, who was not arrested, temporarily camping on Trinidad beach, in Humboldt county.

The seven defendants first above named, upon being arrested, were taken to the county jail in Eureka, there searched by the of-

ficers, and from the person of each, with the exception of Beavert, was taken a membership card of the Industrial Workers of the World, and from the possession of some of them there were also taken certain "credentials" purporting to have been issued by said organization and to confer upon them the authority to discharge certain duties in connection with the promotion of the aims of the organization.

[1] In the opening brief of counsel for the defendants it is expressly conceded that the evidence sufficiently shows that the defendants Powell, Nicholson, and Longstrath were members of the Industrial Workers of the World. As to the defendants Bryan, Taylor, Allen, French, McRae, and Beavert, however, it is contended that the evidence is insufficient to support the finding of the jury that they were members of said organization. This contention as to all these defendants, except Beavert, is predicated upon the proposition that, while membership cards and (from some) delegate credentials bearing the names and signatures of said defendants and signed and issued by the general secretary of the I. W. W. were taken from their persons by the officers at the county jail, at the time of their arrest, the officers, when testifying, were unable to name the particular defendant from whom a particular card or particular credentials were taken. To be more explicit: A membership card was taken from the possession of each of the defendants, bearing his name and signature, but the officers, save in one or two instances, were not able to state on the witness stand, from their own independent recollection, from which of the defendants the particular card or credentials were taken. The objection is without substantial merit. The names on the several cards and credentials, as seen, corresponded with the names of the defendants, and it was for the jury to determine whether the cards, etc., were issued respectively to the defendants whose names they bore. It was but a natural inference, under the circumstances, that a card bearing the name of any one of the defendants was taken from the possession of that particular defendant and not from that of some other defendant of a different name. The cards and credentials constituted sufficient evidence to warrant the jury in concluding that the five defendants referred to were members of the organization, and further in finding that said defendants had knowledge of the principles, the doctrines, the purposes, and the policies of the organization. *People v. Flanagan* (Cal. App.) 223 P. 1014.

[2, 3] Upon the person of the defendant Beavert a membership card was not found, but it was shown that he was arrested at the local headquarters of the organization in Eureka with the other defendants while they

were sitting at a table upon which there were at the time certain documents or writings, purporting to be the minutes of a meeting of the local branch and a record of the activities of certain members of the organization. In the writings purporting to be the minutes or record of the proceedings of certain meetings of the local branch, the name of the defendant, Beavert, appeared in connection with his appointment to the membership of the "committee on resolutions," and also as a member of the "Leaflet committee"; that he was a duly appointed traveling delegate of the organization or the local branch thereof, and had issued credentials to another member authorizing him to accept applications for membership of the local branch and to collect dues, etc. To these significant circumstances may be added these considerations: That there was no denial, at the time of the arrest of the defendants at No. 218 D street, that said place, if not the permanent, was the temporary, headquarters or office of the local wing of the I. W. W. organization. Moreover, it was conceded that the literature in various forms found at the said place at the time of the arrest of several of the defendants, including Beavert, was printed and published by and under the authority of the I. W. W. There was no denial at any time that the book or the writing or document containing the name of Beavert and reciting that he had been appointed as a member of a committee of the organization of the local branch thereof was not what it purported to be, to wit, the minutes or record of the proceedings of some meeting of the local branch of the organization. It was proved, if, indeed, not virtually conceded, that Henry Powell, who was in charge of the place when Beavert and certain other defendants were arrested, was the secretary of the local branch of the organization. There was no attempt to deny that the defendants, other than Beavert, arrested at 218 D street, were members of the I. W. W. Thus it is clear that there were brought before the jury circumstances and other considerations from which the jury were well justified in drawing the conclusion that Beavert was a member of the organization in question. It is argued, however, that, to constitute the writings referred to as competent evidence of Beavert's membership of the organization proof must first be made that said writings were the official minutes of any meeting the proceedings of which they purported to contain the record of. These writings or minutes were signed by "Henry Powell, Sec'y Br.," and it is admitted that that was shown to be the signature of Powell, one of the defendants and secretary of the Eureka branch of the organization. This was a sufficient showing that said writings were the official minutes or record of certain meetings of the local branch of the organization to make

them prima facie proof of their authenticity or of their official character, and sufficient to warrant an inference to that effect until their probative force was overcome by a countervailing showing, and it was for the jury to say whether such a showing had been made.

[4] It is contended that the evidence is insufficient to support the implied finding of the jury that the organization taught, advocated, and practiced acts of criminal syndicalism to further its purposes.

At the time the seven defendants were placed under arrest at 218 D street the officers found and took possession of a quantity of the literature of the organization, consisting of books, booklets, pamphlets, magazines, newspapers, and other periodicals. These contained the platform of principles of the organization, and also addresses, lectures, and writings, published in the official organs of the Industrial Workers of the World, setting forth and expounding the principles and ultimate purposes of said organization. Extracts from these publications and also from other literature of the organization were introduced in evidence. In fact, substantially the same character of literature was introduced in the present case as was presented in the numerous other like cases hitherto appealed to and decided by the Supreme and Appellate Courts. See *People v. Steelik*, 187 Cal. 361, 203 P. 78; *People v. Taylor*, 187 Cal. 378, 203 P. 85; *People v. Roe*, 58 Cal. App. 690, 209 P. 381; *People v. La Rue et al.*, 62 Cal. App. 276, 216 P. 627. In fact, counsel for the defendants in his brief states that the evidence thus introduced in this case and addressed to the proof of the character of the organization, or for the purpose of showing that said organization teaches and advocates the employment of criminal means and measures for accomplishing its aims, was "practically identical with evidence received and considered in the other cases heretofore considered and decided by the courts of appeal," but protests that the evidence introduced herein to establish that element of the offense charged "was insufficient to bring the guilt of the organization down to the time covered by the information." The basis of the latter contention is that much of the literature introduced in the case, and in which acts of violence and sabotage, if not openly, were covertly but understandably, advocated as means for achieving the aims of the organization, were published and distributed prior to the passage of the Syndicalism Act in the year 1919. But, as will be shown, there was testimony, oral and documentary, other than that afforded by said literature, which showed or tended to show that the organization, after the passage of the Syndicalism Act, did not cease teaching and advocating its radical doctrines and continued after that time to

advocate a resort to unlawful means for accomplishing its ultimate objects. Some of the witnesses for the people in this case had testified in other cases previously tried in the courts of different counties of this state. Those witnesses were Albert Coutts, Joe Arada, and the deputy sheriff of Stanislaus county in the years 1917 and 1918, during which years numerous criminal acts of the most diabolical character were committed in said county and the responsibility therefor traced to members of the I. W. W. while prosecuting the activities of said organization in furtherance of its purposes.

Coutts, a member of the I. W. W. from the year 1913 to and including a part of the year 1918, as in the other previously tried cases, gave in this case an extended résumé and explanation of the principles, purposes, and activities of the I. W. W. while he was a member thereof, and told of innumerable instances of the commission of criminal acts by the members of the organization in avowed furtherance of its ultimate aim. His recital of the atrocities perpetrated by the members of the organization during the period of his affiliation therewith is in all respects substantially the same as he gave it in every case previously arising and tried under the syndicalism law and in which he was a witness. His story as he told it in this case may be found in many of the cases above named, and there is therefore no necessity for repeating it herein.

Joe Arada repeated in this case his testimony as given in the case of *People v. Roe*, supra, and other cases named above to the effect that, while he was employed in digging potatoes on a ranch in San Joaquin county in the year 1917, certain members of the I. W. W. applied to the owner of the ranch for like employment, and that in the nighttime, while he and other workmen were asleep in a bunkhouse on the ranch, the aforesaid members of the I. W. W. deposited in his (Arada's) shoes a certain chemical combination which, after he had worn the shoes for a few hours the following day, so burned and injured his feet as to compel him to cease working and to remain in a hospital for many months under medical treatment. As stated, the details of Arada's story as he told it in this case may be found briefly recapitulated in the cases above named, particularly in the case of *People v. Roe*, supra, and for that reason a repetition herein of the details thereof is uncalled for.

R. G. Davis, a deputy in the office of the sheriff of Stanislaus county in the year 1917, repeated in this case the testimony given by him in the other cases mentioned as to a number of incendiary fires in Stanislaus county in the year just named, resulting in the destruction of valuable property—barns, large stacks of hay, etc.—in various parts of said county, and which, he stated, was satis-

factorily shown to be the work of certain members of the I. W. W. Davis' testimony as given in this case is, as before stated, substantially the same as that given by him in the other cases above referred to, and for that reason it need not be reproduced herein.

[5] The testimony of Coutts, Arada, and Davis, although relating to the teachings and practices of the organization before the passage of the syndicalism statute, was, nevertheless, competent for the purpose of showing the unlawful character of the organization. *People v. Steelik*, 187 Cal. 361, 376, 203 P. 78. In that case it is said that, for the purpose of showing that an organization or assemblage of persons is one that falls within the condemnation of the statute denouncing certain acts as "criminal syndicalism," it is proper to receive and consider evidence of its conduct and activities before as well as after the passage of the statute. See, also, *People v. Taylor*, supra; *People v. Roe*, supra; *People v. La Rue*, supra; *People v. Flanagan*, supra; *People v. Bailey* (Cal. App.) 225 P. 752; *People v. Wagner* (Cal. App.) 225 P. 464.

L. Babcock testified that, as a detective connected with the office of district attorney of Sacramento county, and at the request of said district attorney, and for the purpose of securing evidence as to the methods taught, advocated, and practiced by the I. W. W. to accomplish the general scheme of government to which it has committed itself, he joined said organization, at Sacramento, under the name of "L. A. Munson," in September, 1922, and retained his membership thereof until the 1st day of March, 1924; that in the month of May, 1923, he "took out delegate's credentials," and continued ostensibly to act in that capacity as a representative of the organization during the remainder of the year 1923. He stated that, while a member, he attended meetings of the organization held at various places in California, and thereat heard the discussions by the members of what they conceived to be the more effectual course to be pursued to press to fruition the great central purpose of the organization. He testified that the members, at certain meetings held at different places, advocated "direct action" and "the strike on the job." By "direct action," both Coutts and Babcock explained, was and is meant, as the phrase is clearly so understood by all the members, that, where necessary to carry out a particular scheme, the members were (in effect) to take the law into their own hands and commit criminal acts upon property or the persons of the employing class, or, where any of their fellow members are in the toils of the law for offenses denounced by the Syndicalism Act, to resort to similar methods against the officers of the law and so prevent the infliction upon such members of the punishment prescribed by said act for a

violation of its provisions. One of the meetings at which Babcock heard the latter proposition discussed and indorsed was held at a certain place in Yolo county, immediately across the Sacramento river from the city of Sacramento, in October, 1922. The "strike on the job," so Babcock further explained, is where the members of the organization, being employed by the employing class for the performance of certain labor, are to "shirk" on their work—that is, purposely do as little work as possible—and thereby cause the employer to lose money in operating his enterprise, whatever the nature thereof may be, and so make it unprofitable for the "capitalistic" class, as the organization characterizes all employers of labor, to engage in business and carry it on profitably. Babcock further testified that, either in September or October, 1923, he saw and read a letter which, at the time, was lying on the desk of the "supply clerk" of the Stockton branch of the I. W. W. organization, in the I. W. W. hall of said city, purporting to be from the "stationary delegate" at Portola, Plumas county, being signed with the stamp of said delegate, and requesting the secretary of the Stockton branch of the I. W. W. "to have all 'cats' to proceed to Quincy (Plumas county) at once to turn the 'cats' loose upon the lumber barons." He also testified that at some time in 1923 he saw and read two letters, one of which was posted on the wall and the other lying on the secretary's desk in the hall of the I. W. W. in Stockton, one bearing the signature of a delegate named William Dawson and the other over the name of a delegate named John Deady. The letter from the first named requested the secretary of the Stockton branch to send all men possible to the rice fields so that the strike they had started or were about to start could be made a success; that such a course "would improve conditions" in the rice fields. The Deady letter requested "the secretary of the Stockton branch to send 110 cats to Colusa—I think Colusa," said Babcock, "but I am not sure about the town." This witness explained that the number "110" is the designation of the "agricultural branch" of the organization. He further explained, as Coutts and others testified in this and former cases, that the term "cats" was used by the organization for the purpose of designating those members to whom the business of committing acts of sabotage and violence to physical property was assigned by the organization. The witness further testified, against the objection of defendants that the testimony was hearsay, that in the year 1923, on a street corner in the city of Los Angeles, one Barney Brooks, then "branch secretary or stationary delegate" of the Los Angeles wing of the organization, referring, in the presence of the witness and several other members of the I. W. W., to a fire which but a

few days before had partially destroyed the Edison electric plant at Eagle Rock, Los Angeles county, declared that "we ought to burn the whole damned works." Babcock testified to other happenings in I. W. W. halls and the declarations by the members of the organization in the course of discussions at the meetings thereof in various places in the state in 1923 and 1924 which clearly indicated that, since the passage of the Criminal Syndicalism Law, the organization has continued to advocate and indorse employment by its members of unlawful means in furthering the accomplishment of the radical and, indeed, revolutionary plan for overthrowing our existing systems of government. The testimony thus referred to need not be gone into in detail herein. Enough of the details of his testimony have been given above to show that there is evidence to support the implied findings of the jury that both before and subsequent to the passage of the Criminal Syndicalism Law the organization has stood for the commission of criminal acts to push forward its movement to revolutionize the present forms of government of the states and the United States and introduce in lieu thereof what the members are pleased to call an industrial government, whatever that may mean.

[6] The defendants did not take the witness stand in their own behalf. Other members of the organization, however, testifying for the accused, stated that the policy of the organization as to the means by which it had always endeavored to carry out its central object was to do so by peaceable and lawful methods; that, since the Criminal Syndicalism Act became a law, the organization had repeatedly, through its official publications and its lecturers, vigorously condemned the employment of violence or the resort to criminal acts or instrumentalities for effectuating its ultimate purposes and had strictly enjoined its members against the commission of crime or acts of lawlessness for any purpose. Extracts from articles appearing in their official publications issued and circulated by authority of the organization and from lectures delivered by its members since the passage of the statute, emphatically admonishing its members to refrain from committing unlawful acts in prosecuting their activities in behalf of the organization, were admitted in evidence and read to the jury. In a word, the defendants were by the trial court accorded unrestricted latitude, consistently, of course, with the law of evidence, in the matter of making their defense along the lines just indicated. The effect of this showing, though, is only to create a substantial conflict upon the question of the character of the organization—whether its methods of prosecuting its scheme to success are unlawful or such as are denounced by the Criminal Syndicalism

Law. Hence the judgment of the jury upon that issue, as evidenced by their verdict, cannot legally be superseded by that of this court.

[7] There are a few of the rulings which merit special attention herein. It is contended that the testimony of Babcock as to the conversation he had with Barney Brooks on a street of Los Angeles relative to the partial destruction by fire of the Edison electric plant at Eagle Rock involved a narrative of a past event, and was therefore incompetent. *People v. La Rue*, 62 Cal. App. 276, 283, 216 P. 627, 630. It must be conceded that the statement imputed to Brooks is reasonably subject to the construction that it implied that the fire was the incendiary work of persons affiliated with the organization, and that the act was instigated and sanctioned by the organization itself. But we think that the testimony was, nevertheless, properly received. It will not be doubted that it was relevant to the issues of the case. The objection to it is addressed to the question of its competency, and as to this proposition it was only necessary, to render it competent, that it be made to appear, as we think it was made to appear, that the declaration to which the testimony related was made by one authorized to speak for the organization. Brooks, at the time of making the statement, was an officer of the Los Angeles branch of the organization. He was secretary and a delegate of the branch organization, and it is a reasonable inference, from the nature of his official relation to the organization, that in his capacity as delegate, if not in both his official capacities, he was invested with full authority, not only to secure recruits to the ranks of the organization, but to declare, interpret, and advocate the adjective as well as the substantive laws and principles constituting its general political platform or propaganda, and that, upon all matters pertaining to its purposes and activities, his voice was its voice. In this view, testimony of his extrajudicial admissions of atrocities committed in the past by members of the organization in pursuance of its teachings and with its indorsement would be competent testimony as in proof of the unlawful character of the organization.

In his opinion in the case of *People v. Flanagan*, supra, Presiding Justice Finch, while not expressly stating that testimony of the extrajudicial declaration of an officer of the organization implying or directly admitting that certain acts of lawlessness had at some time in the past been committed by certain members to further its ultimate aims, at least intimates that such testimony is admissible, particularly where, as here, all the circumstances and the nature of the official duties of such officer reasonably justify the inference that the declarant is or was authorized to speak for the organization. But

Brooks' declaration amounted to more than an implied reference to a past event. It involved an expression of the then present attitude of the organization as to the methods it believed in and advocated to accomplish its aims; that is to say, the declaration constituted some evidence that the organization, notwithstanding that the Criminal Syndicalism Act was then in existence, believed in, advocated, and would employ, criminal means for establishing its scheme of government.

[8] The next and the last point of which special notice will herein be given involves the rulings of the court permitting the prosecution to prove by parol the contents of the letters which Babcock stated that he saw and read in the hall of the Stockton branch of the organization and to which we have above referred. When objection to said testimony was made, the district attorney stated that he did not have the letters in his possession, and asked the attorney for the defendants if he had possession of them, to which the latter with some show of indignation responded that he did not have any such letters, but that, if he had them in his possession, he would not deliver them to the district attorney. The testimony of Babcock was that the last time he saw the letters they were still in the hall of the Stockton wing of the organization.

The rule of our Code with regard to the proof of a writing is that there can be allowed no evidence of the contents thereof, other than the writing itself, except in certain specified cases, among which are the following:

"1. When the original has been lost or destroyed; in which case proof of the loss or destruction must first be made. 2. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice." Code Civ. Proc. § 1855.

In the instant case the letters were not shown to be in the actual possession of the defendants. The reasonable inference from Babcock's testimony was that they were still in the possession of the officers of the local branch of the organization at Stockton. Notice to the defendants to produce them would obviously have been futile. It is equally obvious that a subpoena duces tecum directed to the officer or officers having official possession and control of the writings, commanding them to produce them in court, would have been futile, since those officers were coconspirators of the defendants, and could not have been compelled to produce and expose in court the contents of any written document which would tend, as the letters in question would certainly tend, to connect the officer producing them with the commission of the same or like crime for which the defendants were on trial. Thus it is clear that

it would have been, and presumably the trial court so viewed the situation, an idle act—indeed, a nonsensical act—to have ordered a duces tecum subpoena to issue and to be served with the view of procuring, for the purpose of fortifying the people's case, the production of those letters. There was then no other conceivable way in which the contents of the letters could be presented to the jury than by means of parol testimony, and the question now is whether, under such circumstances, such testimony is legally available for that purpose. The character or quality of the evidence thus brought into the case is, manifestly, no different from that which is declared by the Code to be competent, and, consequently, proper in certain enumerated instances, where the specified conditions upon which such testimony is receivable have been met. If, therefore, there be any difference between the situation where secondary evidence of the contents of a writing is, by express provisions of the law, allowable, and the situation presented here, it is not in the fact that the parol testimony in the case first mentioned is abstractly superior in evidentiary value to such testimony in the other, but in the fact that in the one case the Legislature has expressly declared that, when circumstances arise which will authorize its reception, it is proper testimony, while in the other case there is no express authority in law for allowing it. We are of the opinion, however, that, under the circumstances of this case, parol testimony of the contents of the letters referred to is admissible upon the theory that, in legal effect, the letters are as much lost to the people as though they were actually lost or their whereabouts unknown and cannot be traced. Indeed, we feel safe in saying, as a result of our investigation of the question, that the consensus of judicial opinion, as well as that of the text-writers, is that, under circumstances such as are present in this case, parol testimony is admissible for the purpose of proving the contents of written documents upon the theory above suggested. It may be true that there is an apparent difference of opinion as to the particular ground upon which such testimony is admissible under circumstances similar to those existing in this case, but, in our opinion, the difference is only apparent and is due to the nature of the verbal statement of the rule or the form in which it is expressed in some of the cases and by some of the text-writers. However, it is not a matter of any consequence as to the particular theory upon which the testimony is admissible so long as it is admissible upon any reasonable theory within the spirit or contemplation of the code section.

In *U. S. v. Reyburn*, 6 Pet. 352, 8 L. Ed. 424, the prisoner was indicted for unlawfully issuing a commission in writing for a cer-

tain vessel "to the intent that such vessel might be employed in the service of a foreign people, that is to say, in the service of the United Province of Rio de la Plata, to cruise and commit hostilities against the subjects and property of a foreign prince, * * * with whom the United States were at peace." The proof of the contents of the commission was necessary to the establishment of the crime against the accused, and the commission was in the possession of one Chase, who was also connected with and criminally culpable in the transaction. The question arose at the trial whether it was proper, under the indicated circumstances, to prove the contents of the commission by parol. The court, holding that parol evidence of the contents of the commission was admissible, said, among other things:

"A subpoena to compel his [Chase's] attendance * * * would have availed nothing, and the law does not require the performance of an act perfectly nugatory. But suppose Chase had been within the reach of a subpoena, and had actually attended court, he could not have been compelled to produce the commission, and thereby furnish evidence against himself. * * * Rules of evidence are adopted for practical purposes in the administration of justice; and must be so applied as to promote the ends for which they are designed."

The foregoing statement of the rule in such instances as the present is approved by the authors of *Encyclopedia of Evidence*, vol. 2, pp. 346, 347, where it is said:

"Tracing the primary evidence to the possession of one interested in its retention and who, although called, could not be compelled to produce it because it would tend to incriminate him, is enough to let in secondary evidence," citing a number of cases in the footnotes.

In *State v. Dreany*, 65 Kan. 292, 69 P. 182, the defendants were accused of and tried upon a charge of combining and entering into an unlawful agreement with other named parties to pool and fix the price to be paid for grain at a certain named place. The contents of the agreement, which was in writing, were necessary to be proved to make out a case. It was not shown that the writing was in the possession of the defendants, but it was made to appear that it was not in the possession of and under the control of the prosecuting attorney. That officer served notice upon the defendants to produce the written agreement at the trial. The document was not produced by the accused, and the court allowed the prosecuting attorney to prove its contents by parol evidence. Upon appeal, the point was urged that the reception of parol evidence for that purpose was error. The Supreme Court held otherwise, and said:

"It is clear that, if such writing is shown to be in the possession of the defendants, they could not be compelled, by notice or otherwise,

to produce it as evidence to be used in a prosecution against them. It is further apparent that, if such writing were shown to be in the possession of defendants, it would be as completely lost to the prosecution, so far as any power existed to procure it as evidence upon the trial, as though it were lost or destroyed altogether. And in such case parol evidence of its contents has been held admissible by this court. *State v. Gurnee*, 14 Kan. 111. As the writing in question was not in the possession of nor under the control of the prosecution, and as it was not within the power of the state to produce it at the trial, we are inclined to the opinion that it was not error to receive secondary evidence of its contents after proof duly made of its existence and execution."

The same general principle underlies the following rule as stated in 2 Wigmore on Evidence, § 1212:

"It is also often said that where the third person is hostile and fraudulently detains the document, this fact of itself suffices to excuse nonproduction."

See, also, *Stark v. Burke*, 131 Iowa, 684, 109 N. W. 206.

We conclude that, under the circumstances as shown, the ruling permitting secondary evidence of the letters in question was legal and proper.

There are no other points which it is deemed necessary to consider herein.

The judgment and the order as to each of the defendants are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

72 Cal. App. 48

JACKSON v. DOLAN et al. (Civ. 5130.)

(District Court of Appeal, First District, Division 1, California. March 27, 1925.)

Courts 116(3)—May amend minutes to show true date of order.

There is no merit in an appeal from an order correcting the minutes of the trial court to show, in accordance with the uncontroverted testimony, that an order granting new trial, from which appeal had been taken, was made on a certain day, later than the day recited on the minutes.

Appeal from Superior Court, Imperial County; Phil. D. Swing, Judge.

Action by L. A. Jackson against E. J. Dolan and another. From an order correcting the minutes of the trial court, defendant Gregory Ashe appeals. Affirmed.

Randall, Bartlett & White, Vincent C. Hickson, and A. P. G. Steffes, all of Los Angeles, for appellant.

Harry W. Horton, of El Centro, for respondent.

TYLER, P. J. This is an appeal from an order of the trial court, made in conformity to the direction of this court in *Jackson v. Dolan*, 58 Cal. App. 372, 208 P. 315, correcting the minutes of the trial court so as to show the true date of an order granting a new trial to defendant and appellant Ashe.

The action in which the new trial was granted was one instituted by plaintiff Jackson to recover damages for personal injuries sustained by him which were alleged to have been caused through the negligent operation of an automobile. The case was tried by a jury, and a verdict in the sum of \$4,000 was rendered in favor of plaintiff, and judgment was entered thereon on December 15, 1920. Thereafter, on the 17th day of December, defendants made a motion for a new trial, and the motion was taken under advisement by the court. This motion was grounded upon excessive damages claimed to have been given under the influence of passion and prejudice, insufficiency of the evidence, that the verdict was against law, and errors of law occurring at the trial. No action was had thereon until December 31, 1920, when the minutes of the court show that the motion was granted as to defendant Ashe.

After perfecting his appeal from this order, and on the 22d day of April, 1921, the plaintiff moved the trial court to vacate and set aside its order granting a new trial and to correct the minutes of the court so as to show that the order was made on Sunday, January 2, 1921, and not Friday, December 31, 1920. Both motions were denied, and the validity of this order was before us on a former appeal. *Jackson v. Dolan*, 58 Cal. App. 372, 208 P. 315.

It appeared in that appeal that the term of office of Hon. Phil. D. Swing, the judge who tried the case and who made the order, expired on January 3, 1921. January 1 and 2 were both legal holidays, so that, for all judicial purposes, the term of office of the trial judge expired on December 31, 1920, the day the order bore date. The motion to vacate the order granting a new trial and to correct the minutes of the court was made on affidavits. The affidavit of the clerk of the court who made the entry in the minutes was to the effect that the order was in fact made on Sunday, January 2, 1921, a legal holiday, and that no other order was ever made. This affidavit was not controverted. It was held on said appeal that, so far as the motion was directed to the vacation of the order granting a new trial, it was properly denied, for the reason that the court had lost jurisdiction to afford any relief, as the effect of the appeal from its order was to remove from its jurisdiction the subject-matter appealed from, including all questions going to the validity or correctness of

such judgment or order. It was further held, however, that, as to the motion to correct the minutes of the court, the same was improperly denied, for the reason that the records of a court remain within its physical custody and control, and an appeal does not prevent the court from correcting mistakes appearing on the face of the record, as courts have at all times power to allow amendments to judgments for the purpose of having them express what was rendered so that the record will speak the truth. It was therefore ordered that the trial court determine the true facts with relation to the entry of the order and take action accordingly.

In conformity with this direction, the trial court proceeded to determine the truth as to the time when the order granting the new trial was made. It found upon uncontroverted testimony that the order vacating the judgment as to Gregory Ashe and granting him a new trial was given, ordered, and made by the court on Sunday, January 2, 1921, and not on December 31, 1920, as recited, and the minutes were accordingly corrected so as to state the true facts.

This is an appeal from such order. From what we have said it is manifest that there is no merit in the appeal.

The order is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

72 Cal. App. 51

JACKSON v. DOLAN et al. (Civ. 4144.)

(District Court of Appeal, First District, Division 1, California. March 27, 1925.)

Appeal and error ⇨112—New trial ⇨155— Motion denied by lapse of time, and so no appeal, where only action is order after expiration of judge's term.

An order granting a new trial made when, for all judicial purposes, the judge's term has expired, is of no effect, so that time for action on the motion having expired, it is under Code Civ. Proc. § 660, deemed denied by lapse of time, from which denial no appeal lies.

Appeal from Superior Court, Imperial County; Phil D. Swing, Judge.

Action by L. A. Jackson against E. J. Dolan and another. From an order granting a new trial, plaintiff appeals. Reversed.

Harry W. Horton, of El Centro, for appellant.

Randall, Bartlett & White, of Los Angeles, for respondents.

TYLER, P. J. This is an appeal from an order granting a new trial. The facts are stated in an opinion filed by us this day on an appeal from an order correcting the min-

utes of the court in the above-entitled action. 236 P. 318. It appears therefrom that the order granting a new trial was made at a time when for all judicial purposes the office of the judge making the order has expired. His act in granting the motion was therefore *functus officio* and of no effect, and the case is left in the same condition, in legal contemplation, as though no order disposing of the motion had ever been made, the consequence of which is that it is deemed denied by lapse of time (Code Civ. Proc. § 660), and from which no appeal lies. This being so, the question as to whether the motion was rightfully or wrongfully decided on the merits is one that is not properly before us.

For the reasons given, the order granting the new trial is reversed.

We concur: KNIGHT, J.; CASHIN, J.

72 Cal. App. 57

AUBEL v. SOSSO et al. (Civ. 5090.)

(District Court of Appeal, First District, Division 2, California. March 30, 1925. Rehearing Denied April 28, 1925. Hearing Denied by Supreme Court May 25, 1925.)

1. Infants ⇨50—Minor may contract for necessary medical treatment while living under care of parent or guardian.

Civ. Code, §§ 35-37, 207, prohibiting minor from disaffirming a contract for necessities, when not living under care of parent or guardian, does not prohibit a minor from making a contract for necessary medical treatment, while living under care of his parent or guardian.

2. Damages ⇨46—Infant entitled to recover special damages for medical treatment necessitated by injury, though expenses paid by parent prior to trial.

A contract by infant living under care of his parent for medical treatment, necessitated by injury alleged to have resulted from defendant's negligence, being valid, fact that obligation has been met by advancements on part of parent prior to trial is no defense to recovery of special damages therefor arising out of defendant's negligence.

3. Appeal and error ⇨766—Proper to affirm judgment, where appellant stated that it set out all evidence on certain question but in fact failed to do so.

Where appellants in their brief printed extracts from testimony on matter of ownership of automobile, and whether or not driver was on errand for defendants at time of injury to plaintiff, and followed it by a statement that they quoted all testimony covering such subject, thus leading appellate court to believe that no other testimony was received, but it appears that other evidence was introduced which appellants did not print in their brief, held that court could properly affirm judgment without further consideration of appeal.

4. Appeal and error ⇨930(1)—Evidence taken in light most favorable to prevailing party.

The jury having found against defendants on appeal, court must take evidence in light most favorable to plaintiff.

5. Master and servant ⇨330(3)—Evidence held to show automobile driver engaged in employer's business.

In action for injuries from automobile, evidence held to sustain finding that driver, a minor, was engaged in business of defendant partnership at time of accident.

6. Master and servant ⇨302(1)—Principal, allowing agent to combine his own business with that of principal, liable for agent's negligence.

The liability of a partnership for negligence of minor agent, who injured plaintiff while on errand for partnership, and taking a joy ride at same time, rests on general rule of liability of principal and agent, where principal allows his agent to combine his own business with that of principal or to attend to both at substantially same time.

7. Trial ⇨229, 295(1)—Instructions must be read as a whole and each need not be complete in itself.

It being rule that instructions must be read as a whole and that each instruction need not be complete in itself, where expression "through the negligence of the defendants" is used, it was not necessary to repeat in every paragraph of instructions, that such negligence must be "proximate cause of injury sustained."

8. Trial ⇨242—Use of expression "and/or," in instruction in reference to liability of partners for negligence of agent, held not misleading.

In action for injury from automobile, driven by one alleged to be engaged in business of defendant partners at time of injury, where it was shown that driver alone was operating automobile at time of accident, and there was no conflict over theory on which claim of negligence of partners was based, use of expression "and/or" in instruction as to liability of partners could not have misled jury.

[Ed. Note.—For other definitions, see Words and Phrases, And/Or.]

9. Trial ⇨203(3)—Instruction as to inference of agency from fact that automobile owner permits another to drive it, though not good law, held not prejudicial in view of instructions.

In action for injuries from automobile in which it was alleged that defendant driver was engaged in business of defendant partners at time of injury, instruction that inference of agency might arise from fact that owner of automobile permits another to drive it, unless shown that driver was not owner's agent, though not good law, held not prejudicial, where undisputed evidence showed that automobile had been used in partnership business, and that it was owned by one or both of such partners, and positive evidence was offered showing that driver was engaged in business of partnership at time of accident.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Willie Aubel, by his guardian ad litem, Joseph Aubel, against August Sosso, also known as Eddie Luciani, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Hearing denied by Supreme Court; Lennon, J., disqualified.

Chas. W. Haswell, of San Francisco, for appellants.

Bradford M. Melvin and Thomas L. Lennon, both of San Francisco, for respondent.

NOURSE, J. Plaintiff, a minor, by his guardian ad litem, sued for damages for injuries caused by being struck by an automobile driven by the defendant Sosso while the plaintiff was walking along a public highway. The defendants Edith Luciani and Sal Carlo were partners jointly operating a summer resort, known as Carlo's Resort, at Agua Caliente. The automobile was owned at the time by the defendant Luciani, who was also the mother of the defendant Sosso, who was a minor. She is sued because of her ownership of the automobile, as well as her interest as a partner with Carlo in the management of the resort, upon the theory that the automobile was at the time of the accident being used in the operation of that business. The cause was tried before the court, sitting with a jury, and a general verdict in the sum of \$1,350 was returned. From the judgment which followed, the defendants have appealed under the provisions of section 953a, Code of Civil Procedure.

The injuries occurred while the defendant Sosso, the minor child of the defendant Luciani, was operating the automobile on a public highway of Agua Caliente in company with some of his boy friends on what they frequently termed a "joy ride." The negligence of this defendant is not questioned and it is unnecessary, therefore, to detail the evidence of the accident. It appears that the defendant Luciani authorized the boy to take the car to carry a guest of their resort to Boyes Springs; that he left the guest at the latter place and returned along the highway and picked up three other boys about his own age, to wit, 15 years, for the purpose of taking a ride, as he was to call at a later hour at Boyes Springs in order to return the guest to the defendants' resort. This part of the evidence is not controverted. It was shown on the part of the plaintiff that, in addition to the errand above mentioned, the defendant Sosso was directed by the defendant Carlo to procure some bread for the resort and that he was engaged upon this errand as the agent of the partnership at the time the accident oc-

surred. This evidence is controverted by the defendants. Evidence was also offered covering the subject of special damages arising out of the medical treatment necessitated by the accident, which expenses it appears were paid by the father of the plaintiff prior to the trial of the case.

[1] On this appeal the appellants attack the ruling of the trial court in allowing the question of special damages to be submitted to the jury, insist that there is no evidence showing any liability on the part of either Edith Luciani or Sal Carlo, and criticize the instructions given by the trial judge.

[2] The attack on the subject of special damages is based upon the theory that the father, being legally liable to furnish his son with necessary medical attendance, no obligation attached to the son for these expenses and he was not, therefore, entitled to recover for the outlay in this action. It is also argued that if any recovery could be had for the medical attendance furnished to the son, it must be on the suit of the father alone. In support of their position the appellants cite sections 35, 36, 37, and 207 of the Civil Code, and from these argue that a minor living with his parents is incapable of entering into a contract even for medical services. No authorities are cited in support of the position taken by the appellants, and from our reading of the sections we are satisfied that the Civil Code did not intend to place such limitations on the power of a minor. We can see no reason to hold that merely because these sections of the Code prohibit a minor from disaffirming a contract for necessities when not living under the care of parent or guardian that he is thereby disabled from entering into a valid, though voidable, contract for such necessities while living under the care of a parent or guardian. On the other hand, section 207 indicates an intention contrary to that suggested by the appellants, because if a third person may, under that section, supply such necessities, and recover the reasonable value thereof from the parent, it is because the minor is legally qualified to contract for such necessities with the third person. Therefore, without being cited to any authorities which support the propositions, we are not prepared to hold that a minor may not make such a contract while living under the care of his parent or guardian. If the contract for such necessities on the part of the minor is valid the fact that the obligation has been met by advancements on the part of the parent prior to the trial of the case is no defense to the recovery of special damages arising out of the appellants' negligence. *Kimball v. Northern Elec. Co.*, etc., 159 Cal. 225, 231, 113 P. 156.

[3-6] The second point raised by appellants is that there is no evidence in the record showing any liability on the part of Edith Luciani or Sal Carlo. In support of their

position on this appeal the appellants have printed in their brief short extracts from the testimony on the matter of the ownership of the car, and to the question whether or not the boy was on an errand for the partnership. This testimony is followed by appellants' statements that they have quoted all the testimony covering the subject, and we are led to believe that no other testimony was received touching the matter of the liability of the appellants Luciani and Carlo. A brief examination of the transcript discloses that a great deal of testimony, not printed by the appellants, was offered and received upon this issue. It appears that Carlo and Luciani were partners conducting the resort; that the automobile had been originally purchased by Luciani and was used generally by the partnership in the conduct of its business; and that at the time of the accident the boy was actually engaged in an errand for the partnership at the specific direction of appellant Carlo. The failure of the appellants to print this evidence in their brief, so that it might be examined by the court on this appeal, is sufficient in itself to warrant an affirmance upon that ground. *Estate of Berry* (Cal. Sup.) 233 P. 330. But, even so, the jury having found against all three appellants, we must take the evidence in the light most favorable to the respondent (*Palladine v. Imperial Farm Lands Ass'n*, 65 Cal. App. 727, 225 P. 291, 294), and though there is a direct denial on the part of the appellant Carlo that the boy was engaged on the errand mentioned, there is sufficient evidence to support the finding of the jury that at the time of the accident he was engaged in the business of the partnership. The liability of the appellants Luciani and Carlo for the negligence of their agent rests upon the general rule of liability of principal and agent where a principal allows his agent to combine his own business with that of the principal or to attend to both at substantially the same time. *Brimberry v. Dudfield Lumber Co.*, 183 Cal. 454, 462, 191 P. 894.

[7, 8] The appellants make the general statement that "there is hardly an instruction which is not subject to criticism." Specific reference is made to some of the instructions give on request of respondent, and these are discussed by number. The record before us does not number these instructions as referred to in appellants' brief. No citation of authority is needed to the point that these instructions must be read as a whole and that each instruction need not be complete in itself. Thus, where the expression "through the negligence of the defendants" is used it is not necessary to repeat in every paragraph of the instructions that such negligence must be "the proximate cause of the injury sustained." We find no error in the use of the expression "and/or" in reference to the liability of the appellants

Luciani and Carlo on the theory that Sosso was the agent of both or of either one of these appellants. The facts were clearly before the jury showing that Sosso alone was operating the automobile at the time of the accident; there was no conflict over the theory upon which the claim of negligence of the other appellants was based; and the jury could not have been misled by these instructions.

[9] Appellants criticize the portion of the instructions which informed the jury that an inference of agency might arise from the fact that the owner of an automobile permits another to drive it, unless it was shown by the owner that the driver of the car was not his agent. We are satisfied that the instruction is not, generally speaking, good law, but when viewed in the light of the facts of this case we cannot say that it was prejudicial. The undisputed facts were that the auto had been used in the business conducted by Luciani and Carlo, and that it was owned by one or both of them. Being an instrument of the business of the partnership and not merely a pleasure car, facts may have appeared which would have justified an inference of agency from the use of the partnership car. Positive evidence was offered showing that the boy was engaged in the business of the partnership when delivering a guest to another resort, and that he had been directed to return with bread for the partnership. The jury could draw its inferences from these facts without instructions, and was not required to make the fine distinction between the period of agency and the period when the boy was engaged in his own pleasure. *Brimberry v. Dudfield Lumber Co.*, 183 Cal. 454, 462, 191 P. 894.

Reading them as a whole, we are satisfied that the appellants were not prejudiced by the instructions given, and that there was no error in the refusal to give those designated.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

71 Cal. App. 723

ADAMS-CAMPBELL CO. v. JONES et al.
(Civ. 4222.)

(District Court of Appeal, Second District, Division 1, California. March 18, 1925.)

1. Trial ⚡404(2)—Court's finding held a conclusion of law and not to support judgment denying defendants relief on counterclaim.

In suit to recover contract price of razor-stropping machines, in which defendants counterclaimed for damages for breach of contract, finding that "plaintiff owes defendants no further sums," held a conclusion of law, though stated as a finding of fact, and cannot be con-

sidered a supporting judgment denying defendants relief.

2. Trial ⚡404(2)—Finding held a conclusion of law and not to support judgment denying defendants relief on counterclaim.

In suit to recover contract price of razor-stropping machines, in which defendant counterclaimed for damages for breach of contract, finding that "defendants were not entitled to payment of \$2,000 from plaintiff," held a conclusion of law, and cannot be considered as finding of fact, supporting judgment denying defendants relief on their counterclaim.

3. Trial ⚡404(2)—Findings must be construed to support judgment, but rejection of specific facts found by court and acceptance of conclusions of law, not permitted.

While findings must be construed, if possible, so as to support judgment, rejection of specific facts found by court, and acceptance of mere conclusions of law in direct conflict with such facts to sustain judgment, is not permitted.

4. Sales ⚡347(6)—Unnecessary for defendants, counterclaiming for damages for breach of contract, to prove a rescission of contract.

In suit to recover contract price of razor-stropping machines, in which defendants counterclaimed for damages for breach of contract, defendants were not required to allege or prove a rescission of the contract.

5. Sales ⚡365 — Findings in suit to recover contract price of razor-stropping machines construed.

In suit to recover contract price of razor-stropping machines manufactured by plaintiff, findings construed to mean that defect in machines manufactured was not due to any imperfect dies furnished by defendants, but was caused by improper substitution by plaintiff of brass instead of steel in manufacture of certain parts thereof as provided by contract.

6. Sales ⚡391(7)—Purchasers held entitled to recover payments made on contract for manufacture of razor-stropping machines.

Purchasers held entitled to recover payments made on contract for manufacture of razor-stropping machines, where contract called for machines to be made in accordance with knocked-down model furnished by purchasers, and manufacturer wholly failed to manufacture such machines in accordance with contract.

Appeal from Superior Court, Los Angeles County; Merle J. Rogers, Judge.

Action by the Adams-Campbell Company against H. R. Jones and another, individually and as copartners doing business as the Mitchell Company. From a judgment for plaintiff and against defendants on their counterclaim, defendants appeal. Reversed, with directions.

Lloyd Wright, of Los Angeles, for appellants.

Pierce, Critchlow & Barrette and Benj. M. Stansbury, all of Los Angeles, for respondent.

CURTIS, J. Plaintiff and defendants entered into a written contract on the 17th day of March, 1920, whereby plaintiff agreed to furnish the material and manufacture for the defendants 5,000 razor-stropping machines at the price of 77 cents each, or \$3,850 for the whole number. Said machines were to be made in accordance with the model furnished plaintiff by defendants, and were to be paid for, one-fourth of the purchase price at the date of the agreement, one-fourth thereof when plaintiff had the material for the manufacture of said machines in its shop, and had actually commenced work on their manufacture, and the balance of the purchase price to be paid pro rata on the delivery of the machines. Upon the signing of the contract, defendants paid to plaintiff the sum of \$1,000, which amount was slightly in excess of the first payment called for in the agreement. On June 11th following, upon the statement of plaintiff that it had on hand in its shop the materials for the machines and had actually begun work upon their manufacture, defendants paid to plaintiff a further sum of \$1,000 as the second payment under said agreement. At various times thereafter and beginning about July 1, 1920, the plaintiff delivered to defendants a number of said machines as manufactured by it, and in each case the machines were entirely unsatisfactory and not in accordance with the written contract between the parties, and were not fit for sharpening razors or razor blades. On each of said occasions defendants returned said machines to plaintiff, and called the attention of plaintiff to the defects therein, and on each of said occasions plaintiff admitted that said machines were not properly made and did not meet the requirements of said contract, and promised and represented to defendants that it would produce and manufacture perfect machines. However, plaintiff never did deliver to the defendants any machines that met the requirements of said contract. None of the machines manufactured by plaintiff under said contract for the defendants, was efficient or fit for the purpose or work for which they were intended, and all of said machines so manufactured were useless. On about September 15, 1920, plaintiff verbally offered to deliver to defendants 5,000 machines, but plaintiff was not then, nor at any other time, able to tender, nor did it tender, said 5,000 machines or any substantial number of machines which met the requirements of the contract under which they were to be manufactured and delivered.

The court found all the above facts to be true, and also that defendants demanded payment of said sum of \$2,000, but that plaintiff failed and refused to pay the same or any part thereof. It further appears that upon defendants' refusal to accept the machines which plaintiff attempted to tender them, plaintiff instituted this action to recov-

er of defendants the contract price of said 5,000 machines, less the sum of \$2,000 paid thereon. The defendants in said action filed an answer denying certain allegations of the complaint, and also filed a counterclaim setting forth in effect all the above-stated facts, which the court found to be true. The court rendered judgment in favor of plaintiff for the sum of \$120.26 for certain articles not connected with the above-mentioned contract, but denied any recovery in favor of plaintiff on said contract, and also denied defendants' right to recover from plaintiff the \$2,000 paid plaintiff on said contract. From this judgment defendants appeal on the judgment roll, and contend that, upon the facts found by the court, they are entitled to judgment against plaintiff for the amount paid by them on the contract, to wit, said sum of \$2,000.

[1-3] In defense of the judgment respondent calls our attention to the fact that in addition to the facts above stated there is a finding as follows:

"It is true that by reason of the nonpayment of said sums and in accordance with the foregoing findings, the plaintiff owes defendants the sum of \$223 for springs, the sum of \$32.48 for the name plate, and \$250 for the dies, but plaintiff owes defendants no further sums."

Upon this appeal we are not concerned with the three items of \$223, \$32.48, and \$250 mentioned in the foregoing finding, but only with the following portion thereof: "But plaintiff owes defendants no further sums." It is contended by respondent that this is a finding of fact, and that the same supports the judgment denying any relief to defendants. If the specific facts found by the court entitle appellants to a judgment in their favor, the further so-called finding that "plaintiff owes defendants no further sums" would not justify the court in refusing such a judgment. This was not a finding of fact at all, but in view of the other facts found, was a mere conclusion of law, although stated as a finding of fact. *Gay v. Moss*, 34 Cal. 125. It could not, therefore, in any sense be relied upon to support the judgment. The court also found as a conclusion of law that "defendants are not entitled to payment of the \$2,000 from plaintiff." Respondent claims that this is a finding of fact although "the court inadvertently called it a conclusion of law." We agree with the trial court in designating this as a conclusion of law. As such, like the other conclusion of law we have already discussed it cannot be considered in determining whether the judgment is supported by the findings. It is true that the rule is well established that findings must be construed if possible so as to support the judgment but this rule does not go to the extent of permitting the rejection of specific facts found by the court and the acceptance of mere conclusions of law in direct conflict with these facts in order to sustain the judgment.

[4] Respondent further argues that the judgment denying any recovery to appellants, in so far as said sum of \$2,000 is concerned, must stand, for the reason that there is no finding that appellants ever rescinded the contract. There is no merit in this contention for the reason that the counterclaim of appellants was not based upon any rescission of the contract. On the other hand, it stated a cause of action for damages for breach of the contract. Upon the breach of the contract by respondent, appellants had the election of at least two remedies. They could rescind the contract and sue for the money paid thereon, or they could sue for damages for breach of the contract. They pursued the latter remedy and it was not necessary for them in such an action to allege or prove a rescission of the contract.

The contract contains a provision that the appellants were "to furnish all the dies necessary for the manufacture of the above (machines), which dies we (respondent) are to keep in repair at your expense." The court found:

"That after the execution of said contract difficulty arose in securing materials, and plaintiff contended it could not procure steel for the side or end plates of the razor-stropping machines and a portion of the razor-holding unit; that thereupon plaintiff represented to defendants that hard brass was as efficient and suitable as steel for said parts of said razor-stropping machines, whereupon the defendants disclaimed any knowledge of the suitability of brass for said parts, and stated to plaintiff they did not have any knowledge whatever as to the quality or properties of such brass, or as to whether it would do as well or better than steel; that thereupon plaintiff substituted half hard brass for steel. * * *

"That the dies so furnished by defendants to plaintiff for the manufacture of said razor-stropping machines had been previously used in the manufacture of a considerable number of said machines, which said machines were in all respects successful in their operation, although there was a slight mathematical variation in a few of the dies. The court finds that none of the razor-stropping machines manufactured by plaintiff under said contract for defendants were efficient or fit for the purpose or work for which they were intended, only about 25 per cent of them worked at all even to start with, and those that did work became out of alignment and useless in a very short time. The court further finds that all of said razor-stropping machines were useless, some to start with, because they were not made in proper alignment, the others, in cases where they were made in proper alignment, became useless and worthless after a short use, due to the fact that plaintiff substituted half hard brass for steel in the side or end plates of the razor-stropping machines it undertook to manufacture under the contract; that the brass plaintiff used for said side plates was not sufficiently rigid to withstand the use and work for which the machines were intended; that said brass was too soft, or so soft that the places where it was joined together to other parts of the machines devel-

oped play upon use, thus causing the machines to become out of alignment upon use so that a razor could not be sharpened uniformly or smoothly throughout the length of its blade."

[5] It is now contended by respondent in support of the judgment that the findings of the court indicate that the imperfections in the dies were partly responsible for the improper alignment in the machines manufactured by respondent. We do not so construe the findings. While the court found that there was a "slight mathematical variation in a few of the dies," it does not find that this defect in the dies was responsible for the imperfect machines. The court, however, does find that all of the machines manufactured by the respondent were useless.

"Some to start with, because they were not made in proper alignment; the others, in cases where they were made in proper alignment, became useless and worthless after a short use, due to the fact that plaintiff substituted half hard brass for steel in the side or end plates of the razor-stropping machines it undertook to manufacture under the contract."

It is apparent from these findings that the imperfection in the machines manufactured was due not so much to any variation in the dies furnished by appellants, as it was to the substitution by respondent of brass for steel in the sides or end plates of the machines. Even if we assume that the cause of the defective alignment in those machines which were useless "to start with" was due to the imperfection in the dies furnished by appellants, an assumption not warranted by the findings however, yet it also appears from the findings that in the manufacture of all the machines made by respondent, the latter used brass instead of steel and that machines so made soon became out of alignment, because the rigidity of the brass was not sufficient to withstand the use and work for which the machines were intended. The only conclusion therefore that can be drawn from these findings is that had all the machines when manufactured been in proper alignment, they would by the use for which they were intended soon have become out of alignment on account of the defective material used by respondent in their manufacture. As we construe the findings therefore the defect in the machines manufactured was not due to any imperfect dies furnished by appellants, but was caused by the improper substitution by respondent of brass instead of steel in the manufacture of certain parts thereof as provided by the contract.

[6] Finally, respondent contends that, as the machines were manufactured according to specifications or instructions furnished by appellants, there was no implied warranty that they would answer the particular purpose for which appellants intended to use

them. In support of this proposition respondent cites the following authorities: *Bancroft v. San Francisco Tool Co.*, 120 Cal. 228, 52 P. 496; *Mannix v. Tryon*, 152 Cal. 31, 40, 91 P. 983; *Stevens v. Parkford*, 48 Cal. App. 131, 191 P. 699. There is no question of the soundness of the legal principle advanced by respondent and supported by these authorities, but we do not think that this principle has any application to the case before us. According to the contract between the parties to the action the machines, which respondent agreed to manufacture for appellants were to be made in accordance with the knocked-down model furnished by appellants. This model as we understand the findings, called for the use of steel in the manufacture of certain parts of the machines. Had respondent, in the manufacture of the machines, complied with all the terms of the contract, including that providing for the use of steel in those parts as shown by the model, then it would not have been responsible to appellant had the machines failed to properly do the work for which they were intended by appellants. For in such a case appellants would have received precisely what they contracted for, and there would have been no warranty, express or implied, on respondent's part that the machines would answer the particular purpose for which appellants intended to use them. The above cases cited by respondent amply support this proposition, but the trouble with respondent's position is that the findings of the court show that it failed to manufacture the machines as called for by its contract with appellants. The right to recover on their counterclaim was not based by appellants on any warranty that the machines, if properly made, would be fit for the purpose intended, but upon respondent's total failure to manufacture the machines in accordance with the terms of the contract. The court found in appellants' favor upon this issue, and very properly, we think, held that respondent was not entitled to recover the balance unpaid on the contract. We think, however, that the court should have gone farther and rendered judgment upon these findings in favor of appellants for the repayment of the amounts paid by them on the contract.

Judgment is reversed with direction to the trial court to enter judgment in favor of appellants for the sum of \$2,000, together with legal interest on \$1,000 of said sum from March 18, 1920, and on \$1,000 of said sum from June 11, 1920, less the sum of \$47.86, being the difference between the said sum of \$120.26 found by said court to be due respondent from appellants, and defendants' costs as taxed by the trial court.

We concur: CONREY, P. J.; HOUSER, J.

HANSCOME-JAMES-WINSHIP v. AINGER et ux. (Civ. 2868.)

(District Court of Appeal, Third District, California. March 19, 1925.)

1. Fraudulent conveyances ☞273—Transfer must be proved made with intent to delay or defraud creditors.

Transfer must be proved to have been made with intent to delay or defraud transferor's creditors, or other persons owning and holding demands against him, to make out a case under Civ. Code, § 3439.

2. Fraudulent conveyances ☞64(1)—Transfer of lots without valuable consideration, during insolvency or in contemplation thereof, void as to creditors, regardless of intent.

Under Civ. Code, § 3442, transfer of lots without valuable consideration, during grantor's insolvency or in contemplation thereof, is void as to his creditors, regardless of actual intent of grantor.

3. Fraudulent conveyances ☞93—Love and affection is a good but not a "valuable consideration."

Love and affection is a good but not a valuable consideration, within Civ. Code, § 3442.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Valuable Consideration.]

4. Fraudulent conveyances ☞95(2)—Transfer by insolvent to wife, in consideration of love and affection, created presumption of fraud.

Transfer during grantor's insolvency of lots to his wife, in consideration of love and affection, created presumption of fraudulent character of conveyance as against grantor's creditors, in view of Civ. Code, § 3442.

5. Fraudulent conveyances ☞277(3) — Presumption as to fraudulent character of grantor's conveyance to wife threw burden on grantor to show valuable consideration.

Presumption as to fraudulent character within Civ. Code, § 3442, of grantor's conveyance to his wife, purporting to be in consideration of love and affection, threw burden on grantor and grantee to show conveyance was supported by a valuable consideration.

6. Fraudulent conveyances ☞95(2)—Receipt by grantor for his use of money borrowed by grantee on lots conveyed held not "valuable consideration."

Receipt by insolvent husband for his own use of money borrowed by wife on lots conveyed to her held not a valuable consideration, within Civ. Code, § 3442, where wife merely acted as husband's agent or trustee in negotiating such loans, and parted with no value.

7. Fraudulent conveyances ☞113(1)—Conveyance with secret reservations for benefit of grantor is void as against creditors.

Conveyance with secret reservations for benefit of grantor is void as against the rights of creditors of the grantor.

8. Fraudulent conveyances ⇨104(2)—Good motive inducing insolvent husband to convey lots to wife without valuable consideration held not to validate transaction.

The fact that a conveyance by an insolvent husband to wife, without a valuable consideration, was made to enable the grantor with money to be borrowed by the wife to proceed with his farming operations, and if successful to satisfy his creditors, *held* not to validate the transaction, within Civ. Code, § 3442.

9. Fraudulent conveyances ⇨104(2)—Mortgagee's release of mortgage lien on lots before their conveyance by mortgagor to wife held not to affect fraudulent character of transaction.

Where a husband's conveyance to wife of lots, as to which a mortgagee released his mortgage lien, was void within Civ. Code, § 3442, as having been made during husband's insolvency, without a valuable consideration, fact that, if the mortgagee had not released its lien, judgment creditor could not have secured a satisfaction of its judgment because the husband owned no other property, *held* not to affect the fraudulent character of the conveyance.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Suit by Hanscome-James-Winship, a corporation, against D. N. Ainger and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Atran & Sheets, of Colusa, for appellants.
Hudson Grant and A. G. Bailey, both of Woodland, for respondent.

HART, J. This is an action by the plaintiff, as a judgment creditor of the defendant D. N. Ainger, to secure a decree setting aside a deed from the said D. N. Ainger to his wife, Mary Ainger, on the ground that said conveyance was fraudulent as to the plaintiff.

Judgment passed for the plaintiff, and the defendants appeal therefrom.

In their brief counsel for the plaintiff state that "the facts of the case are substantially as set forth in appellants' brief." In view of this statement, in setting out the facts herein we will appropriate in part the statement thereof in the opening brief of the appellants:

"On April 5, 1920, the defendant D. N. Ainger became indebted to the plaintiff in the approximate sum of \$6,000, and on December 2, 1920, \$3,000 thereof being in default, the plaintiff commenced an action against the defendant D. N. Ainger, and on the 5th day of April, 1922, recovered judgment in the sum of \$3,000, interest, and costs in that action.

"On January 3, 1922, and for a long time prior thereto, the defendant D. N. Ainger was and had been the legal owner of lots 37, 38, 39, 40, 41, 42, 67, 68, 69, 70, 71, and 72 of a subdivision of blocks 33, 34, and 35 of Ashley's subdivision of the Grimes Ranch, situated in

Colusa county, and hereinafter referred to as the 'lots.'

"While such owner of the lots, and on the 7th day of August, 1920, the defendants made and executed, in favor of the First Savings Bank of Colusa, a real estate mortgage upon the lots and other real estate to secure their note in the sum of \$5,000, and which mortgage was recorded on the 9th day of August, 1920, in Volume 53 of Mortgages, at page 29, Records of Colusa County. Ainger, during all of the time concerned with this action, was engaged in large farming operations and especially in the rice business. On January 3, 1922, D. N. Ainger was loaned up to the legal limit with the First Savings Bank, which was a coordinate institution operated jointly with the First National Bank. On that day for the purpose of giving to D. N. Ainger additional funds to carry on his farming operations, it was agreed between D. N. Ainger, Mary Ainger, the First Savings Bank, and the First National Bank, that the First Savings Bank should release the lots from the terms of its mortgage. In furtherance of this agreement and on January 3, 1922, the First Savings Bank executed a satisfaction of its mortgage for \$5,000 on the lots, and at the same time the defendant D. N. Ainger deeded the lots to his wife, the defendant Mary Ainger. This deed states the consideration to be 'love and affection which the first party has and bears toward the second party. * * *'

"Thereafter, and on January 10, 1922, in conformity with this arrangement for loaning against the lots, Mary Ainger gave her promissory note in the sum of \$300, dated on that day, to the First National Bank of Colusa, which note was the first of a series of notes, which aggregated \$1,082.17, and the last of which was given by Mary Ainger on the 26th day of June, 1922. The \$300 received for the first note by Mary Ainger and the entire sum of \$1,082.17 received from the bank under this transaction was placed to the credit of the defendant Ainger and used by him in his farming operations, and constituted 'full value for the property.' At the time these loans were being made, and at all of the times afterwards, the defendant D. N. Ainger had property not sufficient to cover his liabilities and was insolvent.

"On the 28th day of April, 1922, an execution issued to satisfy the \$3,000 judgment previously described was returned by the sheriff unsatisfied because of his inability to find any property belonging to the defendant D. N. Ainger. On July 26, 1922, after having received an extension of credit as stated by the series of notes in the sum of \$1,082.17 the defendant Mary Ainger gave to the First National Bank of Colusa her mortgage on the lots, dated on that day to secure that sum, which mortgage was recorded on the 28th day of July, in volume 53 of Mortgages, at page 74, Records of Colusa County."

After setting forth the fact of the indebtedness of D. N. Ainger to plaintiff in the sum of \$3,000, the bringing of an action by plaintiff to recover said sum and accrued interest from said Ainger, the securing of judgment by plaintiff against said Ainger

for said principal debt and interest, the issuance of a writ of execution on said judgment, the placing of said writ in the hands of the sheriff, and the return of that officer of said execution wholly unsatisfied, the complaint avers, in paragraph 4 thereof:

"That on or about the 3d day of January, 1922, and while said D. N. Ainger was insolvent, and so indebted to plaintiff, as aforesaid, he, said D. N. Ainger, without any consideration, and with the intent and purpose to hinder, delay, and defraud his creditors, made, executed, and delivered to his said wife, Mary Ainger, a deed of conveyance to that certain real property situate, lying and being in the county of Colusa, state of California, and particularly described as follows, to wit, (then follows a specific description of the lots). * * *

"That said Mary Ainger at said time, and at all times, well knew that the said D. N. Ainger transferred said property and executed said conveyance to her with the intent and purpose to cheat and defraud his said creditors."

The findings are general and follow the averments of the complaint. The defendants admit that D. N. Ainger, at the time of the conveyance of the "lots" by him to his wife, his codefendant, was insolvent, and that the allegation of the complaint to that effect "may be considered true."

The sole contention of the defendants is that the findings, in so far as they embrace the allegations of paragraph 4 of the complaint, are not supported by the evidence or any evidence adduced at the trial and embodied in the record on this appeal. In other terms, the contention is that there is no evidence which supports the finding that the conveyance of the real property concerned herein by D. N. Ainger to his wife was made with the intent and purpose to hinder, delay, and defraud the creditors of the grantor, and that the evidence without conflict shows that there was a valuable consideration for the transfer.

The allegations of the complaint are sufficiently scopeful to cover cases of fraudulent conveyances of property provided by both section 3439 and section 3442 of the Civil Code. The first-named section provides:

"Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

So much of section 3442 of said code as is apposite to the present inquiry reads:

"Any transfer or incumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors."

[1, 2] To make out a case under section 3439 it is necessary that it be affirmatively shown by sufficient evidence that the transfer was made by the transferor with the intent to delay or defraud his creditors or other persons owning and holding demands against him. *Atkinson v. Western Development Syndicate*, 170 Cal. 503, 506, 150 P. 360. Proof that D. N. Ainger did convey the "lots" to his wife with the intent to delay and defraud his creditors would respond to the allegations of paragraph 4 of the complaint that such was his purpose and intent in making the conveyance. On the other hand, if as said paragraph of the complaint also avers, the conveyance was made by D. N. Ainger voluntarily or without a valuable consideration, while said Ainger was insolvent or in contemplation of insolvency, his "intent * * * is immaterial, and the transfer, regardless of the actual intent, is void as to his creditors." *Atkinson v. Western Development Syndicate*, supra; *Benson v. Harriman*, 55 Cal. App. 483, 486, 204 P. 255.

[3-5] The insolvency of D. N. Ainger at the time he made the transfer to his wife is expressly admitted by the appellants, and the expressed consideration for the transfer is "love and affection," which, while a good, is not a valuable consideration. Upon this showing the presumption arose that the conveyance was fraudulent as against the creditors of the grantor. Civil Code, § 3442; *Benson v. Harriman*, 55 Cal. App. 483, 204 P. 259; *Borgfeldt v. Curry*, 25 Cal. App. 624, 144 P. 976; *Southwick v. Moore*, 61 Cal. App. 585, 215 P. 704; *R. C. L. 476 et seq.* Hence the burden was cast upon defendants to prove that the deed of conveyance was supported by a valuable consideration. *Wendling Lumber Co. v. Glenwood Lumber Co.*, 54 Cal. App. 691, 202 P. 929; *Com. Nat. Bank v. Roberts*, 49 Cal. App. 764, 769, 194 P. 751; *Ross v. Wellman*, 102 Cal. 2, 36 P. 402.

[6, 7] The real question presented here for decision is whether the defendants sustained that burden, and as to this proposition the defendants contend that the receipt by D. N. Ainger for his own use of the money borrowed from the bank by his wife on the "lots" constituted a valuable consideration for the conveyance of the "lots" by said Ainger to his wife. We are unable to assent to that proposition. The sole purpose of the conveyance, as all the parties testified was true, was merely to enable the defendant D. N. Ainger to secure additional loans on his own or the community property, if such it was. The grantee herself, in the transaction, parted with nothing of value. She merely acted as the conduit through which D. N. Ainger might himself obtain loans on his own property or that of the community. In other terms, according to the admissions of the defendants, she merely acted as his agent or trustee, and as such was vested by him with the legal

title to the "lots" for the purpose of negotiating for her grantor and for his benefit loans of money on the property granted. If D. N. Ainger had voluntarily conveyed the property in question to his wife or to any other person with a secret understanding or reservation that the grantee should sell the property so conveyed and thereupon turn over to the grantor the full amount of the purchase price, it would hardly be contended that the money thus received by the grantor constituted the consideration to him from his grantee for the conveyance. The case here cannot be differentiated from the supposititious case. Both cases involve nothing more nor less than conveyances with secret reservations for the benefit of the grantor, and such transfers of property cannot be upheld as against the rights of the creditors of the grantor. See 12 R. C. L. p. 545 et seq.; 27 C. J. p. 606, par. 355; *Judson v. Lyford*, 84 Cal. 505, 509, 24 P. 286; *Salisbury v. Burr*, 114 Cal. 451, 454, 46 P. 270; *McKey v. Cochran*, 262 Ill. 376, 104 N. E. 693; *Adams v. Dempsey*, 35 Wash. 80, 76 P. 538, 539.

[8] But much importance seems to be attached by the defendants to the fact that the evidence indisputably shows, as they contend, that the motive in the transaction, rather than involving any purpose or intent in them thereby to defraud the creditors of D. N. Ainger, was to enable him to proceed with his farming operations so that, if successful therein, he would be able to realize from his crops sufficient financial means with which to satisfy the obligations and demands held against him by his creditors, at least in part if not in whole. Granting that such was the motive prompting the transaction, still that consideration is one which is of no materiality in a case falling within the category of fraudulent conveyances to which the instant case belongs, nor, except in so far as it might have relation to the intent with which a conveyance may be made by a debtor, would the motive therefor be a material consideration in any case of an alleged fraudulent conveyance of property. The character of the transaction must be judged or determined by the intent with which the conveyance is made in those cases in which the intent of the parties to the conveyance is a material element to be considered. In this case, however, as in all cases where it is made to appear that the conveyance is not supported by a valuable consideration, and is made while the grantor or vendor is insolvent or in contemplation of insolvency, the transfer, as seen, is fraudulent per se as against the existing creditors of the grantor or vendor, and in such cases neither the intent nor the motive with which the transfer might have

been made is material or of any consequence. In other words, as by the very terms of the statute itself a conveyance of property voluntarily made, while the grantor or vendor is insolvent or in contemplation of insolvency, is absolutely void as against the creditors of the grantor or vendor, any attempt by such grantor or vendor to sustain the legality of the transfer on the ground that it was made with good motives or an honest intent will not be listened to by a court in a suit by the creditors of the grantor or vendor to nullify and set aside the conveyance.

[9] The fact, as is intimated in the briefs, that, if the "lots" had remained subject to the mortgage from the lien of which they were released by the Savings Bank, the plaintiff could not have secured satisfaction of its judgment, either in whole or in part, because D. N. Ainger then owned no other property than that covered by said mortgage, is obviously of no importance here in view of the theory upon which we have deemed it sufficient to consider this appeal for the purposes of the determination thereof. If the case made by the pleadings and the proof were one in which the intent of the grantor was an essential element, and which intent it would be necessary to prove to vitiate the force of the conveyance—that is, a conveyance supported by a valuable consideration, or the grantor was not at the time of making the conveyance insolvent, or made so by the act of making the conveyance or in contemplation of insolvency—then the fact referred to, as it well may be conceived, would be relevant and important as tending to show that the conveyance was not made with the intent to defraud the creditors of the grantor.

There is no question here as to the rights of innocent incumbrancers. The First National Bank of Colusa, from which the loans on the "lots" were obtained, is not a party to this action, and hence, assuming that it was an innocent mortgagee of the premises in question, it is not here to assert any rights which it might have thus acquired in the property as a result of the transaction giving rise to this action. It is, therefore, not necessary to consider (the president of the said Bank having testified that he suggested and that both banks consented to the plan adopted by the defendants to secure further loans to be used in further prosecuting their farming operations) whether the First National Bank was less culpable, constructively, or as a matter of law, in the inauguration and consummation of the transaction eventuating in the execution of the deed in dispute than were the defendants.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

71 Cal. App. 779

BISCONER v. BILLING et al. (Civ. 2863.)

(District Court of Appeal, Third District, California. March 23, 1925.)

1. Estoppel ⇨54—Estoppel in pais does not apply to party who does not know full truth of facts to which conduct or declarations relate.

There can be no estoppel in pais against party who does not know full truth of facts to which his conduct, declarations, or representations constituting basis of alleged estoppel relate.

2. Replevin ⇨134—Finding that plaintiff took possession of property taken from him in replevin action not sustained by evidence.

In action on replevin bond, where tractor replevied had been attached, sold, and plaintiff had assisted purchaser in securing it, finding that plaintiff took possession and assumed control over it so as to estop his action against sureties, held not sustained, in absence of any evidence tending to show he knew tractor he was handling was same as that taken from him in replevin action.

3. Replevin ⇨46—Article replevied not subject to process.

Property acquired by a plaintiff in replevin action was in custodia legis as much as when in possession of sheriff by virtue of writ, and was not subject to process.

4. Attachment ⇨64—Deprivation of possession under writ of attachment was wrongful trespass.

Attachment of property, acquired in action of claim and delivery, accompanied by affidavit required by Code Civ. Proc. § 510, and which had not been finally determined, constituted wrongful dispossession and a trespass which should have been resisted.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Raymond Bisconer against F. T. Billing and another. Judgment for defendants, and plaintiff appeals. Reversed.

G. W. Zartman, of Tulare, for appellant. Feemster & Cleary, of Visalia, for respondents.

HART, J. The plaintiff brought this action against the defendants as sureties on an undertaking executed by them in an action in replevin, in which one J. Tolosano was plaintiff, and the plaintiff herein was defendant.

On the 1st day of March, 1921, said J. Tolosano brought an action in claim and delivery against Raymond Bisconer, the plaintiff herein, for the purpose of recovering the possession of a 25-Sampson sieve grip tractor and a No. 4 12-inch disc plow—

said Tolosano claiming and alleging in his complaint that he was the owner of said property, and that it was of the value of \$2,000; that in said action of claim and delivery or replevin said Tolosano filed the affidavit required by section 510 of the Code of Civil Procedure, setting forth all the facts required by said section to be contained therein, and also a notice and demand upon the sheriff of the county of Tulare to take from said Raymond Bisconer, defendant in said action, the property above described; that, at the same time, said Tolosano executed an undertaking, with F. T. Billing and C. M. Meador, defendants herein, as sureties, in the sum of \$4,000, conditioned for the return of said property or the payment of its value, to said Bisconer in case it cannot be returned, if a return thereof to Bisconer be adjudged in said action; that said sheriff, in pursuance of said demand, took from said Bisconer said property, and, after retaining possession of the same for 5 days, no demand by Bisconer that possession of said property be restored to him within that time having been made, the sheriff turned the tractor over to the plaintiff, who thereupon took it to the "Meador ranch," where Tolosano then resided; that, in the month of December, 1921, the action in claim and delivery was tried, and on the 20th day of February, 1922, the court rendered judgment in favor of Bisconer, the defendant therein and plaintiff herein, for the return to him of said tractor and plow, or, in case said property was not returned, for the sum of \$2,000, the value thereof. These facts are, with greater amplification, of course, alleged in the complaint herein, and are admitted by the answer, but the defendants, as in avoidance of the legal effect thereof, set up a special defense by way of a plea in estoppel, as follows:

"* * * That defendants are informed and believe and therefore allege the fact to be that, during the pendency of the action in replevin, mentioned and alleged in said complaint, and before the entry of judgment therein in favor of the plaintiff and against these defendants, as alleged in said complaint, the said plaintiff, Raymond Bisconer, took possession of the personal property mentioned in paragraph 1 of plaintiff's complaint, to wit, the said No. 25 Sampson sieve grip tractor and one No. 4 twelve-inch disc plow, and ever since has retained and does now retain the possession thereof; that, by reason of the taking possession of said property by plaintiff as aforesaid, the defendants have been relieved of the obligation of returning said property as provided in the undertaking mentioned and referred to in plaintiff's complaint; and that by reason of such taking possession by plaintiff the obligation of said undertaking has been fully discharged."

In response to the special defense or the plea in estoppel so set up, the defendants brought out these facts: That subsequent to the time at which the tractor concerned here was delivered by the sheriff to the possession of Tolosano, and prior to the trial of and the rendition of judgment in the claim and delivery action, one Harry Crowe, through his attorney, J. W. Wright, who was also attorney for Tolosano in the action in replevin against the plaintiff herein, brought an action against Tolosano, and in said action caused a writ of attachment to issue and the same to be levied on said tractor, which was thereupon stored by the sheriff in the warehouse of the Crowe Hardware Company at Tulare; that a short time thereafter said attorney, J. W. Wright, brought in his own behalf an action against Tolosano, and obtained judgment therein and caused execution to be issued thereon and levied on the tractor in dispute; that, at the sale of the tractor under the said writ of execution, said J. W. Wright, first satisfying the judgment in the attachment suit of said Harry Crowe against Tolosano, bought the tractor; that subsequently Wright sold the tractor to one Hugh Pennybaker and gave the latter a bill of sale therefor; that before, but on the day the sale of the tractor was completed, Bisconer, at Pennybaker's request, examined the machine to ascertain whether it was in good condition, and, after the sale was effected, assisted Pennybaker in the removal thereof to the latter's ranch. As to this circumstance, plaintiff herein testified that in the month of October, 1921, while Pennybaker was negotiating with Wright for the purchase of the tractor, he, at the request of the former, went to the Crowe warehouse, where the tractor was then stored, to "look over the tractor and examine it as to its condition; that Mr. Pennybaker bought the tractor that day," paying Wright the sum of \$500 therefor; that Pennybaker then requested plaintiff, Bisconer, to employ some one for him to move the machine to his (Pennybaker's) farm at Exeter; that Pennybaker gave him (plaintiff herein) \$20 to pay the party employed by him for that purpose; that he employed one Al Bearce "to haul it, and saw to the loading of it, and paid Al Bearce the \$20 given me by Pennybaker for that purpose." This testimony by plaintiff was corroborated by Pennybaker. Plaintiff further testified that he bought the tractor at an auction sale conducted by one Pete Robinson, and had it in his possession but a few days when it was taken possession of by the sheriff in the replevin suit brought against him by Tolosano; that he had never used it; that, when he examined the tractor at the Crowe warehouse at the request of Pennybaker, it was covered with dirt; that he had not seen it from about

the 10th day of March, 1921, until he saw it at the Crowe warehouse in October, 1921; that he did not recognize the tractor at the Crowe warehouse on the last-named date as the one which he had purchased at the auction sale; that, inasmuch as the claim and delivery suit had not then been tried, he supposed or assumed that the tractor so purchased by him, and which was taken from his possession by the sheriff under the writ of replevin issued in said action, was still in the possession of Tolosano, to whom, as seen, the possession thereof was delivered by the sheriff; that no one had ever informed him that the tractor on sale at the Crowe warehouse, and which Pennybaker bought, was the tractor, the right to the possession of which was still bound up in the then untried action of claim and delivery by Tolosano against him.

There was received at the trial other testimony than that above referred to, but it was directed only to the identification of the tractor sold by Wright to Pennybaker as the tractor involved in this dispute, as to which, however, there is no serious, if any, controversy between the parties hereto.

Upon the special defense the court found as follows:

"That it is true that during the pendency of the action mentioned and alleged in plaintiff's complaint herein, and before the entry of judgment therein, the plaintiff in this action, Raymond Bisconer, took possession and assumed control of the Sampson sieve grip tractor mentioned and described in plaintiff's complaint, for the purpose of effecting a sale and delivery thereof, and did, while so having possession and control of said tractor, assist and co-operate in effecting a sale and delivery thereof, to one Hugh Pennybaker."

The theory of the decision of the trial court, as is readily to be seen, is in accord with that of the special plea in bar set up by the defendants, to wit: That Bisconer was a party to the transaction resulting in the sale of the tractor by Wright to Pennybaker, and assisted in delivering it to the possession of the latter; that, being a party to the act of removing the tractor from the possession of Tolosano, so that it was placed beyond the power of the latter to comply with the terms of his undertaking in the claim and delivery action requiring a return of the tractor to Bisconer in case judgment passed in said action in his favor, he (Bisconer) is estopped from maintaining the present action against the sureties on Tolosano's undertaking.

[1, 2] Assuming that the findings support the judgment, as to which there is serious doubt, it is clear that the evidence does not support said findings. It is a general rule, within which the case here obviously falls, that there can be no estoppel in pais where

the party against whom the attempt is made to invoke such estoppel does not know the full truth of the facts to which his conduct, declarations, or representations constituting the basis of the alleged estoppel relate. 10 Cal. Jur. p. 632, § 17; *Eaton v. Wilkins*, 163 Cal. 742, 127 P. 71; *Puterbaugh v. Wadham*, 162 Cal. 611, 123 P. 804; *Bashore v. Parker*, 146 Cal. 525, 80 P. 707; *Davis v. Winona Wagon Co.*, 120 Cal. 244, 52 P. 487; *Murphy v. Clayton*, 113 Cal. 153, 45 P. 267; *Ions v. Harbison*, 112 Cal. 260, 44 P. 572; *Bigelow v. Ballerino*, 111 Cal. 559, 44 P. 307; *Wood v. Blaney*, 107 Cal. 291, 40 P. 428.

There is not a particle of evidence to be found in the record before us showing or tending to show that, when he examined the tractor for Pennybaker before the latter completed the negotiations with Wright for the purchase thereof, or later, when he assisted in the removal of the tractor to Pennybaker's ranch, Bisconer recognized the machine as the one which had been taken from his possession by the sheriff under the writ of replevin, and by that officer delivered into the possession of Tolosano, or knew that it was the same tractor. As seen, Bisconer testified that when he examined the tractor for Pennybaker, or when assisting in taking it to the latter's ranch, he did not recognize or identify it as the tractor concerned in the replevin suit. He supposed, he said, that the tractor taken from him by the sheriff was still in the possession of Tolosano. This testimony of Bisconer was not contradicted. One Curtis, a witness for the defendants—a mechanic, and, as he called himself, a "tractor repair man"—testified that, on June 13, 1923, the day on which the trial of this action was begun, he went to the Pennybaker ranch and there inspected the Sampson tractor "that had been purchased by Mr. Pennybaker. Upon examination," he continued, "I found it to be the identical type of tractor that I had seen at the Crowe warehouse in the fall of 1921, and the same type and character of tractor which I repaired 3 years ago on the Tolosano ranch. I observed the number of the tractor, and it was 30x420." Undoubtedly, the purpose of this testimony was to show by inference that the tractor purchased by Pennybaker from Wright could be identified by one familiar with it as the tractor taken from Bisconer under the writ of replevin, and that therefore Bisconer, when inspecting it for Pennybaker, must have recognized it as the tractor involved in the replevin action. But it will be noted that Curtis did not say that the tractor he saw at the Pennybaker ranch was the same tractor he had previously seen at the Crowe warehouse or had worked on at the Tolosano ranch. His statement was that the tractor at Pennybaker's was the "same type and character" of tractor that he had pre-

viously seen or had previously done repair work on at the Tolosano ranch. Thus it is to be noted that, if the purpose of Curtis' testimony was such as it is above suggested that it was, it falls far short of reaching the mark. In other words, it does not justify the inference that Bisconer, on examining the tractor for Pennybaker, or when assisting in its removal to the latter's ranch, must have known that the tractor was the one taken from him by the sheriff in the claim and delivery action. To the contrary, the most reasonable view of that testimony is that, since Curtis, himself a mechanic, who had worked on the tractor, could go no further than to say that the tractor he saw at the Pennybaker ranch was of the same type of tractor as the one he had previously worked on at the Tolosano ranch, it is hardly reasonable to assume or infer that Bisconer, who had had possession of the replevied tractor but 4 or 5 days, and had never worked or used it before it was seized by the sheriff in the replevin suit, could have said any more than that upon the question whether the tractor bought by Pennybaker from Wright was the same tractor which the sheriff had taken from him. Unquestionably, it was true then, as doubtless it is true now, that there are many Sampson tractors of the same type and character as the one with which this controversy is concerned. Moreover, Bisconer, as was perhaps true of Curtis, did not inspect or examine the tractor at the time of its sale to Pennybaker, with his mind charged with any thought or supposition that the tractor sold by Wright to Pennybaker was the identical engine that was taken from him by the sheriff in the replevin action. He examined the tractor on the occasion of the sale thereof to Pennybaker with his mind free from any reason or motive for identifying it with the tractor involved in the replevin suit. Curtis, as may well be supposed, examined the Pennybaker tractor with the special view and purpose of giving testimony for the defendants in the present case tending to prove that the tractor sold to Pennybaker was the tractor seized in the replevin suit. At any rate, it is quite manifest, as before declared, that, while Curtis' testimony no doubt tended to show that the Pennybaker tractor was the tractor involved in the claim and delivery action, it did not tend to show that Bisconer so recognized or identified it at the time of his inspection of it for Pennybaker.

The above is decisive of this appeal in favor of the plaintiff herein. But the record here discloses what well may be characterized as an anomalous situation, and it will do no harm to consider whether, instead of Bisconer, Tolosano and his attorney in the action in claim and delivery were not themselves responsible for the loss by

Tolosano of the physical possession of the tractor. As shown above, J. W. Wright, according to his own testimony, was the attorney for Tolosano in the claim and delivery action. In that action Tolosano secured possession of the tractor from the sheriff upon the undertaking which is the basis of the present action. Tolosano was at that time residing on the ranch of one Meador, whether the party of that name who became, was, and is one of the sureties on his (Tolosano's) undertaking, the record does not show. Tolosano, so his wife and son testified, upon being given possession of the tractor by the sheriff, took the machine to the ranch of said Meador, where it remained until his (Tolosano's) attorney, J. W. Wright, brought suit against his client (Tolosano) in behalf of Harry Crowe, in which action a writ of attachment was issued and by the sheriff or some other officer legally authorized to execute the writ levied upon the tractor, which was thereupon and thereunder taken possession of by the officer and removed from the Meador ranch to the Crowe warehouse at Tulare. Thereafter said J. W. Wright, for and in behalf of himself, brought an action against his client in the replevin suit, J. Tolosano, and therein obtained judgment upon which an execution was issued and levied on the tractor, the same sold under said execution to said J. W. Wright, the judgment creditor in said action; he having satisfied the judgment in favor of Harry Crowe against Tolosano, and so removed the lien of Crowe's attachment on the tractor, if any such lien ever legally attached or could so attach to the tractor under the circumstances then existing as to said property. Thereafter, as seen, Wright sold, or attempted to sell, the tractor to Pennybaker. This proceeding from beginning to end was peculiar to say the least of it.

[3, 4] Although not necessary to the decision of this appeal, as we have above pointed out, nevertheless these considerations may well be suggested as being worthy of thought in the event of a retrial of this case. Tolosano, upon obtaining possession of the tractor from the sheriff, by virtue of his undertaking, acquired the right to the possession thereof and nothing more, and the property, while in his possession under his undertaking, no less than when in the possession of the sheriff by virtue of the writ of replevin, was in custodia legis. The plaintiff's custody was "substituted for the custody of the sheriff. The property is not withdrawn from the custody of the law. In the hands of the claimant, under the bond for its delivery to the sheriff, the property is as free from the reach of other processes as it would have been in the hands of the sheriff." *Hagan v. Lucas*, 10 Pet. 400, 9 L. Ed. 470; *Hunt v. Robinson*, 11 Cal. 262,

citing *Hagan v. Lucas*, supra; *Riverside Portland Cement Co. v. Taft et al.*, 192 Cal. 643, 221 P. 357. It was therefore the duty of Tolosano to keep the tractor in his custody and to allow no one to divest him of the possession thereof upon any pretense or pretext whatsoever. This is what his sureties promised and undertook that he would do, so that, if he was cast in the replevin action, the return of the tractor to Bisconer would be forthcoming, or further, if they (the sureties) were compelled to pay the value of the property because of its not being in the same condition in which it was when seized and, for that reason, well grounded, Bisconer refused to retake it, they could be awarded possession thereof as in recoupment, at least, of the money paid by them to Bisconer in satisfaction of the judgment. It follows that, in surrendering his possession of the tractor in response to the exactions of the writ of attachment in the Crowe Case against him, Tolosano, under the circumstances here appearing, was guilty of a flagrant violation of his engagement, not only to Bisconer, but to the sureties on his undertaking, to retain possession of the tractor. Indeed, the deprivation of that possession, even under or by virtue of the writ of attachment, constituted a wrongful dispossession and a trespass, and Tolosano or his sureties, by proper process in the replevin suit, could have retaken the tractor from the officer seizing it under the writ of attachment or from any other person having its possession by virtue of said writ. See cases above cited, and also *Rhines v. Phelps*, 3 Gilman (8 Ill.) 455; *Pipher v. Fordyce*, 88 Ind. 436; *McKinney v. Purcell*, 28 Kan. 446; *Acker v. White*, 25 Wend. (N. Y.) 614; 34 Cyc. p. 1458. Of course, it would be idle to maintain that Tolosano did not know that the tractor had not been taken from him under the writ of attachment. And there is some evidence that his sureties, the defendants herein, had knowledge of the dispossession. Certainly, Tolosano's attorney in the replevin suit, J. W. Wright, not only knew that the tractor had been removed from the possession of Tolosano, but knew that such taking was wrongful and without legal force. It may be that Wright, before instituting actions against Tolosano in which the processes referred to were issued and used as the pretexts for depriving Tolosano of possession of the tractor, might have withdrawn as attorney for the latter in the claim and delivery action. His testimony does not show whether such was the case, nor does the record anywhere show it. But, assuming that he did, the situation is in no sense changed. The wrongfulness or illegality of the act of taking the tractor under the indicated circumstances is not removed from the transaction.

For the reasons first above given, the

judgment must be reversed, and it is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

71 Cal. App. 762

ANDREOLI v. HODGE et al. (Civ. 4283.)

(District Court of Appeal, Second District, Division 1, California, March 21, 1925. Opinion Modified and Rehearing Denied April 20, 1925. Hearing Denied by Supreme Court May 18, 1925.)

1. Appeal and error ⇐110—There is no right of appeal from order denying motion for new trial.

Under Code Civ. Proc. § 963, there is no right of appeal from an order denying a motion for new trial.

2. Vendor and purchaser ⇐110—Covenant to level farm land integral part of consideration for sale.

Covenant, in contract for sale of land, requiring that land be leveled for planting of alfalfa by date of delivery of possession, *held* integral and material part of consideration, and failure to perform would warrant rescission, under Civ. Code, § 1689.

3. Vendor and purchaser ⇐114—Right to insist on absolute performance of covenant to level land by date specified waived.

Where, in contract for sale of land on which deposit in escrow had been made, vendor agreed to level it for planting by date set, and purchaser subsequently requested different method of leveling requiring more time, order joined by purchaser for payment of portion of deposit in escrow on day before date set, with full knowledge of the then extent of work, and continuance of leveling with purchaser's consent, *held* waiver of purchaser's right to insist on absolute performance by date specified, which could not be revived except by notice granting reasonable additional time.

4. Appeal and error ⇐113(1)—Denial of motion to set aside judgment and enter different one on findings appealable.

Order denying motion to set aside judgment, and on findings enter another and different judgment, is appealable, notwithstanding Code Civ. Proc. § 663a, only provides for appeal from order granting such motion.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Andrew Andreoli against William M. Hodge and another. From a judgment for plaintiff, and orders denying a motion for new trial, and a motion to vacate judgment, and that another and different judgment be entered, defendants appeal.

Judgment reversed, with directions, and appeals from orders dismissed.

Harry W. Horton, of El Centro, for appellants.

Charles E. Scott, of El Centro, for respondent.

CONREY, P. J. [1] Action to establish rescission of a contract of purchase of real property, and to recover money paid on account of that contract. The defendant gave notice of appeal from the judgment; and from an order denying defendant's motion for a new trial; and from an order denying defendant's motion to vacate the judgment, and that another and different judgment be entered. There is no right of appeal from an order denying a motion for a new trial. Code Civ. Proc. § 963. Also there is no right of appeal from an order denying a motion to set aside a judgment and on the findings enter another and different judgment. Section 663a, Code of Civil Procedure, provides that an order of the court granting such motion may be reviewed on appeal. By implication it was intended that there be no appeal where such motion is denied. This is in accordance with the decisions to the same effect, which are based upon the reason that the same questions may with equal effect be reviewed on appeal from the judgment. *Eureka, etc., R. R. Co. v. McGrath*, 74 Cal. 49, 15 P. 360; *Modoc Co-operative Ass'n v. Porter*, 11 Cal. App. 270, 271, 104 P. 710.

The appeal from the judgment comes before us on the judgment roll alone. The facts as found by the court are as follows: On November 27, 1920, the plaintiff and the defendant Hodge, appellant herein, entered into a contract in writing whereby the plaintiff agreed to buy from said defendant, and the defendant agreed to sell to plaintiff a certain 40-acre tract of land for the agreed sum of \$4,500, payable \$500 then and \$1,500 on January 1, 1921. These moneys were to be placed in escrow with the People's Abstract and Title Company. Hodge was to execute a deed to the plaintiff, and plaintiff was to execute, in favor of Hodge, a note payable \$1,000 on January 31, 1922, and \$1,500 on January 1, 1924, said note to bear interest at 7 per cent. per annum from the date of giving possession of said property; said deferred payments to be secured by trust deed. It was also provided in the contract as follows:

"Hodge agrees to properly level for alfalfa all of said land, and to deliver same to Andreoli not later than February 1, 1921, clear of all incumbrances."

On January 1, 1921, defendant extended the time for payment of the \$1,500 agreed to

be paid into escrow on that day, to February 1, 1921. On November 29, 1920, plaintiff paid into escrow said sum of \$500, but he paid no further sum, and did not execute said note and trust deed. On December 11, 1920, Hodge executed and deposited in escrow a deed to plaintiff of said property free of incumbrance. On December 26, 1920, defendant started with the work of leveling said property by leveling the same into two fields with lands for irrigation 660 feet in length. Tracts either 660 feet or 1,320 feet are proper length for alfalfa. Plaintiff, after defendant Hodge had started leveling said land, suggested that defendant Hodge level the land in one field "in lands of 1,320 feet in length." To do this required more time and expense, and defendant Hodge so advised plaintiff. Nevertheless at plaintiff's suggestion, defendant Hodge proceeded with the work of so leveling said property in 1,320-foot lengths.

On January 31, 1921, with full knowledge of the then extent of the work yet required to be done to complete the leveling of the property and the condition of the property in that respect at that time, the parties jointly ordered the application and payment to one Sharp of \$100 out of the said \$500 then on deposit in escrow. Thereafter, on February 16, 1921, without any previous written notice or request that said leveling be completed within any time, plaintiff served written notice on defendant Hodge that plaintiff then withdrew from said contract to purchase said land and rescinded the same, because the said land was not then properly leveled for alfalfa, and because possession of said land was not given. Thereafter, on March 19, 1921, this action was commenced.

On February 1, 1921, said land was not properly leveled for alfalfa. Defendant Hodge, with plaintiff's consent, continued with the leveling of same until February 16th. On said February 16th defendant Hodge was ready, able, and willing to complete the leveling of said land for alfalfa, and was then engaged in the completion and could and would have had the same so completed for alfalfa within from two to three weeks thereafter, "within time for the planting of alfalfa on said land without ordinary material difference in such delay, but with material difference for plaintiff's purposes."

On February 1, 1921, plaintiff was ready, able, and willing to pay into escrow the sum then due and to execute said note and said trust deed, but did not perform any of the things called for by the contract then by him to be performed because of defendant Hodge's failure to perform according to contract, and on February 16, 1921, was unwilling to perform any of the terms of said contract because of the failure of defendant Hodge to properly level said land for alfalfa or to give possession thereof. Defend-

ant Hodge did not continually level said land after commencing work thereon. Said land could have been properly leveled for alfalfa not later than February 1, 1921, had defendant Hodge continually worked thereon. On February 16, 1921, plaintiff demanded of defendant Hodge the return of said \$100 so jointly ordered paid from the money in escrow, and the release of the \$400 still in escrow, and demanded of said company the return of said balance of \$400. Said demand was refused, and said moneys have not been paid. On February 16, 1921, only 20 acres of said 40-acre piece of land was properly leveled for alfalfa.

On the foregoing facts the court determined that the plaintiff was entitled to rescind, and was entitled to recover said sum of \$400. Accordingly, judgment was entered in favor of plaintiff in the sum of \$400 and costs. It is from this judgment that the defendant appeals.

[2] Appellant contends first that the covenant to level the land was an independent covenant, purely incidental to the principal purpose of the sale; that this covenant was not an essential part of the consideration or a condition precedent or dependent in its relation to the main contract. But we think that the covenant in question was an integral and material part of the consideration for the contract. It has been so held in analogous cases, where the vendor, in addition to his agreement to convey, agreed to construct and complete roads or street improvements on the property sold. *Blahnik v. Small Farms Improvement Co.*, 181 Cal. 379, 184 P. 661; *Walker v. Harbor Business Blocks Co.*, 181 Cal. 773, 186 P. 356; *Civ. Code*, § 1689. We perceive no reason why the same principle does not apply in the instant case.

[3] Appellant contends next that time was not of the essence of the contract; or that if time was of the essence thereof, and, if, therefore, the time limited for completion of the leveling of the land was February 1, 1921, nevertheless, the right of plaintiff to insist on absolute performance by that date was waived, and therefore could not be revived except upon notice and demand, and a reasonable time allowed for performance. This last contention, in our opinion, must be sustained. The facts found by the court, whereby the time within which the leveling of the land could be done was necessarily extended at plaintiff's request, constituted a waiver of the right to have the work completed on that date, and thereby granted a reasonable additional time. Whenever such waiver has occurred, the party from whom performance is due cannot, for the same delinquency, again be placed in default, until he has first been allowed a reasonable time to perform his obligation. *Newell v. E. B. & A. L. Stone Co.*, 181 Cal. 385, 388, 184 P. 659, 9 A. L. R. 993. On the facts as they ap-

pear by the record, no right of rescission had accrued.

The judgment is reversed, and the superior court is directed to enter judgment in favor of the defendant. The appeals from the orders are dismissed.

We concur: HOUSER, J.; CURTIS, J.

Amendment to Opinion.

PER CURIAM. [4] Since the decision herein was filed, our attention has been called to the fact that since the time of the decisions to which we referred as indicating that there is no right of appeal from an order denying a motion to set aside a judgment and on the findings enter another and different judgment, later decisions have determined that there is such right of appeal. *Condon v. Donohue*, 160 Cal. 749, 750, 118 P. 113; *Westervelt v. McCullough*, 64 Cal. App. 362, 221 P. 661. But inasmuch as on appeal from the judgment the judgment was reversed, and the defendant has obtained the same relief which was sought by the motion, he has suffered no injury by the dismissal of his appeal from the order.

71 Cal. App. 701

SECURITY INS. CO. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR MARIN COUNTY et al. (Civ. 5169.)

(District Court of Appeal, First District, Division 1, California. March 17, 1925.)

1. Insurance ⇨624(2)—Persons to whom insurance policy is payable must be joined as parties in action at law.

Where a policy of insurance is payable to several persons as their interest may appear, they must join as plaintiffs in an action at law, or, in event of refusal to join, must be made parties defendant.

2. Parties ⇨79, 86—Misjoinder or nonjoinder of parties does not deprive court of "jurisdiction."

In suit on insurance policy, that there was a misjoinder or nonjoinder of parties would not deprive court of jurisdiction to determine the matter; "jurisdiction" being power to hear and determine, and not depending on rightfulness of decision made.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jurisdiction (of Courts).]

3. Certiorari ⇨29—Writ to review will not lie, where there is no excess of jurisdiction.

Certiorari to review action of superior court will not lie, where there is no excess of jurisdiction, although there may be error in decision of court sought to be reviewed.

4. Certiorari ⇨29—Would not lie to review judgments of superior and justice's court, where they acted within their jurisdiction.

Certiorari will not lie to review judgments of superior and justice's courts in action on in-

demnity bond, though they may have had no power to determine rights of other parties beneficially interested in bond because not parties to action, since determination, that plaintiff having succeeded to entire interest under bond was entitled to judgment for full amount, even if incorrect, was binding on parties to action as being within jurisdiction of such courts.

Certiorari to Superior Court, Marin County; Edward I. Butler, Judge.

Original application for certiorari by the Security Insurance Company, a corporation, against the Superior Court of the State of California in and for the county of Marin and Hon. Edward I. Butler, Judge. Writ denied.

Edward J. Jose, of San Francisco, for petitioner.

TYLER, P. J. The petition shows that on or about the 28th day of August, 1923, one A. M. Winstead commenced an action in the justice's court of San Rafael township, county of Marin, state of California, to recover the sum of \$238.50. Said complaint contained the following allegations:

"That at the time of the injury hereinafter mentioned this plaintiff, as vendee, was in possession of the said automobile under contract of sale from H. G. Sirard, as vendor, and the Fairfax Bank was the holder by assignment of the contract of sale covering said automobile, all of which facts are set forth and appear by a rider attached to the policy of insurance hereinafter mentioned; that the amount of interest of said Fairfax Bank hereinabove mentioned in said assigned contract of sale is now \$191.50."

That there was attached to said complaint and made a part thereof the policy of insurance in suit, which contained the following clause:

"It is understood that A. M. Winstead, as vendee, is in possession of the herein described automobile under contract of sale from H. G. Sirard, as vendor, and that the Fairfax Bank is the holder of a mortgage, or is assignee of the contract of sale covering the said automobile. It is agreed that, subject to all the terms and conditions of this policy, loss, if any, thereunder shall be payable as follows, to wit, first, to Fairfax Bank, mortgagee or assignee, to an amount not exceeding the indebtedness secured by said automobile at the time of loss; second, to H. G. Sirard, vendor, to an amount not exceeding the balance due at the time of loss upon the contract of sale above referred to; third, to A. M. Winstead, vendee."

The prayer of said complaint reads as follows:

"Wherefore plaintiff demands judgment against the defendant for the sum of \$238.50 and demands that said judgment when recovered be prorated between the plaintiff in the sum of \$47, and the Fairfax Bank in the sum of \$191.50, or such other sum as the court may

find to be due to said Fairfax Bank at the time of said judgment, and for its costs of suit."

It is further alleged in the petition that thereafter the defendant (petitioner herein) filed a demurrer to said complaint, specifying as a ground of demurrer that the court had no jurisdiction of the subject-matter of said action, which demurrer was overruled by the justice of said court; that the defendant (petitioner herein) thereupon filed an answer in said action, and as a defense thereto averred that said court had no jurisdiction of the subject-matter thereof; that the court thereupon proceeded to try the cause, and that at said trial evidence was introduced tending to prove that plaintiff therein had succeeded to the interests of the other parties to the indemnity bond; that petitioner (defendant therein) refused to put in any evidence, and judgment was rendered in favor of plaintiff for the sum of \$238.50 and costs. That within the time and in the manner provided by law defendant took an appeal from said judgment to the superior court of the state of California in and for the county of Marin upon questions of law and fact; that the action came on regularly for trial, at which time petitioner herein objected to proceeding therewith, and moved for a dismissal upon the following grounds: That the justice's court had no jurisdiction over the subject-matter of said action; and that said superior court had no jurisdiction on appeal therefrom. The court overruled the objection and denied said motion, and permitted plaintiff to file a supplemental complaint containing an allegation that plaintiff, as vendee under the contract of sale mentioned in the complaint, had paid in full to H. G. Sirard, vendor, and to the Fairfax Bank, as holder by assignment of said contract, all moneys due and owing to them, and that neither H. G. Sirard nor said bank had any interest in or to the insurance policy, the subject-matter of the action.

Judgment was thereafter entered in favor of the plaintiff in said action and against the defendant therein (petitioner herein) for the sum of \$238.50 and costs, upon the verdict of a jury. Defendant moved for a new trial, which motion was denied.

It is here claimed that the action of the superior court in proceeding to said trial and in denying said motion to dismiss was in excess of its jurisdiction sitting on appeal from the justice's court; that said action was one in equity, and the judgment attempts to conclude the rights of persons not parties to the action; and that the prayer thereof seeks an adjudication that the parties to the contract of insurance have no rights therein.

[1-4] Where a policy of insurance is payable to several persons as their interests may

appear, there is no question that in an action at law they must join as plaintiffs or, in the event of the refusal of one or more of them so to join, he or they must be made parties defendant. The fact, however, that there is a misjoinder or nonjoinder will not deprive the court of jurisdiction to determine the matter. Jurisdiction is the power to hear and determine, and does not depend upon the rightfulness of the decision made (*Sherer v. Superior Court*, 96 Cal. 653, 31 P. 565). The writ of review will not lie where there is no excess of jurisdiction, although there may be error in the decision of the court sought to be reviewed (*Holbrook, Merrill & Stetson v. Superior Court*, 106 Cal. 589, 39 P. 936). The office of the writ here sought is not to correct errors, but is issued only where a court has acted without or in excess of its jurisdiction (*Goodman v. Superior Court*, 8 Cal. App. 233, 96 P. 395). In the matter before us, while both the justice and the superior courts may have had no power to determine the respective rights of the different parties under the indemnity bond for the reason that the complaint as originally drawn did not make them all parties to the action, still their subsequent determination that plaintiff, having succeeded to the entire interest under the bond, was entitled to a judgment for the full amount, even if incorrect, is binding upon the parties to the action, as the conclusion, whether right or wrong, was one within the jurisdiction of those courts to determine.

The writ is denied.

We concur: KNIGHT, J.; CASHIN, J.

71 Cal. App. 773

JONES v. SOUTHERN PAC. CO. (Civ. 2879.)

(District Court of Appeal, Third District, California. March 23, 1925.)

1. Exceptions, bill of $\S$ 43(2)—Failure to serve bill of exceptions mentioned in motion to set aside default not grounds for refusing to hear motion.

Where affidavit, supporting motion to set aside default for not filing bill of exceptions within time required, mentioned bill among papers relied on, failure to serve bill with notice of motion held not to warrant refusal to hear motion, although under Code Civ. Proc. $\S$ 1010, bill might not be properly admitted to support motion.

2. Exceptions, bill of $\S$ 43(2)—Affidavit of merits by attorney, accompanying motion to set aside default, proper.

Affidavit of merits, to effect that attorney and party believed latter had meritorious grounds of appeal, accompanying motion for relief from default in not filing bill of exceptions within required time, could properly be made by attorney, who would probably know

more about meritorious grounds for appeal than client.

3. Appeal and error ☞985—Exceptions, bill of ☞43(2)—Granting of application to be relieved from default in failing to file bill of exceptions within required time discretionary.

Application to be relieved from default, under Code Civ. Proc. § 473, in failing to file bill of exceptions within required time, is discretionary, and court's action will not be set aside on appeal, except for clear abuse thereof.

4. Appeal and error ☞938(2)—Any doubt as to propriety of action on application to set aside default resolved in favor of application.

Any doubt as to propriety of action on application to be relieved of default in failing to file bill of exceptions within required time will be resolved in favor of application, to the end of securing trial upon merits, and therefore appellate court will be less inclined to reverse an order granting application than refusing it.

5. Exceptions, bill of ☞43(2)—Application to be relieved of default in failing to file bill of exceptions within required time properly granted.

Where party used due diligence in preparing bill of exceptions and could not reasonably have completed them within required time, but failed to secure extension therefor, alleged to be because of mistaken belief that notice of intention to move for a new trial had been served and filed, application to be relieved of failure to file bill of exceptions within required time *held* properly granted, especially where other party had not been prejudiced by delay, notwithstanding right to apply for new trial was not reserved at time of motion, notwithstanding verdict, under Code Civ. Proc. § 629.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by Ruth Jones against the Southern Pacific Company. Judgment for plaintiff. From an order relieving defendant of default in failing to file exceptions within required time, and allowing an appeal, plaintiff appeals. Affirmed.

Cooley & Crowley and Lasher B. Gallagher, both of San Francisco, for appellant.

Levinsky & Jones, of Stockton, for respondent.

FINCH, P. J. This appeal is from an order of the trial court relieving the defendant from its default in preparing and serving its draft of a bill of exceptions within the time allowed by law.

From the affidavit of Arthur L. Levinsky, one of the attorneys for defendant, it appears that judgment in the action was entered on the 8th day of November, 1923; that on the next day affiant requested the official court reporter to prepare a transcript of all the testimony taken at the trial, and that the reporter agreed to do so; that such transcript was delivered on the 14th day of December, 1923, and "immediately upon receipt

of the aforesaid transcript * * * affiant began dictating * * * the proposed bill of exceptions, * * * and ever since the 14th day of December, 1923, save and except on Sundays and legal holidays," affiant's stenographer "has been actively and continuously engaged in preparing said proposed bill of exceptions"; that such transcript contains 351 pages of typewritten matter, without including the instructions or special findings of the jury, "and that by reason thereof it would have been impossible to prepare said proposed bill of exceptions within a shorter period of time than has been already occupied in the preparation thereof; that affiant has had charge of the preparation of said proposed bill of exceptions, and he has continuously, zealously, and diligently dictated the same, and has used every effort, together with the aforesaid stenographer, * * * to complete said proposed bill of exceptions; * * * that the appeal from the judgment * * * which is about to be taken by said defendant is not taken by said defendant for mere purposes of delay, but for the reason that said defendant believes, and its counsel believes, that said defendant has meritorious grounds of appeal, and said appeal will be diligently prosecuted."

The affidavit further states that affiant "believed that a notice of intention to move for a new trial on the part of the defendant * * * had been given, served, and filed herein, and by reason of the said belief * * * your affiant did not, neither did his partner, Gilbert L. Jones, preserve the time within which to prepare and serve the aforesaid bill of exceptions, and it was first discovered by affiant on the 3d day of January, 1924, when affiant was examining the records and files in the above-entitled action in the office of the clerk of the above court, that no notice of intention to move for a new trial in the above-entitled action had been served or filed by defendant; * * * that, if a notice of intention to move for a new trial had been served and filed by the defendant, * * * the time within which said defendant would have been required to serve its proposed bill of exceptions herein would have been extended to at least the 26th day of January, 1924; that plaintiff herein therefore has suffered no injury in point of time, or otherwise, by reason of the failure of said defendant herein failing to preserve its time within which to serve said proposed bill of exceptions, and will not be injured, especially by the reason of the fact that said proposed bill of exceptions is virtually completed, and can be completed by the 7th day of January, 1924, and that the same will be ready to be served on the 14th day of January, 1924, on the hearing of the motions that will be made by the defendant * * * for the purpose of opening the said default." The motion was heard and granted on the

14th day of January, 1924. The proposed bill of exceptions was admitted in evidence on the hearing of the motion. The notice of motion and the foregoing affidavit are dated January 4, 1924. It does not appear when they were served.

[1] The notice stated that the motion would be made "upon this notice, and upon the records, pleading, files, and minutes of the court, in the above-entitled action, upon the affidavit of Arthur L. Levinsky, served and filed herewith, and upon such other evidence, either oral or documentary, as may be produced on the hearing of the motion, and upon the said proposed bill of exceptions, which will be there and then ready for service." The proposed bill of exceptions was not served with the notice. Plaintiff objected to the hearing of the motion upon the ground of such failure of service of the proposed bill. The draft of the bill of exceptions was not admitted in evidence for the purpose of proving anything contained therein, but "for the purpose of showing that the defendant Southern Pacific Company in pursuing the preparation of said proposed bill of exceptions had acted in good faith, and that said proposed bill of exceptions was ready for service at said time, and it was and is stipulated that said proposed bill of exceptions may be omitted from this bill of exceptions on behalf of the plaintiff Ruth Jones." No objection was made to the admission of the proposed bill for the purposes stated, but plaintiff's objection was "to the hearing of said motion." Section 1010 of the Code of Civil Procedure provides that the notice must state "the papers, if any, upon which it is to be based. If any such paper has not previously been served upon the party to be notified, and was not filed by him, a copy of such paper must accompany the notice." It may be true that a paper referred to in the notice and not served therewith cannot be admitted in evidence at the hearing, but failure to serve such paper is not made a ground for refusing to hear the motion or to admit in evidence other papers properly served.

[2] It is contended that no affidavit of merits accompanied the application for relief. The affidavit states "that said defendant believes, and its counsel believes, that said defendant has meritorious grounds of appeal." It is urged that the affidavit of merits "should have shown that the prospective appellant had consulted counsel and had been advised by them that in their opinion it had reasonable grounds to expect a reversal of the judgment appealed from, if the appeal were considered on the merits." It is a general rule that an affidavit of merits should be made by a party to the action, because ordinarily he is more familiar with the facts than is his attorney, but in this case the attorney who conducted the litigation is doubtless more familiar than the

defendant with the grounds of appeal, and the belief, or opinion, of such attorney that there are meritorious grounds of appeal contained in a record which he himself prepared ought to be considered a sufficient showing of merits.

[3, 4] The affidavit does not state that defendant had intended to move for a new trial, but only that affiant believed that such a notice had been served and filed. The showing of mistake is not strong and, as said in *Harbaugh v. Land & Water Co.*, 109 Cal. 70, 72, 41 P. 792, "the action of the court came very near the border line which divides the exercise of discretion from the abuse of such discretion." The showing in that case was not stronger than in this, and the order granting relief was affirmed. A similar order was affirmed in *Stonesifer v. Kilburn*, 94 Cal. 33, 29 P. 332, on slight evidence of mistake. "An application to be relieved from a default under section 473 of the Code of Civil Procedure is addressed to the sound discretion of the trial court, and the action of that court will not be set aside on appeal, unless an abuse of discretion clearly appears. Any doubt that may exist should be resolved in favor of the application, to the end of securing a trial upon the merits. The appellate court will therefore be less inclined to reverse an order granting, than one refusing, an application to open a default. Indeed, the cases in which this court has held that such relief was improperly granted are very rare." *Jergins v. Schenck*, 162 Cal. 747, 748, 124 P. 426. See, also, *Waite v. Southern Pacific Co.*, 192 Cal. 467, 221 P. 204; *In re Barney*, 191 Cal. 18, 214 P. 853; *Jones v. Title Guaranty etc., Co.*, 178 Cal. 375, 173 P. 586; *Savage v. Smith*, 170 Cal. 472, 150 P. 353; *Downing v. Klondike, Min., etc., Co.*, 165 Cal. 786, 134 P. 970; *Mitchell v. California, etc., S. S. Co.*, 156 Cal. 576, 105 P. 590; *O'Brien v. Leach*, 139 Cal. 220, 72 P. 1004, 96 Am. St. Rep. 105; *Langford v. Langford*, 136 Cal. 507, 69 P. 235; *Miller v. Carr*, 116 Cal. 378, 48 P. 324, 58 Am. St. Rep. 180; *Staley v. O'Day*, 22 Cal. App. 149, 133 P. 620; *Pelegrianni v. McCloud River, etc., Co.*, 1 Cal. App. 593, 82 P. 695.

[5] In this case it appears without contradiction that the defendant proceeded promptly and with due diligence to prepare its draft of a bill of exceptions, and that it could not reasonably have completed the same at an earlier time than it did. Undoubtedly the court would have extended the time for such preparation, if application therefor had been made. No prejudice has been suffered by the plaintiff in the action, except its asserted right to prevent a hearing on the merits by reason of the defendant's default. The only delay in the determination of the appeal from the judgment has been caused by the opposition of the plaintiff to defendant's application for relief from its default, and this appeal from the order granting such relief. Under such circum-

stances the ends of justice will be best served by upholding the action of the trial court.

Immediately after the return of the verdict the defendant, under the provisions of section 629 of the Code of Civil Procedure, made a motion for judgment in favor of defendant, notwithstanding the verdict. The defendant did not, in the motion, reserve "the right to apply for a new trial" in the event of the denial of the motion. Appellant contends that the defendant thereby forfeited its right to move for a new trial, and that therefore defendant's counsel could not have believed that a motion for a new trial had been made. It is not necessary to construe section 629, because, if it be conceded that appellant's construction thereof is correct, it would only go to the weight of affiant's statement in the affidavit that he believed the notice of intention to move for a new trial had been given, a question for the trial court's determination.

The order is affirmed.

We concur: PLUMMER, J.; JONES, Justice pro tem.

71 Cal. App. 633

**CRONIN v. CIVIL SERVICE COMMISSION
OF LOS ANGELES COUNTY et al.**
(Civ. 4368.)

(District Court of Appeal, Second District, Division 1, California. March 10, 1925.)

1. Sheriffs and constables — 18, 21—**Sheriff had absolute right to appoint and discharge deputies and other employees in his office before civil service provisions of county.**

Sheriff of county of Los Angeles had absolute right to appoint and discharge all deputies and other employees in his office before adoption of civil service provisions of charter of Los Angeles county, and therefore any limitations must be found within provisions of charter.

2. Prisons — 7—**Appointing power of Los Angeles county sheriff limited in two ways by civil service provisions of charter.**

Under civil service provisions of charter of Los Angeles county, power of sheriff to appoint to position in his office within classified service, including jailer, is limited to appointments from list of three persons certified to him by civil service commission, and by provision that no appointment shall be made because of religious or political opinions or affiliations.

3. Sheriffs and constables — 21 — **Effect of charter of Los Angeles county on absolute power of sheriff to discharge deputies and employees determined.**

The charter of county of Los Angeles did not divest sheriff of power of discharging deputies and employees in his office and vest it in civil service commission, but merely granted commission power to dismiss those falling below standard of efficiency under section 34, and

limited power of sheriff to discharge appointees during period of probation without consent of commission, under section 34 of charter and rule 5, § 5, of the commission.

4. Prisons — 7—**Sheriff could discharge jailer without hearing before civil service commission.**

Sheriff of county of Los Angeles could discharge jailer without hearing before civil service commission; there being nothing in charter of Los Angeles county requiring hearing, notwithstanding section 34, subd. 13, requiring reasons for discharge to be specifically stated and filed with commission, allowing reasonable time for reply, since requirement of hearing in section 34, subd. 15, and in rule 7, § 4, would have been extended to other cases of discharge, had Legislature so intended.

5. Constitutional law — 70(1) — **Courts cannot supply provisions making enactment effective.**

Courts are powerless to read into and supply a charter with provisions which might be deemed to better effectuate its aims.

Appeal from Superior Court, Los Angeles County; Bertin A. Weyl, Judge.

Application for writ of mandate to compel issuance of salary warrant by Robert E. Cronin against the Civil Service Commission of the County of Los Angeles and S. J. Chappel and others, as members of the Civil Service Commission. Judgment denying writ, and plaintiff appeals. Affirmed.

Joseph Scott and A. G. Ritter, both of Los Angeles, for appellant.

Edward T. Bishop, County Counsel, D. De Coster, Deputy County Counsel, and Phil C. Sterry, Deputy County Counsel, all of Los Angeles, for respondents.

CURTIS, J. Plaintiff, Robert E. Cronin, was, on the 11th day of October, 1922, the duly appointed, qualified, and acting jailer of the county of Los Angeles. On said day William I. Traeger, the sheriff of said county, served written notice upon plaintiff, suspending him from his position as a jailer, and notifying him that on the 20th day of said month he would discharge him from his position. With said notice said sheriff presented in writing to plaintiff his reasons for his intended discharge of plaintiff, and on the same day filed with the civil service commission of said county a written copy of said reasons. The plaintiff, on October 17, 1922, filed with said commission his written reply to said reasons. On the 27th of said month said sheriff served a second written notice upon plaintiff in which he notified plaintiff that he was discharged from his position as jailer. The plaintiff, in the belief that said discharge was illegal, made demand upon said commission for a warrant covering his salary for the month of October, 1922, and upon the refusal of said com-

mission to certify said warrant plaintiff instituted this action for a writ of mandate against said commission and the members thereof to compel them to certify a warrant in plaintiff's favor for his salary as such jailer for the month of October, 1922. The trial court rendered judgment in favor of defendants, and from this judgment plaintiff has appealed.

The position taken by appellant is that under the provisions of the charter adopted by the county of Los Angeles, creating a civil service commission, and in force in said county at the time of his attempted discharge, the power to discharge an employee belonging to the classified service of said county was vested solely in the civil service commission, and the principal under whom said employee was serving as a deputy was without any right to remove said employee from such position, and, furthermore, that no such employee or deputy could be discharged in any instance except after a hearing had been had before said commission upon the reasons or charges preferred against him and his reply thereto.

[1] We think it will be conceded, at least it is so well settled in this state that a citation of authorities in support thereof is unnecessary, that prior to the adoption of the civil service provisions of the charter of the county of Los Angeles the sheriff of said county, and, for that matter, all county officers thereof, had the absolute right to appoint and discharge any and all deputies and other employees required for the conduct of the office to which the principal had been appointed or elected. No claim is made by appellant that this power, originally possessed by county officers, has been limited in any way except by the provisions of said county charter. It follows, therefore, that at the time said sheriff discharged appellant, or attempted to discharge him, the only limitation, if any existed, upon his absolute power to appoint and discharge deputies and employees was to be found in the charter adopted by the county of Los Angeles and in force at said time. With regard to the power of the sheriff under said charter to appoint his deputies we are not concerned in this action, but the better to understand the whole scheme provided by the charter in the adoption of the civil service provisions thereof it might be well to briefly refer to certain of its provisions governing the appointment, as well as those providing for the discharge, of deputies and employees.

Section 30 of the charter provides for the appointment, by the board of supervisors of the county, of a civil service commission to consist of three members.

Section 33 divides the officers, deputies, and employees of the county into two classes; namely, the unclassified and the classified service. The unclassified service com-

prises all officers elected by the people and members of certain boards, also certain deputies among which is one deputy in the office of the sheriff, known as under sheriff or chief deputy. The classified service includes all other positions.

Section 41 provides that—

"No person in the classified service or seeking admission thereto shall be appointed, reduced or removed, or in any way favored or discriminated against because of his political or religious opinions or affiliations."

Section 51 provides that—

"Each county or township officer, board or commission, shall appoint, from the eligible civil service list, for either permanent or temporary service, all assistants, librarians, deputies, clerks, attachés and other persons in the office or department of such officer, board or commission, as the number thereof is fixed and from time to time changed by the board of supervisors."

Section 34 provides:

"The commission shall prescribe, amend, and enforce rules for the classified service, which shall have the force and effect of law. * * * The rules shall provide: * * *

"(2) For open, competitive examinations to test the relative fitness of applicants for such positions."

"(6) For the appointment of one of the three persons standing highest on the appropriate list.

"(7) For a period of probation not to exceed six months before appointment or promotion is made complete, during which period a probationer may be discharged or reduced with the consent of the commission."

"(13) For discharge or reduction in rank or compensation after appointment or promotion is complete, only after the person to be discharged or reduced has been presented with the reasons for such discharge or reduction specifically stated, and has been allowed a reasonable time to reply thereto in writing. The reasons and the reply must be filed as a record with the commission."

"(15) * * * The commission shall ascertain and record the comparative efficiency of employees in the classified service and shall have power, after hearing, to dismiss from the service those who fall below the standard of efficiency established."

We have only mentioned above those subjects over which the commission is authorized to prescribe rules and which are pertinent to this proceeding.

In pursuance of the power given it by said section 34 the commission prescribed a set of rules. These rules, in so far as they are material to the question involved herein, provide for the holding of competitive examinations to test the relative fitness of applicants for county positions in the classified service:

Rule 5, § 1: "Whenever a vacancy in the classified service is to be filled, the appointing officer shall make requisition upon the civil

service commission for certification of three names of persons eligible for the position.
* * *

Section 2: "Upon receipt of requisition for certification of names to fill a vacancy, the commission * * * shall certify to the appointing officer, from the register of eligibles appropriate for the group in which the position to be filled is classified, the three names at the head thereof, of persons eligible and willing to accept the place."

Section 5: "Appointment from original eligible lists shall be on probation for a specified period of not less than two months, nor more than six months. The appointing officer shall, when giving notice of appointment, state the length of the probationary period established by him for such appointment. Otherwise, the probationary period shall be six months. If, at the close of the designated probationary period, the conduct or capacity of the probationer has not been satisfactory, he shall be notified in writing by the appointing officer that he will not receive absolute appointment. Otherwise, his retention in the service shall be equivalent to a final and absolute appointment. The appointing officer shall not discharge or reduce the probationer to take effect before the expiration of the specified probationary period, without the consent of the commission."

Rule 7, § 4: "The commission shall ascertain and record the comparative efficiency of the employees in the classified service, and shall have the power, after hearing, to dismiss from the service those who fall below the standard of efficiency established."

Rule 11, § 1: "Discharge or reduction in rank or compensation after appointment or promotion is complete, of a person in the classified service, shall be made only after such person has been presented with the reasons for such discharge or reduction specifically stated, and has been allowed a reasonable time, to be stated in the communication setting forth said reasons, to reply thereto in writing. The statement of reasons and the reply must be filed as public records with the commission."

[2] As to the power of the sheriff of Los Angeles county, under the civil service provisions of the charter, to appoint to positions in his office belonging to the classified service (and this includes all deputies in his office, with the exception of the under sheriff or chief deputy, and, therefore, the office of jailer is included therein), it is apparent, from the provisions of the charter and the rules of the civil service commission above referred to, that this power is still lodged in said officer, but with such limitations as are prescribed by said charter and the rules of the commission. While before the adoption of the charter he had the absolute power to appoint all deputies in his office and to fill their positions with persons of his choice, after the adoption of the charter, and under its provisions, he still has the right to appoint all such deputies, but there are two limitations placed upon this power of appointment. These are: First, all appointments to positions in the classified service must be made from the list of three persons

certified to him by the civil service commission; and, secondly, no appointment to positions in the classified service shall be made because of the religious or political opinions or affiliations of the appointee.

[3] Having thus determined the power of the sheriff regarding appointment of his deputies, what, if any, changes have been made by the charter regarding the power of this officer to discharge such deputies and employees? In his brief, appellant says, "It will be noted from the reading of the sections relating to removal and discharge that nothing is said by either the charter or the rules as to who is authorized to make such discharge or removal." With this concession on the part of appellant, it would hardly seem necessary to further pursue the question as to the power of the sheriff to discharge or remove any deputy or employee in his office. For, as we have already seen, the sheriff, prior to the adoption of the charter, had the absolute right to discharge and remove any deputy in his office, and according to appellant's brief, as nothing is said in either the charter or the rules of the commission upon this subject, it necessarily follows that said officer still possesses the power vested in him prior to the adoption of the charter.

We, however, feel that the concession made by appellant in his brief and quoted above is somewhat stronger against him than the facts really warrant. Section 34 of the charter provides that the commission shall ascertain and keep a record of the efficiency of employees in the classified service, and shall, after hearing, have power to dismiss from service those who fall below the standard of efficiency established by the commission. While the commission is given power to dismiss employees in the classified service in this one instance, we fail to find in this regulation of the commission any intention to divest the principal of his general power to remove and discharge deputies and employees whom he considers inefficient or out of harmony with his administration of his office. It may be in some instances, on account of friendship, or other reasons, the principal may desire to retain an inefficient deputy in his office. In such a case the commission, under the rule last referred to, would have the right to remove such employee if he fell below the standard of efficiency, even against the will and without the consent of the principal. This rule or regulation would not in any way conflict with the provisions of law vesting in the principal a general power to discharge deputies and employees.

There is a further limitation in our opinion upon the absolute power of the principal to discharge deputies and employees, found in section 34 of the charter and in section 5, rule 5, of the commission. This rule provides, first, that all appointments

shall be on probation, and, second, that during the probationary period the appointee shall not be discharged by the appointing officer without the consent of the commission. In view of this rule and the provision of the charter authorizing its adoption by the commission, it is argued by appellant, if it be held that the principal has the absolute right to discharge deputies under regular appointment, that the lot of the regular employee is more uncertain and precarious than that of a probationer. This may be true. There may have been some good reason in the minds of the framers of the charter for placing a check on the power of the principal to discharge a probationer before the expiration of his probationary period. Just what this reason was may or may not be apparent, but it is evident that the provisions of the charter providing for such a rule and the rule itself only refer to appointments during the time the appointee is serving his probationary term, and cannot by any manner of construction known to us be extended so as to apply to deputies or employees serving under final and absolute appointment. The contention, therefore, of appellant that the power of discharge and removal is vested in the civil service commission, or that the principal can only make such discharge or removal with the consent of said commission, finds no support either in the provisions of the charter or in the rules prescribed by the commission.

[4] As to appellant's contention that the sheriff, even if authorized to discharge him, can do so only after a hearing before the civil service commission, he relies upon subdivision 13 of section 34 of the charter and the rule of the commission, based upon said subdivision, which we have already quoted in full. This provision of the charter provides that a deputy in the classified list can only be discharged after he has been presented with the reasons for such discharge and has been allowed a reasonable time to reply thereto in writing. Appellant argues that, as the charter here provides that no deputy can be discharged until written charges are preferred against him and an opportunity given him to reply thereto, it was contemplated by the framers of the charter that a hearing must be had by the commission on said charges and reply before any discharge can be made. To so construe the charter would be to read something into it which was not placed therein by those who framed it. We find that in subdivision 15 of said section of the charter and in section 4 of rule 7, when the commission seeks to dismiss an employee in the classified list, on account of his falling below the standard of efficiency established by the commission, it can do so only after a hearing. It will thus be seen that the freeholders, in whom the law vested the sole

power of framing the charter, had in mind at least one instance when they thought a hearing should be had, and that by design they provided for a hearing in that instance, and in another instance they made no such provision. For this court now to hold that a hearing should be had by the commission before a principal could discharge a deputy when none had been provided for in the charter would be for this court to usurp the functions of the freeholders and to change their work in a material respect. This it has neither the right nor the inclination to do. We must accept the charter as framed by the freeholders and not attempt to enlarge its scope under the guise of judicial interpretation. Neither subdivision 13 of said section 34 of the charter nor rule 11, as prescribed by the commission, provides for any hearing upon the charges preferred against a deputy before the principal may discharge him. All that is required by the charter and the rules of the commission is that the officer discharging the deputy shall serve upon him, a reasonable time before his discharge, and file with the commission, a statement of the reasons for the discharge. This procedure was observed by the sheriff of the county of Los Angeles in his discharge of appellant, and it follows, therefore, that said discharge was legal and effectual.

Great stress is laid by appellant upon the case of *Bannerman v. Boyle*, 160 Cal. 197, 116 P. 732, in support of his contention that he can only be removed after hearing before the civil service commission upon the charges preferred against him by the sheriff and his reply thereto. In this action it was held that the attempted removal by the mayor of the city and county of San Francisco of a member of the board of education of said city and county during the term of office for which he had been regularly appointed, without any notice to him or any opportunity to make a defense, was void. The decision was based upon the rule supported by the great weight of authority that, where an officer is appointed for a fixed term, and it is provided that he may be removed during the term for cause, without other qualifying words, such removal cannot be made except after notice and a hearing. It is quite apparent that this case differs in two material respects from the case before us. In that case the officer was appointed for a fixed term of office, and the charter provided that he could only be removed for cause. In the case before us, the appellant, as jailer, was not appointed for any fixed term, and there is nothing in the charter of the county of Los Angeles providing that the principal might discharge him only for cause. Under these circumstances we do not consider the case of *Bannerman v. Boyle* an authority which could be followed in the present action.

[5] Appellant suggests, however, that a construction of the civil service provisions of the charter of the county of Los Angeles that will permit the discharge of deputies and employees belonging to the classified service by the principal, without a hearing before the civil service commission, will render the whole scheme of civil service, so far as it is made applicable to said county, a sham and a farce, and will utterly destroy the purposes of this wise and important part of the county charter. Assuming that appellant is correct in this criticism, we are unable to perceive how it can effect the determination of the question before us. It may be that a hearing by the commission, before a principal can discharge a deputy, is most desirable. In fact, it may be absolutely essential to the proper and adequate functioning of the system of civil service as applied to employees in the county offices. Yet, if the freeholders, elected by the voters of said county, failed to provide for such a hearing, the courts are powerless to supply what they neglected to incorporate in the charter. We are, however, not entirely satisfied that appellant is correct in his conclusion that without such a provision in the charter the attempt by the freeholders to enact adequate civil service regulations was futile and ineffectual. Under the law, as we have already seen, prior to the adoption of civil service, the principal in office had the absolute right to appoint and discharge all deputies and employees required in the conduct of his office. It was claimed that this power was greatly abused by the principal to the detriment of the public service and often resulted in the displacement of experienced and efficient persons to make room for the personal and political friends of the appointing officer. To remove this condition the legislation known as "civil service" was proposed, and its purpose was not so much to deprive the principal of the power vested in him to remove deputies as it was to limit his power of appointment and to provide that all appointments by him should be made from lists of names of persons furnished him by the civil service commission and who had satisfactorily passed the examination held by the commission. With this restriction placed upon his power of appointment, the principal was unable to select for his deputies his personal and political friends. Deprived of this power to appoint his favorites, there was but slight excuse or temptation on his part to discharge efficient employees in his office for the reason that he must fill their places by men whose names appear on the list certified to him by the commission. But his right to make such discharge has seldom been interfered with by civil service legislation. As head of the office and responsible for its successful administration he must have, and all civil

service legislation has recognized this principle, the right to control his subordinates, even to the extent of removing them whenever in his judgment the public interest demanded their removal. His right to discharge, however, under civil service regulation, is not absolute as it was under the old system. He cannot, as a rule, now discharge a person in the classified service on account of the latter's political or religious opinions or affiliation, and before he can discharge a person in this class he must present such person with the reason for his discharge and give him a reasonable time to reply thereto. Both the reasons for the discharge and the reply of the employee must be in writing and filed as public records in the office of the commission.

At the oral argument of this case counsel for respondent cited a number of excerpts from reports of civil service organizations, addresses by advocates of civil service reform, and standard works upon the principles of civil service legislation, as indicating that the provisions of the charter of the county of Los Angeles are in harmony with the well-established and well-recognized principles of civil service. We will refer to only one of these citations, and that from Proctor on Principles of Public Personnel Administration, which is in the following language:

"Few civil service commissions, however, have the power of deciding cases of dismissal. In perhaps 80 per cent. of the civil service jurisdictions throughout the country, administrative officers have the power to remove their subordinate employees, either absolutely or subject to certain restrictions. The appointing officer should have the power to remove, suspend, or lay off his subordinates. If he does not have this power, it is difficult to see how he can enforce discipline and maintain a high standard of efficiency in the organization for which he is responsible. At the same time an administrative officer in making removals should be subject to definite restrictions. Civil service laws commonly provide that he shall not remove public employees because of religious or political affiliations, but only for bona fide reasons of misconduct or incompetency. In order to make effective this provision, the administrative officer should be required to furnish the employee whom he wishes to remove, a written statement of the reasons for his action, and to give the employee an opportunity to reply in writing. He should also be required to file with the civil service commission a copy of the reasons for his action and a copy of the reply of the employee. Experience shows that where the civil service system is once well established, administrative officers do not ordinarily abuse the power of removal. The motive for making an unjust removal would be in most cases the desire to put in the place of the employee removed a person more acceptable on political or similar grounds. But an administrative officer has little incentive for making an unjust removal if entrance to the civil service is safeguarded by a careful enforcement of the merit principle."

The Supreme Court of this state has, in the case of *Cahen v. Wells*, 132 Cal. 447, 64 P. 699, expressed its views upon the subject in similar language. On page 452 (64 P. 701), the court says:

"Since the head of an office could not, under the merit system, fill a vacancy with a person of his own choice, but must do so, with the person, or one of the two or three persons, certified by the commission, the incentive to make removals, except for actual incompetency, would be very slight. One of the reformers quoted in the brief, after pointing out that removals are rarely asked for except to make a vacancy for a particular man, says, 'Under the merit system of appointment, the question of removals would be solved without legislation.'"

It is apparent, therefore, from these quotations, and many more of the same general character could be cited if deemed necessary, that the provisions of the charter of the county of Los Angeles providing for civil service regulation of certain of its employees are in harmony with the general principles of civil service legislation as understood and explained by writers upon the subject of unquestioned authority, as well as by our own Supreme Court.

In accordance with the views hereinbefore expressed we are of the opinion that the judgment should be affirmed, and it is so ordered.

We concur: CONREY, P. J.; HOUSER, J.

72 Cal. App. 63

ZOLKOSKE v. UNITED STATES FARM & LAND CO. (Civ. 5096.)

(District Court of Appeal, First District, Division 2, California. March 30, 1925. Hearing Denied by Supreme Court May 25, 1925.)

1. Trial $\S$ 243—Instructions as to responsibility for false representations held contradictory.

In action for damages for fraud in sale of realty, instructions as to responsibility of defendant for false representations by persons acting as agents within scope of authority, accompanied by instructions that false representations to be actionable must have been made by defendant itself, and "must be traced directly to" defendant, held contradictory.

2. Principal and agent $\S$ 158—Principal may be liable for fraud of its agent without having directly instigated it.

Principal may be liable for fraud of its agent without having directly instigated it.

3. Trial $\S$ 296(1)—Correct instruction does not cure incorrect instruction, where instructions contradictory and confusing.

Giving of correct instruction on a material issue will not relieve the vice of an incorrect one, where the instructions are contradictory and serve to confuse the minds of the jury.

4. Trial $\S$ 296(2)—Error in instructions as to responsibility of principal for false representations of agent held not cured by accompanying correct instruction.

Error in instructions as to responsibility of principal for false representations of agent held not cured by accompanying correct instruction, where the same error was repeated throughout the trial and emphasized.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Theodore Zolkoske against the United States Farm & Land Company. Judgment for defendant, and plaintiff appeals. Reversed.

W. W. Murphy, Charles S. Wheeler, and Charles S. Wheeler, Jr., all of San Francisco (Henry F. May, of San Francisco, of counsel), for appellant.

E. T. Young, of Los Angeles, and Butler & Van Dyke, of Sacramento, for respondent.

NOURSE, J. Plaintiff sued for damages for fraud involved in the purchase of land owned by the defendant in Madera county and being a part of the Chowchilla ranch. The cause was tried before the court sitting with a jury, which, by a vote of nine to three, returned a verdict in favor of the defendant. Plaintiff moved for a new trial. The motion was denied, and from the judgment which followed the plaintiff has appealed on the judgment roll and a bill of exceptions.

A brief statement of the facts will suffice, as the only errors alleged and relied on by appellant arise from the instructions given the jury. The defendant corporation purchased the Chowchilla ranch, consisting of about 107,000 acres, and subdivided it into lots of about 20 acres each for the purpose of sale to the public. The defendant, either directly or through its agents, sold the greater portion of the tract prior to the year 1918, at which time it had about 11,000 acres left unsold in scattered tracts. These remaining lands were very much inferior to the lands which had been sold, containing large quantities of alkali and hardpan, which made them difficult to sell, a condition which was well known to the defendant. In March, 1918, through the aid of an agent of the defendant, a Mr. Hollister was presented to Mr. Robertson, the president and acting head of the defendant corporation, as a representative of the Daniel Hays Company of Chicago, a corporation engaged in the real estate brokerage business. Arrangements were made between Robertson and Hollister by which the latter was authorized to sell the remaining lands owned by the defendant corporation, and these were confirmed by the letter of March 22, 1918, addressed to Hollister and signed by Robertson, as president of the de-

fendant corporation. Basing its authority upon this letter, the Daniel Hays Company immediately commenced an active campaign for the sale of these lands, during which a large number of books and pamphlets were issued to its agents advertising the lands in glowing terms. The material for this advertising was taken from booklets, maps, and photographs furnished the Hays Company directly by the defendant. Through the use of this advertising matter the plaintiff was induced to purchase some of the lands at a grossly exorbitant price, and he bases his suit for damages upon the fraudulent misrepresentations which induced the purchase.

On this appeal the respondent frankly concedes the fraud and the misrepresentations on the part of the Hays Company and its agents; but the respondent insists that it is not responsible, as the Hays Company was not its duly authorized agent. The fact of this agency thus became an important issue of fact in the trial. The appellant, however, does not rest on the proof of agency alone, but urges that the liability of the respondent also rests upon the proven fact that the respondent knew that false representations were being made by selling agents of the Hays Company, which was holding itself out as the authorized agent of the respondent; that these representations were based partly on information furnished the Hays Company by the respondent; and that the respondent, while fully cognizant of the fraud perpetrated on the appellant, obtained the fruits thereof and thereby ratified the acts of the salesmen.

In both of these instances the competent evidence is overwhelmingly in support of appellant's contentions. At times the respondent seems to agree with the appellant in this respect, and states that the only dispute in the evidence was on the value of the land sold to the appellant—a question which is not involved in this appeal as the fraud is conceded. Then we find in respondent's brief the statement that the claim of agency on the part of the Hays Company is "utterly without supporting evidence," and similar expressions are used regarding the issues of "scienter" and ratification. But these assertions are frightfully in disregard of the printed record. Proof was offered and not controverted that in July, 1918, just prior to the sale to the appellant, the Hays Company was selling other lands in the same tract for the respondent; that, throughout the entire period, the respondent dealt with the Hays Company as its authorized selling agent, furnished it information for its advertising campaign, received copies of all literature issued by the Hays Company, in which it held itself out as respondent's agent, and permitted that company to circulate this literature containing false and fraudulent representations about the land without objection

on its part. In addition to this we find in the telegram of September 6, 1918, sent to the Hays Company by the respondent, that the respondent canceled the contractual relations then existing with the Hays Company, specifically withdrawing "all propositions made to you but particularly those contained in our letters of March twenty-second, May tenth, and June third written to your Mr. H. L. Hollister." Now, the letter of March 22, referred to in this telegram, was the letter addressed to Hollister upon which Hays Company based its authority to act as agent for the respondent. That the respondent treated this letter as conferring such authority is apparent from the use of the expression "propositions made to you" in referring to the letter "written to your Mr. H. L. Hollister."

Evidence was offered that all the literature containing the false representations regarding the lands was sent to the respondent in proof of the issue that respondent had knowledge of the fraud which was being committed in its name and for its benefit. It was also shown that the proceeds of the sale went to the respondent upon the execution of its deed of conveyance. The sufficiency of this evidence is not involved in this appeal. What we have endeavored to point out is that evidence was before the jury in support of these issues of fact which required the submission of the issues to the jury. Appellant's position on the appeal is that the jury was not properly instructed. Respondent does not argue the points raised by appellant, but devotes its brief to a discussion of the sufficiency of the evidence to support the verdict. This may be true, but, on the other hand, we are satisfied that, if the jury had rendered its verdict in favor of the appellant, that verdict would have also been supported by the evidence. Thus the errors in the instructions become vital.

[1-3] We do not deem it necessary to discuss these instructions in detail. The main error arises from the fact that the trial judge adopted the instructions proposed by both parties, and thus, on the material issues, the instructions given were hopelessly contradictory. For illustration, the trial judge, on the request of appellant, instructed the jury as to the legal responsibility of the respondent for false representations made by persons acting as agents of the respondent within the scope of their authority; but this was accompanied by three instructions requested by the respondent to the effect that the false representations to be actionable must have been made by the respondent itself and "must be traced directly to the" respondent. These instructions were not only contradictory, but those given at respondent's request was incorrect statements of the law, because if an agency existed—a fact which the jury was to determine—the re-

spondent may have been liable for the fraud of its agents without having "directly" instigated it. The giving of a correct instruction upon a material issue will not relieve the vice of an incorrect one where they are contradictory and serve to confuse the minds of the jury. *People v. Maughs*, 149 Cal. 253, 261, 86 P. 187; *Pierce v. United Gas & Elec. Co.*, 161 Cal. 176, 185, 118 P. 700; *Starr v. Los Angeles Ry. Corp.*, 187 Cal. 272, 280, 201 P. 599; *O'Meara v. Swortfiguer*, 191 Cal. 12, 15, 214 P. 975.

[4] The instructions on the subject of respondent's liability, if the jury should find that it was responsible for the false representations being made, or had knowledge that they were being made and countenanced the fraud to its own financial benefit, are of like tenor. At the request of the appellant the trial judge correctly stated the law on that subject, and then, at the request of the respondent, told the jury, in effect, that there was no responsibility and no ratification. In addition to charging the jury in respect to matters of fact the instructions on this subject are contradictory and misleading.

If we were to find that the error in these instructions was insignificant, the fact that the same error was repeated time and again throughout the charge to the jury so that the error was constantly emphasized, while the correct instruction was given but once, is sufficient to demonstrate the prejudice to appellant's cause arising from the error.

Judgment reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

72 Cal. App. 94

C. O. BASHAW CO. v. WOOD & STEVENS, Inc. (Civ. 5083; S. F. 10954.)

(District Court of Appeal, First District, Division 2, California. April 1, 1925. Rehearing Denied April 28, 1925. Hearing Denied by Supreme Court May 28, 1925.)

1. Principal and agent §89(8)—Evidence held to warrant finding that consignee of prunes was authorized to use its own judgment in settling with buyer.

In action for money expended by plaintiff's assignor for prunes consigned to it by defendant, evidence held to warrant finding that plaintiff's assignor was authorized to use its own judgment in settling with buyer, or accepting buyer's rejection of prunes, and in otherwise disposing thereof.

2. Principal and agent §63(1)—Consignee, having authority to ship goods in own name, has same authority to discharge or modify contract with buyer as to make it.

Authority, given consignee to ship prunes in its own name, gave it same rights to dis-

charge, modify, or control obligation of contract with buyer as to make contract.

3. Principal and agent §63(1)—Consignee held authorized to accept buyer's rejection of prunes, to return price paid, and to dispose of prunes elsewhere.

Authority given consignee to use his own judgment in settling with buyer, to accept buyer's rejection of prunes, or to otherwise dispose thereof, gave it full authority to accept buyer's rejection of prunes, return purchase price, and to endeavor to sell them elsewhere.

4. Principal and agent §89(9)—Consignee's authority to accept buyer's rejection of prunes, and to return price received, held to present questions of fact for court.

In action for money expended by consignee of prunes as agent to sell, consignee's authority to accept buyer's rejection of prunes, to return price paid, etc., held to present questions of law for court.

5. Appeal and error §1010(1)—Finding of trial court, supported by evidence, binding on appellate court.

Finding of trial court, supported by evidence, and not contradicted by contrary evidence, is binding on appellate court.

6. Principal and agent §89(7)—Condition of prunes rejected by buyer held material, merely to show consignee's good or bad faith in accepting buyer's rejection.

Where principal issue in action for money expended by consignee in seller's behalf was whether consignee exercised undue authority in accepting buyer's rejection of prunes, condition of prunes was material, merely to show consignee's good or bad faith.

7. Appeal and error §1071(1) — Judgment, supported by one count of complaint and findings thereon, against which no attack was made, not disturbed on appeal.

Judgment, supported by one count of complaint and findings made thereon, against which no attack was made by defendant, cannot be disturbed because some of findings addressed to another count were vulnerable to attacks made thereon.

8. Appeal and error §527(2)—Appellant's incorporation in record of findings, refused by court, and assigning error to trial court's ruling thereon, held improper practice.

Where trial court refused to incorporate certain paragraphs in its findings, it was improper practice for appellant to cause proposed findings to be incorporated in record, and assign rulings of trial court as error, effect of which was attempt to convert findings into bill of exceptions or statement of case.

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by the C. O. Bashaw Company, substituted for Bashaw, Gray & Rosstan, Incorporated, against Wood & Stevens, Incorporated. Judgment for plaintiff, and defendant appeals. Affirmed.

Alfred C. Skaife, of San Francisco, and Arthur L. Fullman, of New York City, for appellant.

Norman A. Eisner, of San Francisco, for respondent.

STURTEVANT, J. The trial court, sitting without a jury, awarded the plaintiff a judgment as for moneys laid out and expended by plaintiff's assignor in behalf of defendant. The defendant has appealed under section 953a, Code of Civil Procedure.

The story, as recited in the findings, is told first by affirmative allegations in response to the first count contained in plaintiff's complaint, which is a common count as for moneys laid out and expended. The story is told again by affirmative findings in response to the second count pleaded in the complaint which purports to plead the facts. The latter findings are (1) that the plaintiff is a corporation; (2) that the defendant is a corporation; (3) that Herbert E. Gray Company is a corporation; (4) that on August 7, 1919, the defendant requested Herbert E. Gray Company to accept from defendant 574, 50-pound boxes 100/120 prunes and consigned the same to Gray's correspondents in London, and that Gray consented to do so without making any charge for his services; (5) that Gray thereupon consigned the prunes to Crichton, London; (6) and that the defendant furnished to Gray a description of the goods, which Gray accepted, and on which Gray offered the goods for sale in London, and, acting on that description, Crichton sold the prunes and remitted to Gray as the net amount of the cash sales \$3,281.98; (7) that on the arrival of said prunes in London, England, the purchaser thereof rejected the same because of the condition of said prunes and demanded back the purchase price that had been paid therefor; that said Alexander Crichton & Co. notified said Herbert E. Gray Company, Incorporated, and said Herbert E. Gray Company, Incorporated, notified said defendant of the fact of said rejection; that said defendant did thereupon authorize said Herbert E. Gray Company, Incorporated, to use its own judgment in settling with said purchaser or in accepting said rejection, and in otherwise disposing of said prunes; that said Herbert E. Gray Company, Incorporated, acted in good faith, with diligence and care, and accepted said rejection, and instructed said Alexander Crichton & Co. to return said purchase price and to endeavor to sell said prunes elsewhere; that said Herbert E. Gray Company, Incorporated, instructed said Alexander Crichton & Co. to advance the money to repay said purchase price and promised to repay to said Alexander Crichton & Co. any deficit that might remain upon the resale of said prunes; that the acceptance of said rejection was for the best interests of said defendant; that the

market value of prunes of the character offered for sale and according to the description furnished by said defendant had risen since the time of said sale in London, England, and that, if said rejection had not been accepted, the said Herbert E. Gray Company, Incorporated, might have been rendered liable for substantial damages; that Herbert E. Gray, the president of Herbert E. Gray Company, Incorporated, went personally from New York to London, inspected the prunes and acted for Herbert E. Gray Company, Incorporated, with reference thereto; that the condition of said prunes on the arrival of said Herbert E. Gray in London was such as to require immediate and prompt attention if same were to be resold; that it was necessary for Herbert E. Gray, representing said Herbert E. Gray Company, Incorporated, to act immediately; that a case of necessity existed for prompt and immediate action in the interests of said defendant; that said Herbert E. Gray acted reasonably, in good faith, and without negligence, in authorizing said Alexander Crichton & Co. to return said purchase price and to endeavor to resell said prunes; that said defendant was promptly notified by said Herbert E. Gray Company, Incorporated, of the acceptance of said rejection, the return of said purchase price and the instructions given to said Alexander Crichton & Co. to resell said prunes, and that, upon the return of said Herbert E. Gray, the president of Herbert E. Gray Company, Incorporated, to New York, from London, England, where he had inspected said prunes, and had acted for and on behalf of said Herbert E. Gray Company, Incorporated, said defendant did not repudiate or object to said action, but approved and ratified the same with full knowledge of all of the facts, and promised that it would take care of any amounts owing to said Herbert E. Gray Company, Incorporated, as soon as the net proceeds of said resales of said prunes were ascertained; (8) that Crichton accepted the return of the prunes, repaid the purchase price, and thereafter made diligent efforts to resell the prunes and later returned to Gray a bill for \$2,265.28 for the difference between the amounts received from the sale of the prunes and the expenses incurred; that Gray paid Crichton and thereafter assigned his claim to this plaintiff; (9) that Gray acted gratuitously and in accordance with the instructions of the defendant, and with diligence and in good faith; (10) that the defendant did not at any time sell the prunes to Gray; (11) that, when the prunes arrived in London, the same were in bad condition; and that Gray "acted reasonably and in the interest of said defendant in authorizing the acceptance of said rejection, and the return of said purchase price, and the immediate resale of said prunes, and in not submitting the claim of the purchaser

to arbitration or litigation. The court further finds that the condition of said prunes on their arrival in London, England, was not due solely or at all to the negligence or want of care of the purchaser of the prunes subsequent to his securing title to the same. The court does not find the particular time or place the said prunes became or were bad, but does find that said Herbert E. Gray Company, Incorporated, acted reasonably and in the best interest of said defendant in all that it did respecting said prunes."

The evidence showed without conflict that before the prunes arrived in London that Crichton, on August 25, 1919, sold to Badcock, Bishop & Co., London, under a c. i. f. contract representing them to be "Rosenberg Bros. & Co. pack average of the season of 1918," that contract contained a covenant "all questions or disputes arising under this contract shall be referred to two arbitrators, one to be appointed by each party. In case such question or dispute arises respecting quality or condition, the buyer shall accept the goods and the arbitrators shall decide only the question of allowance (if any) to be made to the buyer. The arbitration shall be held in London and shall be claimed within seven days of the first arrival of the goods at the wharf at London or before removal from the quay in Liverpool or other ports." The evidence introduced at the trial consisted of the oral testimony given by Herbert E. Gray and the deposition of H. W. Brown, one of the agents of Alexander Crichton & Co. The testimony of those two witnesses was to the effect that the prunes were "fermenting," "full of life," and "in very bad condition." The evidence showed affirmatively that neither the purchaser nor the seller demanded an arbitration.

[1] We now take up the points made by the appellant. For reasons which will presently appear, we do not take them up in the order made by the appellant. The fifth point made by the appellant is a claim that plaintiff's assignor exceeded his authority in accepting the rescission. The appellant states the point in five different ways. The burden of these attacks is that, assuming that Gray was an agent to sell, he had no authority to rescind, or authorize the rescinding of an executed sale. If the record showed nothing more than that Herbert E. Gray Company was an agent to sell, of course, there might be something in the point. However, the record, shows affirmatively that when the purchaser inspected the goods and reported his rejection that that report was communicated to the defendant and, as found by the trial court, the "said defendant did thereupon authorize said Herbert E. Gray Company, Incorporated, to use its own judgment in settling with said purchaser, or in accepting said rejection and in otherwise

disposing of said prunes." That finding was fully supported by the evidence. Mr. Gray so testified. In an earlier part of his testimony he also testified that Crichton had advised him and, in turn, he had advised Wood, that, if the dispute went to arbitration, the purchaser could claim loss of profits as an element of his damage, and, as the price of prunes on the London market had risen, that the item of damage would be a substantial one.

[2, 3] In doing what he did regarding the rescission, Mr. Gray did not exceed his authority. His authority was two-fold and rested upon two separate principles of law. In the first place, he had been authorized by the defendant to send the prunes in his own name to London. Under those circumstances he would have the same rights to discharge, modify, or control the obligation of the contract as he had to make it. 2 C. J. "Agency," § 289; *Ricketson v. Richardson*, 19 Cal. 330; *Hayes v. Campbell*, 55 Cal. 421, 36 Am. Rep. 43; *Hoskins v. Swain*, 61 Cal. 338. In the second place after the goods had arrived in London, after they had been examined and rejected, and after these facts were reported to the defendant, Herbert E. Gray Company received from the defendant a second authorization (finding 7, supra), to act in the matter. Under that second authorization Mr. Gray had full authority to do everything that he did. 2 C. J. "Agency," § 243; *Goldtree v. Swinford*, 74 Cal. 586, 589, 16 P. 493; *Kuhlman v. E. J. Hart Co.* (Tenn. Ch. App.) 59 S. W. 455, 461; *Garnett v. Parry Mfg. Co.*, 185 Ala. 326, 64 So. 559, 561; *Cole Carriage Co. v. Hacker*, 45 Ind. App. 368, 90 N. E. 923; *Washington Cedar & Fir Products Co. v. Elliott*, 91 Conn. 350, 100 A. 29, 30; *International Harvester Co. v. Swenson*, 135 Minn. 141, 160 N. W. 255.

[4, 5] As no question is presented regarding the power of Mr. Gray to talk or act for his company, as no question of power is presented as to the authority of Mr. Wood to speak and act for his company, and as nothing was done orally which under the statute of frauds should have been in writing, it becomes patent that the whole case becomes a question for the jury. In this respect the case is parallel with and we call attention to the ruling of the court in *Garnett v. Parry Mfg. Co.*, supra. The various questions involved were therefore solely questions of fact for the determination of the trial court. As that court has found that the Herbert E. Gray Company did not exceed its authority, and as there is no conflict in the testimony in that behalf, the finding is supported by the evidence, and is binding on this court.

[6] Points 1, 2, 3, and 4 are all concerned with the actual condition of the prunes and as to whether that condition was good or bad, and, if bad, what caused it and when did it

happen. If this case were one between the buyer and seller, those points would be of interest, however as between the Herbert E. Gray Company, as agent, and the defendant, as principal, the gravaman of the case is whether there was exercised by the former undue authority. The condition of the prunes became material merely to show good faith or bad faith on the part of the agent.

Under point 6 the appellant makes 20 separate attacks on the admission or rejection of evidence. We have examined each one and we find no substantial merit in any one of the attacks. It may be conceded that some immaterial testimony was admitted, but, as the trial was before the court and not before a jury, it is patent that immaterial testimony could do no harm. The judgment of the trial court can be sustained only as the same is supported by material testimony and not by any quantity of immaterial testimony. But in this behalf it should be remarked that we find very little immaterial testimony creeping into the record through any one of the rulings complained of.

[7] In the seventh point the appellant claims that certain findings are not supported by the evidence. We have examined each separate finding attacked, and have examined the evidence, and find that each of the said findings so attacked is supported by the evidence. However, there is another answer to this attack. The findings mentioned, each and all, were addressed to the second count of plaintiff's complaint. No attack whatever is made on the findings responsive to the allegations of the first count. Therefore, even though some of the findings on the second count are vulnerable to the attacks made, nevertheless the judgment may not be disturbed, as it is fully supported by the first count and the findings made thereon.

[8] In the trial court the appellant prepared and asked the trial court to incorporate certain paragraphs in its findings. The trial court refused. Thereafter appellant caused the proposed findings to be incorporated in the record and the ruling of the trial court is assigned as error. No such practice is authorized by law. The effect of the practice attempted was to convert the findings into a bill of exceptions or statement of the case. Of course, that is improper practice.

The last point made is that the findings do not support the judgment. This point is supported by the argument that the first part of the finding which we have numbered 11 is contradictory of the latter part of the same finding. A mere reading demonstrates that there is nothing in the point.

We find no error in the record.
The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for hearing in the Supreme Court, after judgment in the District Court of Appeal, is denied.

We disapprove of that portion of the opinion wherein it is said: "As the trial was before the court, and not before a jury, it is patent that immaterial testimony could do no harm," as not embodying a correct statement of the law on the subject. *Smith v. Westfield*, 88 Cal. 374, 383, 26 P. 206; *Rulofson v. Billings*, 140 Cal. 452, 460, 74 P. 35; *Title Ins. Co. v. Ingersoll*, 153 Cal. 1, 9, 94 P. 94. As the case is one within the jurisdiction of, and originally appealed to this court, we have examined the record, and are convinced that appellant suffered no material prejudice because of the rulings of the trial court in the admission of testimony.

71 Cal. App. 617

ZELLER v. MILLIGAN et al. (Civ. 4369.)

(District Court of Appeal, Second District, Division 1, California. March 10, 1925.)

1. Notice ☞6—When party will be deemed to have actual knowledge of facts.

In view of Civil Code, § 19, where party has notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, contemplated by section 1691 relative to rescission, or where facts were presumptively within his knowledge, he will be deemed to have actual knowledge of such facts.

2. Notice ☞6—What knowledge charges one with notice of facts within statute.

Knowledge which one obtains and the possession of which is urged as being sufficient within Civ. Code, § 19, to require further inquiry by such person, must be directly related to the ultimate knowledge in question, or the known facts must be such that to a person of ordinary care and prudence further inquiry would not only be suggested but imperatively demanded to the end that the truth with reference to the main fact may be disclosed.

3. Notice ☞6—To charge one with notice, facts must be such as ordinarily to excite inquiry with reference to particular fact which inquiry is designed to elicit.

To charge one with notice, the facts must be such as ordinarily to excite inquiry with reference to particular fact which inquiry is designed to elicit.

4. Vendor and purchaser ☞100—Party held not obliged to rescind promptly on discovery of misrepresentation relating to consideration, and not to matters inducing her to execute contract.

Where the misrepresentations of defendants as to alleged losses in the operation of a hotel, in which plaintiff had an interest, induced her to sell that interest, plaintiff, in order to

protect her rights in the premises, was not obliged to rescind promptly on discovery of fraud pertaining entirely to value of consideration which she received, and not relating to matters which induced her to sell.

5. Contracts ⚡271—Generally act of rescission implies notice to other party to contract of intention and determination to extinguish contract.

Generally rescission requires notice to other party to contract of intention and determination to extinguish contract.

6. Contracts ⚡266(1), 271—Giving of notice to rescind and offer of restoration ordinarily is prerequisite to maintenance of action of rescission.

Giving of notice to rescind and offer of restoration ordinarily is prerequisite to maintenance of action of rescission, in absence of circumstances excusing notice and offer.

7. Vendor and purchaser ⚡101—Law abhors idle acts.

As respects vendor's duty to notify vendee of rescission, the rule applies that the law abhors idle acts.

8. Vendor and purchaser ⚡104—Party instituting action for rescission day after discovery of fraud held not required to give formal notice of rescission as condition to maintaining action.

Complaint in vendor's action for rescission, instituted day after discovery of fraud, held to disclose facts justifying plaintiff's failure to give formal notice of rescission as condition to maintaining action; defendants' rights not being changed or prejudiced by such failure.

9. Vendor and purchaser ⚡104—Circumstances shown by complaint praying for rescission held to justify plaintiff's failure to offer restoration of possession of property.

Circumstances shown by complaint praying for rescission held to justify vendor's failure to offer restoration of consideration before commencement of action for rescission.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Martha Zeller (a single woman) against J. R. Milligan and others. Judgment for defendants, and plaintiff appeals. Reversed.

W. A. Sloane and Harrison G. Sloane, both of San Diego, for appellant.

Leonard Wright, of San Diego, and L. N. Turrentine, of Escondido, for respondents.

HOUSER, J. Plaintiff appeals from a judgment "on the pleadings" in favor of defendants. The suit purported to be for the rescission of a contract wherein an accounting was prayed as auxiliary relief.

The main controversy between the appellant and the respondents appears to be regarding two points, namely: (1) Whether or not the attempted rescission of the contract

was made by the plaintiff with sufficient promptness after discovery by plaintiff of the alleged fraud of the defendants; and (2) whether or not a notice of such rescission was given to the defendants, coupled with an offer to restore to defendants "everything of value" which plaintiff had received "under the contract."

The complaint filed in the action contains allegations, in substance, that plaintiff and defendant E. G. Norton were the owners (subject to a mortgage of approximately \$48,000) of a certain hotel property which, by arrangement between them, Norton was managing, and upon its sale was to share in the profits derived therefrom. It is alleged that said Norton and defendants J. R. and J. L. Milligan entered into a conspiracy for the purpose of defrauding plaintiff of the value of her interest in the equity of said property, to which end said Norton made to plaintiff certain false representations regarding the losses which said Norton stated were being sustained through the operation of the hotel, and which losses required an immediate sale of the property in order that anything of value might be saved to plaintiff and said Norton; that by reason of such false representations plaintiff entered into an agreement with said defendants to sell to them, and that she did sell to them, her interest in the equity in said property for the sum of \$6,000, payable \$200 in cash and the balance of \$5,800 by a promissory note of E. G. Norton and his wife, Daisy Norton, secured by a fourth mortgage on certain property, and certain trust deed notes of the purported value of \$5,000, which said defendants E. G. Norton and J. R. Milligan represented to plaintiff "were good, and that the same were of the actual value of \$5,000; that said statements were made as representations of fact and were not given as opinions; that the said defendants further represented and stated that the same had always paid interest as called for under the terms thereof"; that, believing in said statements and relying solely thereon, plaintiff accepted the promissory note of said defendants, together with said collateral security, in full consideration for her interest in the equity in the property involved, but that, as a matter of fact, the said trust deed notes were of no greater value than the sum of \$100, and that the fourth mortgage was thereafter rendered of no value by reason of the sale of the mortgaged property under a prior trust deed; "that the real facts concerning said promissory note and the said trust deed notes were not discovered by plaintiff until on or about May, 1922," at which time plaintiff "learned for the first time the true value of said collateral security," and at that time was informed that nothing had been paid upon the said trust deed notes, and that no interest

had been paid thereon; "that said plaintiff first learned of the fraud practiced upon her in misrepresenting the financial condition of said hotel and actual value of her equity therein, on or about the 1st day of August, 1922"; that defendant Norton never made any accounting to plaintiff of his dealings in the operation of said hotel from the 8th day of May, 1920, to the 7th day of May, 1921, and that he has received and converted profits of said business in the sum of \$1,000; that between the 7th day of January, 1921, and the date of the commencement of the action, to wit, August 2, 1922, defendants Milligan received and converted profits from the said hotel business amounting to the sum of \$1,000; "that plaintiff is ready, able, and willing, and hereby offers, to restore to the said defendants the said sum of \$200, the said promissory note, and the said trust deed notes, as they may be respectively entitled to receive the same; that plaintiff further offers to do equity toward any other defendant herein concerned;" that on and after the 10th day of July, 1922, defendants Brock and Robinson were in the exclusive possession of the hotel, and on the 1st day of August, 1922, plaintiff informed said last-named defendants of her election to rescind her agreement whereby said defendants Milligan were alleged to have obtained their apparent interest therein, and that such attempted rescission was based upon the fraud of the said defendants Milligan and Norton; that upon a proper accounting from defendants Milligan and Norton plaintiff would be entitled to receive a greater amount than the value of the trust deed notes, together with the sum of \$200 in cash; "that through the fraudulent concealment of said defendants plaintiff was unable, prior to the commencement of this action, to ascertain what amount or what property the said defendants are in equity entitled to receive upon rescission; that to her best information and belief said defendants are entitled to nothing, and plaintiff is entitled to retain everything now in her possession in satisfaction of, or as security for, the amounts due her by said defendants; that the said defendants Milligan and Norton, since on or about August, 1921, have asserted conflicting claims upon said * * * trust notes and plaintiff had no information prior to the commencement of this action as to which of said defendants, if either of them, were entitled to receive the same; that by the actions of said defendants as aforesaid, the circumstances attending rescission herein have been complicated and the terms of an equitable rescission can be determined only by a judicial examination thereof." It is further alleged that on or about the 27th day of February, 1922, the said defendants Milligan and Norton "failed and neglected to pay their indebtedness which was secured by prior trust deed upon

the real property mortgaged to this plaintiff as security for said note of \$5,800; that thereupon, after due notice to said defendants, a sale was had by the trustee under such trust deed; * * *" also that defendants Lillian Milligan, Nancy Milligan, and Daisy Norton have no interest in the controversy "except as the wives" of the respective defendants Milligan and Norton.

The complaint also contains an allegation to the effect that any notice of rescission other than that given would have been an idle act; that none of the defendants suffered any injury or prejudice by reason of the delay in bringing the action. The action was commenced on August 2, 1922.

From the foregoing it will appear that the first intimation that plaintiff had of "the true value of said collateral security" was approximately 3 months before the action was commenced, and "that said plaintiff first learned of the fraud practiced upon her in misrepresenting the financial condition of said hotel and actual value of her equity therein on or about the 1st day of August, 1922," which was the day before she instituted proceedings against defendants. In addition thereto, it should be noted that on February 27, 1922, which was several months prior to such "discovery" by plaintiff, defendants Milligan and Norton failed to pay their indebtedness, which was secured by a prior trust deed upon the real property mortgaged to the plaintiff, and that said property was sold under foreclosure proceedings.

When the right to rescind exists, section 1691 of the Civil Code prescribes the mode of rescission which must be pursued. It is as follows:

"Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules:

"1. He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and,

"2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so."

It is urged by appellant that the discovery by her 3 months before the action was commenced, of the true facts relating to the collateral security for the \$5,800 indebtedness of defendants on account of the purchase price of plaintiff's interest in the equity in the hotel was not such knowledge as is contemplated by the statute. Section 19 of the Civil Code provides that—

"Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has con-

structive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

The primary question, then, is whether or not the failure of defendants Norton and Milligan to pay their indebtedness, which was secured by a prior trust deed upon the real property mortgaged to plaintiff as security for their note to plaintiff in the sum of \$5,800, resulting in a foreclosure as to plaintiff's and defendants' rights in such mortgaged property, coupled with the discovery by plaintiff in May, 1922, "of the real facts concerning said promissory note and the said trust deed notes," were sufficient circumstances to put her "upon inquiry as to the particular fact" that she had been defrauded in the transaction by which she sold to defendants Norton and Milligan the property in question.

[1] As is said in the case of *Lady Washington Consolidated Co. v. Wood*, 113 Cal. 482, 45 P. 809:

"As the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts"—citing cases.

[2, 3] The difficulty encountered consists, not so much in ascertaining the general rule applicable to the inquiry, but in its application to the facts of the case. It is clear that the knowledge which one obtains, and the possession of which is urged as being sufficient to require further inquiry by such person, must be directly related to the ultimate knowledge in question; or, the known facts must be such that to a person of ordinary care and prudence further inquiry would not only be suggested but imperatively demanded, to the end that the truth with reference to the main fact may be disclosed. "The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission." *Tarke v. Bingham*, 123 Cal. 163, 166, 55 P. 759, 760. To charge one with notice "the facts must be such as ordinarily to excite inquiry with reference to the particular fact which the inquiry is designed to elicit." 20 R. C. L. 350.

In the case of *Wilkerson v. Thorp*, 128 Cal. 221, 224, 60 P. 679, 681, the court, in discussing the point here under consideration, uses the following language:

"Constructive notice is a knowledge of such facts, that the party possessing such knowledge is conclusively presumed to know other things besides the facts which have been proven to have come to his knowledge. The information or knowledge of facts possessed by a party must be such that he is conclusively presumed to have notice of the main fact to which the constructive notice is invoked."

In the instant case the main fact was whether or not misrepresentation had been made regarding the financial losses in the operation of the hotel which were the inducement to plaintiff to enter into the contract of sale of her interest in the equity in the premises. The facts of which she acquired knowledge were, briefly, in substance, that a part of the security for the payment to her of the consideration for the transfer of her interest had failed, and that statements made by defendants Norton and Milligan to the effect that all interest payments, in connection with the trust deed notes affecting their security for the said debt owing to plaintiff, had been made, were untrue. In other words, the alleged losses in the operation of the hotel were what induced plaintiff to sell, and the later knowledge which she obtained had entirely to do with the consideration which she was to receive for the sale of her interest.

[4] It may be said that one who would deliberately make a misstatement as to one material fact affecting a transaction should be distrusted as to any and all other material statements affecting the matter, and that, because of the distrust thus engendered, the person interested in the truth of facts concerned in the transaction would be put upon inquiry regarding every fact involved therein; that is to say, his suspicions having been aroused because of one misrepresentation, it thereupon became his bounden duty thoroughly to investigate as to every other representation which in any way had induced the interested person to enter into the contract.

But the allegations of the complaint show that the representation as to the losses which were being sustained in the operation of the hotel and the consequent inability of the owners to meet payments which would become due on the property were what actually led plaintiff to enter into the agreement for the sale of her interest in the equity. Misrepresentations by defendants with reference to the securities for the payment to plaintiff of the consideration for the transfer, while intimately connected with the transaction, were entirely distinct from any misrepresentation regarding the losses arising from the operation of the hotel. It follows that, in order to protect her rights in the premises, plaintiff was not obliged to "rescind promptly" on the discovery by her of the fact relating to the payment of interest on the trust deed notes, or the fact that other security held by her had failed.

[5] As heretofore stated, the only allegation with reference to the notice of rescission, in substance, is that plaintiff informed defendants Brock and Robinson, who were in possession of the property, "of her election to rescind her agreement whereby defendants Milligan obtained their apparent in-

terest therein, and that said rescission was based upon the fraud of the said defendants Milligan and Norton."

[6] The general rule is that the act of rescission by one party to the agreement implies some notice to the other party thereto of an intention and determination to extinguish the contract. *McGue v. Rommel*, 148 Cal. 539, 83 P. 1000, and cases therein cited; *Brown v. Domestic Utilities Mfg. Co.*, 172 Cal. 733, 159 P. 163. Notwithstanding such rule, there are authorities to the effect that "the intention to repudiate sufficiently appears where the party seeking to rescind institutes against the other legal proceedings based upon a disaffirmance of the contract." 24 Am. & Eng. Ency. of Law (2d Ed.) p. 645, and cases cited. In this state, however, in view of the many decisions affecting the general subject of rescission, there can be no doubt but that ordinarily, in order that the action may be maintained, in the absence of circumstances excusing a preliminary notice of rescission and offer to restore to defendant everything of value received by the plaintiff, the complaint must contain an allegation, and the proof must show, that such notice has been given and such offer to restore has been made. *Kelley v. Owens*, 120 Cal. 502, 47 P. 369, 52 P. 797, where the authorities are reviewed; *Hammond v. Wallace*, 85 Cal. 531; *Lupton v. Domestic Utilities Mfg. Co.*, 173 Cal. 415, 160 P. 241; *Conlin v. Studebaker Brothers*, 175 Cal. 395, 165 P. 1009; *Richards v. Farmers' & Merchants' Bank*, 7 Cal. App. 387, 94 P. 393, where many authorities are cited; *Crouch v. Wilson*, 183 Cal. 576, 191 P. 916; *Taylor v. Hammel*, 39 Cal. App. 205, 178 P. 547.

[7, 8] In the leading case of *California F. & F. Co. v. Schiappa-Pietra*, 151 Cal. 732, 91 P. 593, the several exceptions to the general rule requiring a preliminary notice of rescission and offer to restore are stated, among which may be noted the following: (1) Where the plaintiff is entitled to retain that which he has received; (2) where the rights of the defendant can be fully protected by the decree, or where an accounting is necessary to determine the relative rights of the parties; (3) where, without any fault of the plaintiff, peculiar complications have arisen which make it impossible for plaintiff to offer full restoration.

It should be remembered that on a determination of the matter submitted to the trial court plaintiff was entitled to have taken at full face value each and every allegation contained in the complaint. With reference to

the several exceptions just noted to the general rule requiring preliminary notice and offer to restore, an examination of the complaint shows that, as to the first exception, plaintiff is not only entitled to retain the \$200 which she received on the sale of her interest in the equity of the hotel property, but also a considerable sum in addition thereto. As to the second exception, the rights of the plaintiff and the defendants regarding the executed instruments of the respective parties could be fully protected by the decree; and, assuming the truthfulness of plaintiff's allegations, an accounting between plaintiff and each of defendants Norton and Milligan was necessary to determine their respective rights. Regarding the third exception, still assuming the facts to be in accordance with the allegations of the complaint, without any fault of the plaintiff, peculiar complications existed with reference to a settlement of the conflicting claims among the several defendants as to the ownership of the trust deed notes held by plaintiff as collateral security. Finally, by the complaint plaintiff asserted her willingness and ability on a determination of the suit to fully restore to defendants everything of value which she had received from them and to do equity in the premises.

The instant action was commenced on the day following the discovery by plaintiff of the alleged fraud which had been practiced upon her by the defendants. The law abhors idle acts. A formal notice of rescission on the same day on which the suit was instituted would have given the defendants no information differing either in nature or extent from that contained in the allegations of the complaint; nor were defendants' rights in the premises in any manner changed or prejudiced by reason of the plaintiff's failure to give such notice.

[9] Adopting the language used by the Supreme Court in the case of *California F. & F. Co. v. Schiappa-Pietra*, 151 Cal. 732, 742, 91 P. 593, 596:

"We are therefore of the opinion that the circumstances shown by the complaint fully justify the failure of plaintiffs to offer to restore possession of the property before the commencement of the action, and bring the case within those classes of cases in which no such offer is necessary as a condition precedent to action."

The judgment is reversed.

We concur: CONREY, P. J.; CURTIS, J.

72 Cal. App. 13

GODEAU v. LEVY. (Civ. 4697.)

(District Court of Appeal, First District, Division 1, California. March 26, 1925.)

1. Municipal corporations ☞705(10)—Excessive speed must have contributed proximately to collision.

Mere fact that plaintiff's ambulance was traveling between 15 and 20 miles an hour at intersection, in violation of Motor Vehicle Act, § 22, would not of itself constitute contributory negligence, but it must further affirmatively appear that such violation contributed proximately to collision.

2. Municipal corporations ☞706(5)—Finding violation of speed ordinance was not proximate cause of collision sustained.

In suit for injury to plaintiff's ambulance from collision, evidence held to sustain finding that collision was due solely to negligent acts of defendant, and that speed of ambulance, even if in violation of Motor Vehicle Act, § 22, was not proximate cause of collision.

3. Appeal and error ☞907(4)—Assumed that trial court, in reaching conclusion as to responsibility for collision, was guided by use of diagram from which witnesses testified and which was not brought up on appeal.

In suit for damages to automobile from collision, where witnesses to accident illustrated their testimony before trial court on diagram, which was not brought up with record on appeal, it must be assumed that trial court, in reaching conclusion as to responsibility for accident, was guided to some extent by use of diagram.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Jules S. Godeau against Morton Levy. Judgment for plaintiff, and defendant appeals. Affirmed.

O'Brien & Murphy, of San Francisco, for appellant.

Gus L. Baraty, of San Francisco, for respondent.

KNIGHT, J. Action for damages to property resulting from a collision between a motor ambulance belonging to plaintiff and defendant's automobile. The collision occurred shortly after 7 o'clock in the evening of April 30, 1921, at the intersection of Franklin and Fulton streets, San Francisco. The action was tried by the court without a jury. Plaintiff was awarded judgment in the sum of \$577.75. The defendant appeals.

The sole point made by appellant is that respondent's right of recovery is barred because of the alleged contributory negligence on the part of the driver of respondent's ambulance. In this connection it is contended that the evidence of respondent shows that said ambulance was traveling between 15

and 20 miles an hour at said intersection in violation of section 22 of the state Motor Vehicle Act (St. 1919, p. 220), which limits the speed of automobiles, when approaching or traversing an intersecting highway, to 15 miles an hour.

[1] Assuming, however, that said ambulance was traveling at that rate of speed at that point, such fact alone would not constitute contributory negligence. It is necessary that it further affirmatively appear that such violation contributed proximately to the happening of the accident. The trial court found against appellant on that issue upon a state of facts from which, we think, the inference may be clearly drawn that the speed of the ambulance had nothing to do with the cause of the accident.

[2] The substance of the evidence supporting the findings may be briefly stated as follows: The ambulance was being driven northerly along the easterly side of Franklin street. As it approached the intersection of Fulton street, both the gong and the siren were sounded. Appellant's automobile was traveling easterly down Fulton street, and as it approached the intersection of Franklin street was maintaining a speed estimated to be upwards of 30 miles an hour. After the ambulance entered the intersection, the driver thereof observed the fast approach of appellant's machine, which was then 50 or 60 feet westerly of the intersection and traveling a little to the left of the middle line of Fulton street. As the ambulance neared the center of the intersection, appellant's machine apparently headed directly toward said ambulance, making it necessary for the ambulance driver, in order to avoid being struck, to change his course slightly to the right. Appellant, being unable to prevent a collision by stopping his car, owing to the excessive rate of speed he was traveling, swung sharply to the left, as if to turn up Franklin street, and in doing so his machine swerved, the right rear end thereof striking the left rear end of the ambulance, injuring the taillight and fender of said ambulance and forcing it into an electric light pole, demolishing the radiator of the ambulance and quite generally wrecking the front end thereof. Following the impact, appellant's machine continued on for about 75 feet across Franklin street finally being stopped in a lot on the northeast corner of said intersection. It is apparent, we think, from the evidence above narrated, that the trial court did not abuse its discretion in concluding that the collision was due solely to the negligent acts of the appellant, and therefore the finding of the trial court upon the issue of contributory negligence must be sustained. *Gett v. Pacific Gas & Electric Co.*, 192 Cal. 621, 221 P. 376; *Rodgers v. Le Baron*, 58 Cal. App. 665, 209 P. 216; *Shank v. Blackburn*, 53 Cal. App.

620, 200 P. 762; Breeze v. Brooks, 97 Cal. 72, 31 P. 742, 22 L. R. A. 257.

[3] Furthermore, witnesses to the accident illustrated their testimony before the trial court upon a diagram which has not been brought up with the record on appeal. It must be therefore assumed that the trial court, in reaching its conclusions as to the responsibility for the accident, was guided, to some extent at least, by the use of said diagram. Emerick v. Johnson, 64 Cal. App. 460, 221 P. 675.

The cases cited by appellant are distinguishable from the one before us, in that the circumstances of those accidents were such that, on appeal, it could be readily declared, as a matter of law, that the negligent acts relied upon as barring the right of recovery contributed proximately to the causes of the accidents, and that no reasonable inference could be drawn to the contrary. Here the evidence presents a situation fully justifying the inference that the alleged negligent act of respondent's driver, if committed at all, did not contribute to the happening of the collision.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

72 Cal. App. 52

PEOPLE v. WILLIAMS et al. (Cr. 842.)

(District Court of Appeal, Third District, California. March 27, 1925.)

1. Criminal law §696(4)—Accused's counsel, desiring that answers to particular questions be stricken, should have specified them in motion to strike.

Accused's counsel, who desired that answers to particular questions be stricken, should have specified them in motion to strike.

2. Criminal law §338(7)—Cross-examination as to use by accused of assumed names held improper.

Cross-examination as to use by accused of assumed names held improper, where there was no issue or dispute as to accused's true name, and no other circumstance justifying reference to assumed names.

3. Criminal law §338(7)—Questioning accused as to whether he had been arrested under another name held improper.

Questioning accused as to whether he had been arrested under another name held improper.

4. Criminal law §1036(2) 1044—Impropriety of asking accused whether he had not used assumed name and been arrested under another name held waived.

Impropriety of asking accused whether he had not used assumed name and been arrested under another name held not ground for com-

plaint, where accused's counsel failed timely to object and to make specific motion to strike.

5. Criminal law §1169(1)—Erroneous reception in evidence of testimony that accused passed under other names held not reversible error.

Erroneous reception in evidence of testimony that accused has passed under other names held not a miscarriage of justice requiring reversal, where it did not appear verdict of jury was induced by the reception of the incompetent testimony.

6. Robbery §27(6)—Requested instruction as to accused's attempt in good faith to take money from witness under claim of title held properly refused as not justified by evidence.

Requested instruction, as to accused's attempt in good faith to take money from person of prosecuting witness under claim of title, held properly refused as not justified by evidence.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Frank Williams and George O'Neil were convicted of an attempt to commit robbery, and second named defendant appeals. Affirmed.

E. Hendricksen and A. R. Price, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

JONES, Justice pro tem. The defendants were jointly charged with the crime of attempt to commit robbery. They were tried jointly, and the jury returned a verdict of guilty as charged as to each defendant. The defendant Williams waived time for the imposing of sentence, and judgment was thereupon pronounced against him. The defendant O'Neil made a motion for new trial, which was denied, and from the order denying the motion, and from the judgment which followed, he has appealed.

On the evening of October 19, 1924, the defendants were with one Woolwine, the complaining witness, in the city of Sacramento. They were patronizing different saloons, and Woolwine became badly intoxicated. After midnight the three were seen by two policemen on M street, between Second and Third streets, and Woolwine was being supported by the defendants. Woolwine was pulling back from his two companions, and then the two officers saw Williams strike Woolwine a blow in the face, causing the latter to fall to the sidewalk. Officer Gorman testified that Williams looked in the direction he and his fellow officer were coming; that O'Neil had got on top of Woolwine; and that Williams holloed, "Look out, the bulls are coming," and started to walk away from his associates. He was placed under arrest by Officer Redding, while Gorman

pulled O'Neil off of Woolwine. It was the testimony of Gorman that, as he pulled O'Neil up, the latter's hand came out of Woolwine's trouser pocket, and that he heard Woolwine say, "Take it all, but don't beat me." In rebuttal this same witness was asked the following question by the district attorney:

"Now, I will ask you if at any time the defendant O'Neil stated that the reason he was putting his hand, or going through Mr. Woolwine's pocket, was to get \$5 that he claimed that Woolwine owed him?"

To this question the witness replied:

"He did, when we had him at the box up there at Third and L, there was the three standing there together; he says: 'I want this man taken in, too.' I says: 'We will take him as a witness; we have got to take him in.' That is the time he says that he owed him \$5; he said that is the way he was going to get it."

When under cross-examination, the appellant denied that he had made the statement incorporated in the question of the district attorney, but admitted that he had told the officer that Woolwine owed him over \$5; to bring Woolwine along; that he figured he had \$5 coming to him as change.

The defendants did not deny that Williams had knocked Woolwine to the ground but they testified that Woolwine had become quarrelsome and had struck Williams, who returned the blow and then started to walk away to avoid further trouble. The appellant, according to his testimony, then bent over Woolwine to see if his head was cut, as, in falling he had hit a glass door and broken the pane; and, while bending over Woolwine, he fell on top of the prostrate man, from which position he was raised to his feet by the officer. He contended that he fell because of his intoxicated condition, but the officer and another witness would not concede that he was under the influence of liquor.

On this appeal the appellant contends that the trial court erred in sustaining objections to two questions asked the complaining witness on cross-examination; in permitting certain questions to be asked by the district attorney of the defendant Williams; in admitting the testimony of the witness Max P. Fisher; and in refusing to give an instruction requested by the defendants.

While the court might properly have allowed the two questions asked by counsel for defendants, yet it cannot be held that prejudicial error resulted, for, assuming that affirmative answers would have been given by the witness, yet it is difficult to believe, from an examination of the entire record, that a different result would have been produced by such answers.

[1] While under cross-examination the defendant Williams was asked by the district attorney, without objection, if he had not

gone under several different names. His answer was, "No," as to each name specified. He was then asked "Weren't you arrested under the name of Johnson in Los Angeles in 1920?" to which he answered "No, no." Counsel for defendants then remarked, "Now, we submit, if your honor please, that that is improper cross-examination." After several similar questions had been asked, and had been answered in the negative, counsel for defendants then asked that "all the answers—questions and answers be all stricken out," which motion was not granted. The objection of counsel was interposed after the witness had answered. If he had then desired that the answers be not allowed to stand to these particular questions, he should have specified them in his motion.

[2-5] There can be no question that the questions asked the witness as to his use of assumed names did not, in this case, constitute proper cross-examination, as there was no issue or dispute as to his true name, and there was no other circumstance justifying them. *People v. Mohr*, 157 Cal. 732, 109 P. 476; *People v. Fleming*, 166 Cal. 357, 136 P. 291, Ann. Cas. 1915B, 881. The impropriety of asking the witness if he had been arrested under another name is too evident to call for the citation of authority, and had timely objection and a specific motion to strike been made, counsel's contention that the court had committed error in regard to these matters would have been of greater merit. The situation, however, as to the testimony of the witness Fisher, is somewhat different, for that witness, who was the identification expert of the Sacramento police department, was permitted to testify, over the objection of defendants, that Williams had passed by the names suggested. Some testimony was elicited from this witness on cross-examination which tended to show that the defendant had been arrested under other names. The court endeavored to limit the testimony of the witness to the matter of the use of other names, and, on motion, struck out the answers as to previous arrests. That the court erred in permitting the witness to testify, after timely objection had been made, that Williams had passed under the other names, there can be no doubt, and the question then arises: Did the error cause a miscarriage of justice? The evidence presented by the prosecution made a strong case against the defendants, and the case was not, so far as a reading of the record discloses, weakened by the explanations given by the accused men; in fact, it may be said that their evidence tended to corroborate the testimony of the witnesses for the prosecution as to some of the vital points in the case. It therefore does not clearly appear that the verdict of the jury was induced by the admission of this incompetent testimony, and we are constrained to hold that no miscarriage of justice resulted therefrom.

[6] Defendants requested the following instruction, which the court refused to give:

"You are instructed that if you find that the defendant O'Neil attempted to take property from the person and possession of the prosecuting witness, and you further find that he believed in good faith such property to be his own and that he endeavored to take the same under claim of title in himself, he is not guilty of the crime charged."

This instruction was properly refused, as there was no evidence in the case to support it. The appellant, in explaining his close proximity to Woolwine when arrested, testified that, when stooping over Woolwine to see if his head was cut, he had fallen over because he was intoxicated. There is, in this explanation, no claim that he was endeavoring to recover property belonging to him, and he denied having made any statement that he was making such an effort, thus repudiating any such claim. No error, then, was committed by the court in refusing to give the offered instruction.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

72 Cal. App. 1

SIMONS BRICK CO. v. HETZEL et al.
(Civ. 4322.)

(District Court of Appeal, Second District, Division 1, California. March 25, 1925.)

1. Mortgages $\hookrightarrow$ 186(5)—Evidence that work was begun on lot before filing mortgage for record held sufficient to sustain judgment for lien claimant over mortgage.

In actions to foreclose mechanic's liens, evidence that work was begun on land in question before filing defendant's mortgage thereon held sufficient to sustain judgment giving lien claimants priority over mortgage.

2. Mechanics' liens $\hookrightarrow$ 168—"Commencement of work," giving subsequent incumbrancers notice of mechanic's lien, held to require work and labor, effects of which are apparent.

"Commencement of work" necessary to give notice of right to mechanic's lien, taking precedence, under Code Civ. Proc. § 1186, over subsequent incumbrancers, requires some work and labor on ground, effects of which are apparent, such as beginning to dig foundation, or work of like description.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Visible Commencement of Work.]

3. Mechanics' liens $\hookrightarrow$ 168—Mortgages $\hookrightarrow$ 151(3)—Subcontractor held to have lien from date of commencement of work on building; mechanics' lien held prior to mortgage.

Under Code Civ. Proc. § 1186, relating to effect of mechanics' liens, provided for by section 1183, subcontractors performing labor and

furnishing materials under contract between owner and contractor, are entitled to lien which relates back to time of commencement of work on building, so as to take priority over mortgage recorded subsequent thereto, notwithstanding failure to file original contract as required by section 1183.

4. Mechanics' liens $\hookrightarrow$ 95—Statute held not to differentiate between liens arising out of direct contract with owner and those accruing through contract between owner and contractor; "direct lien."

Under Code Civ. Proc. § 1183, as amended by St. 1911, p. 1313, providing that liens provided in that chapter should be "direct liens," term "direct liens" includes those arising under duly recorded contract as well as those where no contract has been filed for record, and no difference is made between liens arising from a direct contract with the owner and those accruing through a contract between the owner and the contractor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Lien.]

5. Mechanics' liens $\hookrightarrow$ 132(4)—Failure of subcontractor to file claim within 30 days after completion of work held not to render lien invalid.

Under Code Civ. Proc. § 1187, providing for time of filing claims of liens, fact, that subcontractor did not file claims for lien for record within 30 days after furnishing last work and material, did not render lien invalid, where lien claim was filed within 30 days after filing notice of completion, and 90 days had not elapsed from date of actual completion.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Suits by the Simons Brick Company against Valentine Hetzel and others, by L. R. Anderson against G. C. Harbolt and others, by Campbell & Ward against the Harbolt Hotel Corporation and others, and by the F. E. Newberry Electric Company against Valentine Hetzel and others. In each suit the defendant Western Loan & Building Company cross-complained. Judgment for plaintiff in each suit, and cross-complainant appeals. Affirmed.

Bieksler, Smith & Parke, of Los Angeles, for appellant.

Richard J. O. Culver, G. C. De Garmo, and Glen Behymer, all of Los Angeles, for respondent.

CURTIS, J. The Harbolt Hotel Corporation was, on the 17th day of April, 1917, the owner of a certain lot in the city of Los Angeles, and on said day said company entered into a written contract with one Valentine Hetzel for the erection on said lot of a hotel building. Said contract was not filed for record in the office of the county recorder of said county until the 9th day of June, 1917. On April 30, 1917, said hotel company executed a mortgage upon said real

property in favor of appellant, the Western Loan & Building Company, to secure the payment of a promissory note for \$42,972.50, and said mortgage was, on the 7th day of June, 1917, duly filed for record in the office of the said county recorder. Thereafter, respondents performed labor and furnished material in the construction of said hotel building, under said contract between said hotel company and the said Hetzel. Failing to receive payment for said labor and materials, they filed liens for the respective amounts due them, and thereafter instituted their actions for the foreclosure of such liens. The court rendered judgment in favor of said lien claimants, the respondents herein, not only sustaining their liens but decreeing that said liens were prior and superior to the mortgage lien of the Western Loan & Building Company, the appellant herein.

[1] The court found that, prior to the execution and recordation of appellant's said mortgage, and on or about the 17th day of May, 1917, but prior to June 1, 1917, said contractor Valentine Hetzel, in pursuance of the said contract for the construction of said hotel, began the erection and construction of said building and continued work thereon until the early part of November of said year. Appellant contends that the construction of said building was not commenced until after its mortgage had been filed for record in the office of said county recorder, and it attacks the finding of the court that the said contractor began the erection of said building prior to the 7th of June, 1917, as unjustified by the evidence. In support of this contention, appellant refers to the testimony of F. H. Gentry and J. D. Brady to the effect that they visited the real property in question on the morning of the 7th day of June, 1917, for the purpose of seeing that work upon the building had not been commenced before the mortgage was recorded. These two witnesses both stated that they went upon said lot on said day and found no evidence of any work having been done on the building or indicating that the construction of said building had been commenced. And, furthermore, that there was no building material or machinery of any kind upon the lot at this time.

Appellant calls our attention to the fact that these two witnesses were the only witnesses who testified at the trial as to the appearance or condition of said lot on the 7th day of June, 1917, the date the mortgage was recorded, and that therefore their testimony is uncontradicted. But there was testimony that some time during the latter part of May or the first part of June, 1917, and one witness in one part of his testimony puts the time as two days before appellant's mortgage was recorded, a firm by the name of Faulkner & Hobson, as subcontractors under the original contractor Hetzel, were at

work upon said lot, making excavations thereon to be used and which were actually used thereafter in the erection of said building; that said subcontractors excavated a trench along the front line of said lot about 60 feet in length and 3 or 4 feet in depth, and they spent two days in making such excavations, when they were stopped in said work because it was found that appellant's mortgage had not been recorded. Furthermore, that before these subcontractors had quit the premises, the witness F. H. Gentry, who represented appellant in certain matters and who testified that he went upon the lot on the morning of June 7, 1917, for the express purpose of seeing whether any work had been begun upon the building, visited the property and stated to the original contractor, Mr. Hetzel, "This work has to stop as the mortgage has not been recorded." He was informed by Mr. Hetzel that, "We are just quitting. Harbolt was here and told us about it." The subcontractors thereupon quit all work and removed all their machinery and tools from said lot. After the mortgage had been recorded they resumed the work of excavating for the building, but being unable to give the bond required of them, they ceased work altogether before finishing their contract.

[2] As to just what is meant by the term "commencement of work" and as to the amount and character of work necessary to be done upon a building in order to say that work has been begun thereon, we think the true rule is stated in Phillips on Mechanics' Liens (3d Ed.) p. 387, where it is said:

"What this law means is some work and labor on the ground, the effects of which are apparent—easily seen by everybody; such as beginning to dig the foundation, or work of like description, which every one can readily see and recognize as the commencement of a building."

Applying this rule to the evidence before the court in this action, we cannot say that such evidence is not sufficient to sustain the finding of the court that work was commenced upon the building prior to the time that appellant's mortgage was filed for record.

[3] Appellant's main contention on this appeal, however, is that the lien of its mortgage is superior and prior to the liens of respondents, even conceding that work was commenced upon the building before its mortgage had been recorded. Section 1186 of the Code of Civil Procedure provides as follows:

"Effect of Liens. The liens provided for in this chapter are preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished; also, to any lien, mortgage or other incumbrance of which the

lienholder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done, or the materials were commenced to be furnished."

In the case of *McClain v. Hutton*, 131 Cal. 132, 61 P. 273, 63 P. 182, 622, the Supreme Court, in construing the above section, held that where the contract between the owner and contractor was invalid by reason of the failure of the parties thereto to comply with section 1183 of the Code of Civil Procedure, liens for labor performed and materials furnished, related back only to the time the work was done and the materials commenced to be furnished, and the court held that such liens were subsequent and inferior to the lien of a mortgage filed for record after the building had been commenced but prior to the time the work was done and the materials were commenced to be furnished. The court in this case further held that:

"Under this provision [section 1186, Code Civ. Proc.] the cases must be divided into two categories, distinguished by the existence, or nonexistence, of a valid contract. In the former case [where there is a valid contract] the priority of the liens is to be determined by the date of the commencement of the building; in the latter by the time the work was done, or the materials commenced to be furnished."

As we understand this decision, the court held that where there was a valid contract, liens thereunder related back to the commencement of the building, but where the contract was invalid the liens related back only to the respective dates when the work was performed and the materials were commenced to be furnished. The reason of the rule thus enunciated we think is apparent. Under section 1183, as it stood at the time *McClain v. Hutton* was decided, the failure to record the contract rendered it "wholly void, and no recovery shall be had thereon by either party thereto; and in such case, labor done and materials furnished by all persons * * * except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." But, where the contract was duly filed for record, all liens against the building were based primarily upon the contract, and the labor and material covered by the liens were deemed to have been performed and furnished under said contract. The section therefore divided liens into two classes, those arising under a valid contract between the owner and the contractor, and those where the labor done and materials furnished were deemed to have been done and furnished at the personal instance of the owner. This latter class included all liens of subcontractors, materialmen, and laborers, when there was no valid contract of record, and each of these persons by section 1183 was given a lien by virtue of an

implied contract between him and the owner. As far as his right to a lien was concerned, he occupied the same relative position to the owner as if the latter had not made any general contract whatever, but had personally and directly bought the materials and employed the labor used in the construction of the building. In such a case, each laborer and materialman would depend for his lien upon his individual agreement with the owner, and his right to a lien would only commence when he began labor upon, or commenced to furnish material for, the building.

The liens of respondents herein, however, rest upon a somewhat different basis. Since the decision of *McClain v. Hutton*, supra, and in 1911 (St. 1911, p. 1313) section 1183 was amended, and as then amended it is still in force. In its amended form it differs materially in its requirements from what it did prior thereto. It now contains no provision that for failure to record the original contract between the owner and contractor, said contract shall be wholly void, or void at all, or invalid. Neither does it contain any provision that, when the contract is not filed for record, "the labor done and materials furnished shall be deemed to have been done and furnished at the personal instance of the owner," nor any like provision. Under the section as it now stands, the contract, although not filed as required by the statute, is a valid and subsisting contract between the owner and contractor, and binding upon them and all persons furnishing labor or material for the building, except that when not recorded, the liens provided for by said section, except that of the contractor, shall not be limited by the amount of the contract price. All liens for labor done or materials furnished for the building primarily rest upon this contract and derive their validity therefrom. There is no contract, either express or implied, between the owner and the subcontractors, or others performing work or furnishing material for the building. Following, therefore, the reasoning of the court in *McClain v. Hutton*, supra, the liens of such persons, originating under and depending for their validity upon the original contract, would date back to the time of the commencement of work upon the building.

There is nothing in the decision of *Roystone v. Darling*, 171 Cal. 526, 154 P. 15, which in any way conflicts with this conclusion. In the last-named case the court held that section 1183 described two classes of liens. One where the required bond and contract had been filed, in which case the amount of the liens is limited to the contract price of the building; and the other class, where the bond and contract have not been filed, in which case the liens, other than that of the contractor, are not so limited. The latter class of liens, the court

held, were direct and independent of any account of indebtedness between the owner and contractor, as this clause is used in section 14 of the Act of 1911, amending said section 1183 and other sections of the Code of Civil Procedure upon the subject of liens of mechanics and others. Appellant argues that as the court held that this class of liens are direct liens, then they are deemed to arise by virtue of a contract direct with the owner, and, therefore, they relate back only to the time the work was done or materials were commenced to be furnished. We find nothing in this decision that would warrant such a construction. In fact, the court expressed some doubt as to the exact meaning of the term "direct liens" as used in said act (page 537 [154 P. 15]) and it expressly refrained from any attempt to define the meaning of these words. In view of the language of the Supreme Court, we would hesitate to express an opinion as to just what was meant by this term.

[4] We are satisfied, however, that a "direct lien," as the term is used in the amendment of 1911, does not mean a lien arising by virtue of a contract, express or implied, with the owner, as distinguished from a lien where a valid contract was properly filed. In the first place, while the law prior to 1911 expressly provided for a class of liens which were deemed to arise by virtue of a contract direct with the owner, the amended law contains no such provision. In the second place, section 1183, as amended in 1911, provides that "the liens in this chapter provided shall be direct liens." The chapter referred to is entitled "Liens of Mechanics and others upon real property," and embraces all of the law of the state upon the subject of liens of mechanics and others for labor done and material furnished in the construction of buildings, and "direct liens," referred to in section 1183 comprehend all liens, including those arising under a duly recorded contract, as well as those where no contract has been filed for record. To hold that, by the use of the term "direct liens" in this section, it was intended to differentiate liens arising by virtue of a direct con-

tract with the owner from those accruing through a contract between the owner and the contractor, would be to give this section a construction unwarranted by its context. There is nothing, therefore, either in the decision of *Roystone v. Darling*, or in said section 1183, that would justify this court in holding that upon the failure to file the original contract, as prescribed by said section, the liens relate back only to the time when the work and materials specified in the liens were done or commenced to be furnished.

The respondents in this action, having performed labor and furnished materials under a contract between the owner and contractor, are entitled to liens for such labor and materials; and as such contract was a valid contract, their liens relate back to the date of the commencement of the work upon the building. Their liens are therefore prior to that of appellant's mortgage, which was not filed for record until after the commencement of said work.

[5] Appellant makes a further contention that respondents, in order to perfect their liens, or to give them any vitality whatever, were required to file their respective claims of lien for record within 30 days after they had respectively furnished their last work and material. We think this contention is answered by section 1187 of the Code of Civil Procedure, which provides for the time of filing claims of lien. In a recent decision our Supreme Court has held, in a case where the contract between the owner and contractor had not been filed as required by section 1183, as amended in 1911, that a claim of lien filed within 30 days after the filing of notice of completion is sufficient, provided 90 days have not elapsed from the date of actual completion. *Bird v. American Surety Co.*, 175 Cal. 625, 631, 166 P. 1009. Respondents, in filing their claims, met the requirements of said section 1187 as construed by this decision of our Supreme Court.

For the reasons hereinbefore expressed, judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

5. Certiorari ☞71—Petitioner not entitled to recover costs against superior court for entering erroneous dismissal of appeal.

Petitioner for writ of certiorari *held* not entitled to recover costs against superior court for entering an erroneous dismissal of his appeal regularly perfected, where no application was made to superior court for relief.

Application by Roy C. Corrigan for certiorari to review an order of the Superior Court in and for the County of Solano, dismissing an appeal from justice court. Judgment annulled.

Lindauer & Horan, of Vallejo, for petitioner.

Russell F. O'Hara, of Vallejo, for respondent.

FINCH, P. J. [1] Petitioner applies for a writ of certiorari to review an order of the superior court dismissing an appeal, on questions of law alone, from a judgment of the justice's court of Vallejo township, Solano county. Both the petition and the return show that the appeal was regularly perfected, and that it was argued upon the merits in the superior court by counsel for the respective parties and submitted to the court for decision of the questions of law involved therein. No motion to dismiss the appeal was made. The clerk's record shows the entry of a judgment dismissing the appeal. From affidavits presented at the hearing in this court, which cannot be considered, of course, for the purpose of impeaching the record, it appears that the court ordered the affirmance of the judgment, and the judgment of dismissal was inadvertently entered by the clerk.

In *Buckley v. Superior Court*, 96 Cal. 119, 31 P. 8, it was held by a divided court that the writ of certiorari will not lie to annul a judgment of dismissal of an appeal, even though such judgment is "entirely without support in the law." The decision in that case, however, has been overruled. *Golden Gate Tile Co. v. Superior Court*, 159 Cal. 474, 114 P. 978. See, also, *Peacock v. Superior Court*, 163 Cal. 701, 126 P. 976; *Lucchesi v. Superior Court* (Cal. App.) 229 P. 996; *Hellner v. Superior Court*, 61 Cal. App. 785, 215 P. 709; *Terminal Railway v. Superior Court*, 48 Cal. App. 586, 192 P. 116; *Fest v. Superior Court*, 37 Cal. App. 95, 173 P. 610; *Rauer's Law, etc., Co. v. Superior Court*, 26 Cal. App. 289, 152 P. 957. "The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from." Code Civ. Proc. § 955.

[2-4] A judgment of dismissal, however, implies that it is not a determination of the merits of the appeal. A dismissal applies "to a removal out of court prior to a judgment on the merits." 9 Cal. Jur. 595. "A dismissal of the appeal is nothing more or less than a refusal to proceed in the action." *Golden Gate Tile Co. v. Superior Court*, su-

72 Cal. App. 383

CORRIGAN v. SUPERIOR COURT IN AND FOR SOLANO COUNTY. (Civ. 2959.)

(District Court of Appeal, Third District, California. April 22, 1925.)

1. Appeal and error ☞670(1)—Affidavits not considered to impeach record on appeal.

Affidavits cannot be considered for purpose of impeaching record on appeal.

2. Appeal and error ☞803—Dismissal of appeal does not imply determination of merits.

A judgment of dismissal of an appeal implies that it is not a determination of the merits of the appeal, under Code Civ. Proc. § 955.

3. Appeal and error ☞803—Dismissal of appeal duly perfected is attempted abdication of jurisdiction which court must exercise.

Dismissal of appeal duly perfected is an attempted abdication of a jurisdiction which court must exercise.

4. Justices of the peace ☞166(5)—Superior court could enter judgment affirming judgment of justice court, where judgment dismissing appeal was void.

Where appeal from judgment of justice court was regularly perfected, and superior court ordered an affirmance, judgment of dismissal, inadvertently entered by clerk being void, superior court still had power to enter affirmance of justice's judgment in accordance with its original order.

pra. A dismissal of an appeal "duly perfected and diligently prosecuted * * * is in effect nothing more nor less than an attempted abdication of a jurisdiction which the court is bound in every proper case to exercise. It is, in other words, a refusal to decide a cause which it is the plain statutory duty of the court to decide." *Edwards v. Superior Court*, 159 Cal. 710, 712, 115 P. 649, 650. Since the judgment entered by the clerk dismissing the appeal is void, and, according to the facts stated in the affidavits, it is not the judgment ordered by the court, it is still within the power of the superior court to enter a judgment affirming the judgment of the justice's court, in accordance with its original order. *Edwards v. Superior Court*, supra.

[5] In this case the superior court would doubtless have vacated the erroneous entry of dismissal of the appeal, if application had been made therefor. It will be the policy of this court in future to require that application be first made to the superior court for relief in similar cases. The petitioner is not entitled to recover costs from the respondent court or the judge thereof. *Platnauer v. Superior Court*, 33 Cal. App. 394, 165 P. 41.

The judgment dismissing the appeal from the justice's court is annulled.

We concur: McDANIEL, Justice pro tem.; PLUMMER, J.

71 Cal. App. 752

GATES v. PENDLETON. (Civ. 4375.)

(District Court of Appeal, Second District. Division 1, California. March 20, 1925. Hearing Denied by Supreme Court May 18, 1925.)

1. Judgment $\S$ 237(4)—Against one of parties originally made defendants not unauthorized.

Where action was dismissed as to all defendants excepting one before case came on for trial second time, judgment against the one held not unauthorized.

2. Evidence $\S$ 222(1)—Witnesses $\S$ 379(1)—Inconsistent statements of party may be considered as admission against interest as well as for impeachment.

Inconsistent statements of party to an action may be considered as admission against interest as well as for purpose of impeachment.

3. Appeal and error $\S$ 1099(3)—Holding that passenger in son's automobile might be found responsible for negligence of driver held law of the case.

Holding of Supreme Court that where automobile owner was asked to carry his father and fellow guests to entertainment, and declined invitation, but permitted his employé to drive the party, inference was warranted that father was in charge so as to be responsible for negligence of driver was law of the case on subsequent appeal, where jury could have found such facts.

4. Witnesses $\S$ 275(8)—Party called by adverse party may be examined by all parties.

A defendant called by plaintiff as a witness under Code Civ. Proc. $\S$ 2055, may be exam-

ined by codefendant represented by different counsel, under provisions of section 1846.

5. Evidence $\S$ 580—On second trial, testimony of deceased party on first trial admissible, though deceased dropped as party to suit.

In view of liberal construction required by Civ. Code, $\S$ 4; Code Civ. Proc. $\S$ 4, and in view of Code Civ. Proc. $\S$ 1910, testimony of party called under Code Civ. Proc. $\S$ 2055, in former trial, and who had died prior to second trial, and as to whom case had been dismissed, could be received under section 1870, subd. 8, as being testimony of deceased witness in former action between same parties relating to same matter, there being no change as to parties affected.

6. Appeal and error $\S$ 1050(1)—Merely cumulative evidence, even if calling for conclusion and hearsay, not reversible error.

In action against passenger in automobile as being responsible for injuries caused by driver, testimony of owner that he intrusted machine to defendant, even if calling for conclusion and hearsay, held harmless error as being merely cumulative.

7. New trial $\S$ 162(5)—Consent to remittitur signed by another than plaintiff's attorney with latter's authorization held sufficient.

Where plaintiff's attorney was temporarily absent from county, written consent to remittitur, required before court would deny motion for new trial, held sufficient when signed by attorney authorized to do so by plaintiff and his regular attorney, and afterwards ratified and confirmed by plaintiff in person.

8. New trial $\S$ 162(5)—Filing of required consent to remittitur in office of county clerk not ground for complaint.

Where court made conditional order requiring filing of written consent to reduction of judgment within certain fixed time, that consent was filed in office of county clerk held not ground for complaint.

9. New trial $\S$ 163(1)—That order denying motion was entered after regular office hours not ground for complaint.

Where trial court made conditional order that if plaintiff should file written consent to reduction of judgment new trial would be denied, that order denying motion was made and entered in minutes of court after regular office hours, on day fixed as date within which such consent had to be filed, held not ground for complaint.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by W. W. Gates against C. W. Pendleton. Judgment for plaintiff, and defendant appeals. Affirmed.

E. J. Emmons, of Bakersfield, and Meserve & Meserve and C. W. Pendleton, all of Los Angeles, for appellant.

Thomas K. Case, of Los Angeles, for respondent.

HOUSER, J. Because of personal injuries sustained by plaintiff in an automobile accident, he brought an action for damages against C. W. Pendleton, Sr., C. W. Pendleton, Jr., a man by the name of Houston, and a certain corporation.

The action has been twice tried. On the first hearing a motion for nonsuit was granted. An appeal from the judgment thereon rendered resulted in a reversal thereof. *Gates v. Pendleton*, 184 Cal. 797, 195 P. 664. Before the case came on for trial the second time C. W. Pendleton, Jr., died, and the action was dismissed as to all defendants excepting C. W. Pendleton, Sr. From a judgment in favor of plaintiff, defendant appeals.

[1] Appellant's first claim for reversal in substance is that the action having been brought against several defendants, a judgment against one of such defendants is unauthorized. No authority in point is submitted by appellant, and we know of none which would sustain such contention.

It is next urged that the evidence shows that defendant was but a passenger in the automobile which collided with plaintiff, and that as such passenger defendant had no control of said automobile or its movements, or the driver thereof. It appears that one General C. F. A. Last was desirous of entertaining some of his friends at a certain clubhouse situated some distance outside of the city of Los Angeles, but that he did not have automobile transportation at his command sufficient to accommodate his intended guests in conveying them to and from the place where the clubhouse was located. Regarding the point under consideration, the testimony of C. W. Pendleton, Sr., on the second trial was to the effect that General Last "requested him to invite appellant's son (C. W. Pendleton, Jr.), to bring with him his automobile so that he, appellant's son, could take some of the guests to the place of celebration"; that at that time defendant's son was absent from home, but was expected to return on the morning of the day on which the trip was planned; that instead of talking with his son personally regarding the matter, C. W. Pendleton, Sr., sent word to his son by a young man who was in the son's employ, and that the result was that the son, being unable to attend the "celebration," in compliance with the request thus communicated, sent his automobile with the young man as the driver thereof. It was on the return trip from the clubhouse that the accident in question occurred.

When the case was tried the first time the testimony given by C. W. Pendleton, Sr., differed in its effect in certain important respects from that given by him on the second hearing. Apparently with that fact in mind, and for the purpose of impeaching the testimony given by said defendant on the second trial, counsel for plaintiff offered a part

of the testimony given by defendant on the first trial as follows:

"A. Why, General Last suggested that if I knew of any one who had a car who could take a part of his party down to the place where we were going, he would invite him along as a guest; he would be very glad to have it, because he did not have enough automobiles arranged at that time to take the party, and I told him that my son had a car, and, while he was away, he was expected home early in the morning the day on which this excursion was fixed, and I would ask him to take us down, and I sent word to him by Tolle (the young man in the son's employ), as he left me at the corner, to tell my son and ask him if he would not go along and take a number of people that were there. Clarence (Tolle) came back alone, and said that my son, having just come home, told him that he had some things to attend to and would not go, but would let him have the car."

[2] While the general rule with reference to statements made by a witness which are inconsistent with the testimony of the witness is that such statements may be considered for the purpose only of reflecting upon the credibility of the witness, such rule does not wholly apply when the witness is a party to the action. Any statement so made by a party to an action may be considered, not only for the purpose of impeachment, but as an admission against interest as well. In the case of *Hall v. Bark Emily Banning*, 33 Cal. 522, plaintiff sued to recover the value of the contents of a trunk. On the trial plaintiff testified to the value of the property. Regarding such value, witnesses for the defendant testified to former statements made by plaintiff which were inconsistent with the testimony which she had given at the hearing of the action. Touching the effect of such testimony the court said:

"The latter testimony may be regarded in two aspects: First, as evidence tending to impeach the plaintiff as a witness; and second, as evidence of admissions of a party to the suit. Regarding the plaintiff as a witness, her declarations made out of court, differing from her statements as a witness in the case, tend to impeach her credit. And this is their only tendency. They are not competent evidence of any fact in issue. * * *

"The rule is settled beyond all controversy that the admissions or declarations of a party to a suit are admissible as evidence against the party making them. When given in evidence, they tend, as does other competent evidence, to prove the fact in issue to which they relate. We do not understand that the result of the permission given by statute to the parties to an action to testify in their own behalf, has blended in one, the different characters of party and witness, nor obliterated the distinction between admission of parties against interest, and statements out of court contradictory to their testimony at the trial."

[3] In the instant case we have one statement by defendant C. W. Pendleton, Sr., to the effect that General Last had requested

said defendant to invite his son "to bring with him his automobile so that he, defendant's son, could take some of the guests to the place of celebration," and another important statement that General Last was desirous of having the son and his automobile for the purpose of conveying some of the guests, and that defendant had said that he would ask his son to take them down, and sent word to his son "to tell my son and ask him if he would not go along and take a number of people that were there."

Again referring to the case of *Hall v. Bark Emily Banning*, 33 Cal. 522, we find the rule laid down that, where the testimony given by a party to the action differs materially from his admissions, a conflict in the evidence is created. Assuming the correctness of such rule, the jury in the instant case had the right to believe the admissions of defendant, rather than the testimony which he gave. When the case was formerly before the Supreme Court (*Gates v. Pendleton*, 184 Cal. 797, 195 P. 664), the facts were assumed to be in accordance with the statements contained within defendant's said admissions, and it was held that in such circumstances, coupled with the further fact within defendant's knowledge (of which there is no dispute) that his son had declined the invitation to join the party, but had sent as a driver of the automobile the young man in his employ who had carried the message from the father to the son—the inference was reasonable that thereafter the father was in charge of the expedition, and was responsible for the negligence of the driver. It will thus be seen that the testimony adduced on the second hearing of the action, and which the jury had a right to determine presented the true facts in the case, was identical with the facts, when the appeal from the judgment based upon the ground of the motion for nonsuit in the first hearing was decided by the Supreme Court, as reported in 184 Cal. 797, 195 P. 664. As heretofore stated, the conclusion reached by the Supreme Court was in effect that on such facts C. W. Pendleton, Sr., was liable. In view of the fact that there is no substantial difference between the assumed facts in the action as presented on its first hearing and the facts which the jury undoubtedly determined to be true when the cause was heard the second time, the decision in 184 Cal. 797, 195 P. 664, became and is the law of the case, at least so far as the question of the sufficiency of the evidence to sustain the verdict and judgment is concerned. *Baird v. Baird*, 193 Cal. 225, 223 P. 974; *Benson v. Shotwell*, 103 Cal. 163, 37 P. 147.

[4, 5] Complaint is made by appellant that the court erred to his prejudice in admitting in evidence on the second trial the testimony given by C. W. Pendleton, Jr., on the first hearing of the action. On the first trial the plaintiff called C. W. Pendleton, Jr., as a

witness under the provisions of section 2055 of the Code of Civil Procedure. It is appellant's contention that because that section provides, in part, that "such witness, when so called, may be examined by his own counsel," appellant, who was represented by different counsel from that representing C. W. Pendleton, Jr., was precluded from any examination of such witness. The statute, however, is entitled to a broader construction. In itself it contains the provision that "a party to the record * * * may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses"; and by section 1846 of the Code of Civil Procedure it is provided that "a witness * * * can be heard only in the presence and subject to the examination of all the parties, if they choose to attend and examine." By considering the two statutes together, it is plain that the construction for which appellant contends is untenable.

Subdivision 8 of section 1870 of the Code of Civil Procedure provides that evidence may be given upon the trial of "the testimony of a witness deceased, * * * given in a former action between the same parties, relating to the same matter."

It is urged that because death had removed C. W. Pendleton, Jr., as a party to the action, the statute which requires that in order that his testimony be admissible, the action must be "between the same parties" has no application to the instant facts. In other words, when C. W. Pendleton, Jr., gave his testimony the action involved persons differing from those affected by the action when his testimony was sought to be used in evidence.

The case of *People v. Bird*, 132 Cal. 261, 263, 64 P. 259, is authority for the statement that at common law the testimony of a witness given on a former trial of a case between the same parties was admissible for or against either party to the action, upon showing that such witness was either dead or without the jurisdiction of the court; and that before the adoption of the codes such rule was sanctioned and employed in this state (citing cases). Since the enactment of section 1870 of the Code of Civil Procedure the courts have repeatedly construed that section in accordance with the common-law rule, and have uniformly adhered to the principle. *Meyer v. Foster*, 147 Cal. 166, 81 P. 402; *Mann v. Scott*, 180 Cal. 550, 182 P. 281; *Benson v. Shotwell*, 103 Cal. 163, 37 P. 147; *Hicks v. Lovell*, 64 Cal. 14, 27 P. 942, 49 Am. Rep. 679.

Section 1910 of the Code of Civil Procedure provides that:

"The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination could in that

case have been made between them alone, though other parties were joined with both or either."

Considering such sections in connection with the provisions of subdivision 8 of section 1870 of the Code of Civil Procedure, with reference to "the same parties," it is clear that "those between whom the evidence (of C. W. Pendleton, Jr.), is offered were on opposite sides" when the case was first tried, and that "a judgment * * * could in that case have been made between" the plaintiff therein and C. W. Pendleton, Sr., "though other parties were joined with either or both."

It is also apparent that a judgment against all the parties defendant in the instant action would have been equally effective as to each of them, and that on the payment thereof by any one of them no right in him to contribution by the others would have existed. While, strictly speaking, after the death of C. W. Pendleton, Jr., the action as then subsisting was not "between the same parties," in common sense and understanding there was no change as to the parties affected. It is a rule of construction that the provisions of the code "are to be liberally construed" with a view to effect its objects and to promote justice. Section 4, Civ. Code; section 4, Code Civ. Proc. In the case of *Briggs v. Briggs*, 80 Cal. 253, 22 P. 334, it is declared that the long-settled and beneficial rule of evidence, like that which permits depositions taken in an action between two parties to be used in evidence in an action between the successors in interest of such parties, should not be abrogated by a strict construction of the language of the statute, and that the phrase "the same parties" should not limit the use of evidence otherwise admissible to those persons whose names appear of record in the action. See, also, *Fredericks v. Judah*, 73 Cal. 604, 15 P. 305, where an executor of a will was accorded the same rights as the testator would have had in the matter of the use of evidence given in a former action by a witness who had died before the hearing of the second action. The object of the statute in question was to make available to any party to an action the testimony of a witness given on a former hearing thereof when, because of the death of such witness, his testimony in person no longer would be possible. The construction for which appellant contends, if within the letter of the law, is surely without its spirit.

[6] But if it be assumed that plaintiff had the right to introduce in evidence on the second hearing of the action the testimony which was given by C. W. Pendleton, Jr., at the time the case was first tried, appellant urges the further objection (which was made at the time the testimony was given), that a part of such evidence was improperly

admitted for the reason that it called for a conclusion of the witness, was hearsay, incompetent, irrelevant, and immaterial. The testimony to which such objection was thus made was as follows:

"Q. To whom, if any one, had you intrusted the machine? A. That day?

"Q. To your father at any time? A. Yes; to him and to Tolle."

The evidence shows that at no time had C. W. Pendleton, Jr., directly communicated with defendant C. W. Pendleton, Sr., regarding the matter. Apparently, with reference to the same testimony, the Supreme Court on the former appeal (*Gates v. Pendleton*, 184 Cal. 797, 800, 195 P. 664, 665, said:

"The statement of the son that he loaned the car to Tolle and his father cannot bind the latter unless he had authorized or requested Tolle to get the use of it for him, or unless, with knowledge that the auto with Tolle as its driver had been furnished to him by his son, he accepted the use and service so tendered."

Based on the evidence adduced on the first trial, and which evidence differed in no material respect from that which the jury had a right to accept on the second hearing, the Supreme Court ruled that "the father must have understood, what was the fact as shown by the son's testimony, that the car and driver were furnished for his use." At any rate, in view of the fact, according to the defendant's admission, upon which the jury necessarily acted in bringing in its verdict, that he had invited his son and had requested that he take several of the party to the "celebration," coupled with the fact that the son's automobile was sent to and used by defendant C. W. Pendleton, Sr., the objectionable evidence (if it can be so considered) given by the son to the effect that he had intrusted the automobile to his father on that occasion, was merely cumulative, and the error, even assuming it to be such, was harmless.

[7-9] It is finally contended by appellant that the court erred in denying defendant's motion for a new trial. It appears that on the hearing of the motion the trial court made a conditional order to the effect that if within a certain fixed time plaintiff should file a written consent that the judgment be reduced in a certain amount, the motion for a new trial should be denied; otherwise that such motion be granted. Plaintiff's attorney was temporarily absent from the county where the action was tried at the time the order was made; but another attorney who (according to the several affidavits of plaintiff and his said attorneys) had been authorized both by plaintiff and by plaintiff's attorney to act in the premises, filed on behalf of plaintiff and his attorney the required consent, which consent was afterward ratified and confirmed by plaintiff in person. Thereupon the motion for a new

trial was denied. Further question is raised by appellant because the written consent was filed in the office of the county clerk, and the order denying the motion for a new trial was made by the court and entered in the minutes of the court after regular office hours on the day fixed by the court as the date within which such consent had to be filed. In such circumstances we are unable to perceive any just cause for complaint on the part of defendant.

The judgment is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

71 Cal. App. 604

VICINO et al. v. AMADOR. (Civ. 5002.)

(District Court of Appeal, First District, Division 2, California. March 9, 1925.

Rehearing Denied April 7, 1925.)

1. New trial ⇐155—Order, granting new trial not made within 2 months after verdict, ineffective.

Order, granting new trial not made within two months after verdict, is ineffective under Code Civ. Proc. § 660.

2. Appeal and error ⇐607(1)—Delay in notice for transcript not ground for objection, where certified by trial court.

Where transcript of record below was certified by trial court, and proceeding subsequent to preparation of transcript was also certified, objection, that notice to clerk to prepare transcript was not filed in time, is without merit.

3. Highways ⇐184(2, 4) — One, contending that rule as to automobilist turning on highway was violated, must prove facts showing violation, and trial court should be asked to state all of Motor Vehicle Act applicable.

One, contending that another had violated rule prohibiting operator of automobile from turning from right side of highway to left, must prove facts which show violation, and trial court, in giving its instructions, should be asked to state all provisions of Motor Vehicle Act applicable, and not merely one of statutory elements.

4. Highways ⇐184(4)—Instruction, submitting law as to operation of vehicles in closely built up district, held erroneous as not sustained by evidence and leaving definition of closely built up district to jury.

Where defendant's negligence in automobile collision was based on alleged violation of Motor Vehicle Act, § 1, as amended by St. 1919, p. 192, § 1, subd. 6, and section 20, subd. q, as amended by St. 1919, p. 214, § 12, providing that, in closely built up territory, vehicles cannot turn about and proceed in opposite direction, except at intersection, but no evidence was introduced to show that scene of accident was in a closely built up territory, as defined by the act, held that instructions submitting law applicable to operation of vehicles in closely

built up district, leaving jury to define what constituted a closely built up district, and to determine whether accident occurred by reason of fact that defendant turned from right side to left side of highway was erroneous and highly prejudicial to defendant.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Lawrence Vicino and another, copartners doing business under the firm name and style of the Union Garage & Machine Shop, against Frank Amador, in which defendant filed a cross-complaint. Judgment for plaintiffs, and defendant appeals. Reversed.

Louis Oneal and C. M. Booth, both of San Jose, and Welburn Mayoock, of Gilroy, for appellant.

Rea & Caldwell, of San Jose, for respondents.

STURTEVANT, J. Plaintiff filed a complaint, the defendant filed a cross-complaint and after issue joined on each of those pleadings, the parties went to trial before the court sitting with a jury. Judgment went for the plaintiff, and the defendant has appealed.

[1, 2] The respondents make a preliminary objection to the appeal being heard on the record which is before us. A proper understanding of that objection requires the statement of these preliminary matters: The verdict was filed February 14, the judgment was entered February 15, and notice of intention to move for a new trial was filed February 19, and the trial court made an order granting a new trial on April 18, all of said dates being in the year 1924. It will be noticed that the order granting the new trial was not made within two months after the verdict, and for that reason the order was ineffective. Code Civ. Proc. § 660. The record does not disclose that a notice of entry of judgment was given, nor does it disclose that a notice was given of the order granting a new trial. On May 9, 1924, the appellant filed a notice of appeal and requested that the evidence, etc., be transcribed. Thereafter the clerk's transcript was prepared, the reporter's transcript was prepared, and notice was given that the same would be presented for approval. On the day noticed written objections were presented opposing the certification of the record, and said objections were supported by the records and files of the trial court. Thereafter the trial court certified the record, and furthermore it certified the proceedings subsequent to the preparation of the transcript. No formal motion to dismiss this appeal has been made, but in his brief the respondent calls attention to the foregoing facts by way of objecting to a hearing in this court. The objection is without merit. The point was

ruled in the case of *Revert v. Hesse*, 184 Cal. 295, 297, 193 P. 943.

The trial court gave, at the request of respondent, certain instructions, and it denied or modified certain instructions requested by the defendant. The plaintiff pleaded negligence by using the same language as was before the court in *Stein v. United Railroads*, 159 Cal. 368, 113 P. 663. The same language was used by the defendant in his cross-complaint. The accident complained of happened near the town of Gilroy in Santa Clara county. Neither party introduced any local ordinance, but both parties relied on the provisions of the general laws. Immediately before the accident, the plaintiff was traveling south, taking a new automobile to make a delivery thereof. It was the theory of the defendant that the plaintiff was traveling at an excessive speed, to wit, 40 or 50 miles per hour. Immediately before the accident, the defendant had been traveling north, and about the time that he came in front of the Catholic church, he turned from the right-hand side of the road to the left-hand side. In this movement it is the contention of the appellant that the turn was so made as to attempt to park his car facing the left-hand side of the street at right angles, whereas respondent contends that the appellant was describing an arc to proceed in the opposite direction.

The first instruction complained of is respondent's instruction 13.

"I instruct you that in deciding this case you are entitled to take into consideration the following facts:

"First: Whether or not defendant was driving his automobile on the right side of the highway.

"Second: Whether or not defendant turned from the right side of the highway to the left in a closely built up district, where there was no intersection of streets.

"Third: Regardless of the above two facts whether or not defendant was driving his automobile in a careful and prudent manner so as not to endanger the life or limb of any person or the safety of any property."

The second instruction complained of is respondent's instruction 15, which is as follows:

"I also instruct you that, if you find that defendant was not operating his automobile on the right side of the road as required by the provisions of the Motor Vehicle Act of the state of California above quoted to you, or that he suddenly turned his automobile from the right side of the highway to the left in a closely built up district, where there was no intersection of streets, he is then guilty of negligence as a matter of law, and if said accident would not have happened, except for said act of defendant, that the plaintiff is entitled to recover in this case."

[3] The appellant contends that there is no provision contained in the general statutes which prohibits the operator of an automobile from turning from the right side of a

highway to the left. The respondent contends that there is. Both are partly correct and partly in error. Under the terms of the Motor Vehicle Act, then in force, the operator of an automobile should not in certain places turn from the right to the left side of the highway so as to proceed in the opposite direction. That rule is subject to several provisos and limitations. If a party contends that the rule has been violated, he must prove the facts which show the violation, and the trial court in giving its instructions should be asked to state all of the provisions of the statute applicable, and not merely one of the statutory elements. As neither party contends that the accident in question occurred in a business district, we shall not confuse the record by adverting to the statutory provisions applying thereto. Highways are roads and streets erected as such by the public. Pol. Code, § 2618. The trustees of a town may place conspicuously thereon at the boundary lines of certain parts of the town signs of sufficient size to be easily readable by a person using the highway, bearing the words and figures "20 miles speed limit," which words shall be printed in white letters on a red background. The parts of the town on which such signs may be placed are the territory thereof contiguous to a public highway, which is on the line of said highway not mainly devoted to business, where for not less than a quarter of a mile the dwelling houses and business structures on such highway average less than 100 feet apart. Such territory so marked with signs is by the statute defined as "closely built up." In a "closely built up" territory no vehicle shall be turned so as to proceed in the opposite direction except at an intersection of the public highway. Motor Vehicle Act, § 1 (Stats. 1919, p. 192, § 1, subd. 6), and section 20, subd. q. (section 12).

Bearing in mind the provisions of the statute just quoted, we shall pass to a consideration of the evidence. The evidence introduced showed the existence of some sign on the side of the highway near the point where the accident happened. But the evidence did not show whether the sign was erected by the trustees of the town of Gilroy, whether the sign was red with white letters thereon, or whether there were any letters on the sign. There was no evidence introduced showing whether there was any building within one-quarter of a mile of the Catholic church hereinabove mentioned.

[4] In this condition of the record it is manifest that the evidence introduced did not justify the trial court in giving any instruction regarding the law applicable to the operation of motor vehicles in "a closely built up district." Bearing in mind the calls of the statute governing the operation of a motor vehicle in "a closely built up district," it should first be stated that the trial court did not attempt to give any law on that sub-

ject except what is contained in respondent's instruction 13 and respondent's instruction 15.

As to instruction 13, it should be observed that there was no conflict whatever in the evidence, and the evidence was all to the effect that the defendant was driving his automobile on the right side of the highway, and also that the defendant was driving his automobile in a careful and prudent manner so as not to endanger the life or limb of any person or the safety of any property; and, furthermore, as we have shown above, it was the contention of both parties that the defendant did turn from the right side of the highway to the left side of the highway. Under these circumstances instruction 13 left the jury by its verdict to define what is "a closely built up district" and thereafter to find that the act of the defendant was committed in, or was not committed in, such a district. By reason of the verdict returned, it must necessarily be concluded that the jury found that the place where the accident occurred was "a closely built up district," whereas, as we have shown, there was not a particle of evidence in the record to support the finding.

Respondent's instruction No. 15, when compared with the provisions of the statute above quoted, contained all the vices that were contained in instruction 13 and an additional error which requires a reversal of the case. A mere reading of the instruction discloses that the instruction left to the jurors to define "a closely built up district," and then to determine whether the accident occurred by reason of the fact that the defendant turned from the right side to the left side of the highway at that point, and if so the instruction thereupon directed a verdict in favor of the plaintiff. Of course, that was not the law, and, furthermore, it was highly prejudicial to the defendant. In view of the conclusions which we have reached regarding the giving of the foregoing instructions, it is not necessary for us to consider the alleged errors regarding the action of the trial court in refusing or modifying certain instructions proposed by the defendant.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

71 Cal. App. 717

BUSSENIUS et al. v. WARDEN. (Civ. 4321.)

(District Court of Appeal, Second District, Division 1, California. March 18, 1925.)

1. Pleading ⚡345(1)—**Plaintiff's failure to deny execution or genuineness of defendant's tax deed held not to entitle defendant to judgment.**

In action to quiet title, failure of plaintiffs to file affidavit denying genuineness or due exe-

cution of defendant's tax deed to the property under Code Civ. Proc. § 448, held not to entitle defendant to judgment, since plaintiffs might have become owners of property, where their complaint was filed more than a year after date of deed.

2. Pleading ⚡129(5)—**Plaintiffs held not to lose right to question legal effect of deed by admitting its genuineness and due execution.**

In action to quiet title, plaintiffs, who by failing to deny admitted genuineness and due execution of defendant's tax deed to the property, did not thereby lose right to question its legal effect or to introduce evidence re-establishing their title.

3. Taxation ⚡758—**Tax deed, reciting that property was "assessed," held insufficient to transfer title.**

Tax deed, reciting only that property was "assessed," held insufficient to transfer title to purchaser, in view of Pol. Code, § 3771, as amended by St. 1919, p. 142, § 1; Pol. Code, § 3785b, as added by St. 1913, p. 558, § 4; Pol. Code, § 3786, and section 3787, as amended by St. 1917, p. 241, § 1; "assessed" not being equivalent to statement that property was assessed for taxation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assess.]

4. Taxation ⚡627—**Sale of property for delinquent taxes held void, where delinquent list failed to state amount of penalties.**

Sale of property for delinquent taxes to state was void, in view of Pol. Code, § 3764, as amended by St. 1913, p. 556, § 1, though notice of sale stated, as required by Pol. Code, § 3765, that, unless such taxes, together with costs and penalties, were paid, property would be sold, where delinquent list stated amount of tax and costs, but not amount of penalties.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action to quiet title by Robert G. Bussenius and another against Grace P. Warden. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. Irving McKenna and Catherine A. McKenna, both of Los Angeles, for appellant.

Donald Barker, of Los Angeles, for respondents.

CONREY, P. J. Action to quiet title. The plaintiffs are the owners of the described real property, unless their title has been divested by reason of a tax deed dated and executed on the 2d day of July, 1920, by the tax collector of the county of Los Angeles to Grace P. Warden, who is defendant and appellant herein.

The defense to the action was founded on said deed, of which a copy is annexed to the answer, as Exhibit A thereof. The plaintiffs did not, after receiving a copy of the answer, file with the clerk any affidavit denying the genuineness or due execution of the deed.

Section 448, Code of Civil Procedure, provides that, when these conditions exist in the record of an action, "the genuineness and due execution of such instrument are deemed admitted." At the trial of the action appellant moved for judgment on the pleadings, and argued that, because of the admission of fact above stated, she was entitled to judgment in her favor. Appellant now contends that the court erred in denying said motion.

[1, 2] We think that the court did not err in denying the motion. Assuming that the deed vested title in the grantee at the time of its execution, it might be that the plaintiffs had become the owners of the property when, more than a year after the date of the deed, they filed their complaint in this action. Moreover, when respondents, by failing to deny, admitted the genuineness and due execution of the deed, they did not thereby lose the right to question the legal effect of the instrument, or their right to introduce evidence re-establishing their title, notwithstanding the existence and adverse effect of said deed.

[3] This property had been sold to the state for delinquent taxes of the year 1914, the tax sale taking place on the 1st day of July, 1915. Under the law existing at that time, and continued in force, with some changes of detail, in the year 1919, it was provided that, where property theretofore sold to the state for delinquent taxes has remained unredeemed for a period of five years, the tax collector, by following certain prescribed proceedings in connection with his annual delinquent tax sale shall sell such property at public auction to the highest bidder for cash. Pol. Code, § 3771 (Stats. 1919, p. 142). Section 3785b of the Political Code (Stats. 1913, p. 558), provides that, when property has been sold to a purchaser at delinquent tax sale, other than the state of California, in pursuance of section 3771 of this Code, the tax collector must execute a deed to the purchaser, and that said deed "shall be in substance, and may be in form as follows: * * * That whereas the real property hereinafter described was duly assessed for taxation in the year 19— to — (stating name as on assessment-roll) and was thereafter on the — day of —, 19—, duly sold to — by —, tax-collector of said county of — for nonpayment of delinquent taxes which had been legally levied in said year 19—, and were a lien on said real property, the total amount for which the same was sold being —. * * * Now, therefore," etc. The last sentence of said section 3785b reads as follows: "The provisions of sections 3786 and 3787 of this Code are hereby made applicable to the deed herein provided for."

Section 3786 of the Political Code provides that such deed, duly acknowledged or proved, is primary evidence of certain stated facts

relating to assessment, equalization, levy, non-payment of tax, sale, nonredemption, that the person who executed the deed was the proper officer, and, where the real estate was sold to pay a poll tax or taxes on personal property, that the real estate belonged to the person liable to pay the tax. Section 3787, Political Code (Stats. 1917, p. 241), provides that such deed, duly acknowledged or proved, is (except as against actual fraud) conclusive evidence of the regularity of all other proceedings, from the assessment by the assessor, inclusive, up to the execution of the deed. It is the contention of appellant that nothing was shown by respondent to overcome the prima facie title which she claims was vested in her by said tax deed, and that she is entitled to judgment in her favor on the findings of the court.

Respondents contend that the tax deed is void on its face because it fails to state a fact required by the statute to be stated in a deed of the kind in question. As we have shown, section 3785b, Political Code, requires that the deed "shall be in substance and may be in form as follows": The form then given recites, among other things, the fact that the property "was duly assessed for taxation." The deed under which appellant claims title, in its recital relating to this particular fact, omits the words "for taxation." The language of the deed, so far as pertinent to this objection thereto, is as follows:

"That whereas, the real property hereinafter described was duly assessed in the year 1914 to Ella L. Moody and was thereafter on the 2d day of July, 1920, duly sold to Grace P. Warden by W. O. Welch, Tax Collector of the County of Los Angeles, for nonpayment of delinquent taxes which had been legally levied in the year 1914. * * *

We think that the deed was not legally sufficient to transfer title. "It has uniformly been held in this state that a tax deed which misrecites or omits to recite any one of the facts required by the statute to be recited has no effect at all as a conveyance, the theory being that it is competent for the Legislature to prescribe the form of instrument which, as the result of a proceeding in invitum can alone divest the citizen of his title, and that where the statute prescribes the particular form of a tax deed, the form becomes substance, and must be strictly pursued, and it is not for the courts to inquire whether the required recitals are of material facts or otherwise." *Henderson v. De Turk*, 164 Cal. 296, 128 P. 747. While it is true that under section 3785b the "form" need not be absolutely that described in the statute, the prescribed facts must be stated in the deed. Property may be "assessed" for purposes other than taxation. Therefore a recital that the property has been "assessed" is not equivalent to a statement that it was assessed for taxation.

[4] The findings of fact, after declaring that the tax collector did execute and deliver to appellant a deed, the said exhibit A, further state that on June 30, 1915, the tax collector made and filed with the county clerk of Los Angeles county an affidavit of publication of delinquent tax list of that county for the assessment of the year 1914, which affidavit, among other things, stated that he had caused to be published a copy of the delinquent tax list of the year 1914, and that attached to the affidavit were true copies of the stated documents, of which publications were made at certain stated dates; that the said delinquent tax list, together with the affidavits, etc., were published on those dates, and that true copies thereof are as follows: (Here follow copies of the delinquent tax list, affidavits, notices and explanations as so published, in so far as the same affect or refer to the land described in the complaint.) The notice stated that the tax collector, on July 1, 1915, at the place and hour stated, "unless the taxes delinquent as appears by said list, together with the costs and penalties," were paid, would sell all said real estate upon which taxes were a lien, to the state of California. The part of the delinquent tax list referring to the property described in the said tax collector's deed to appellant is as follows:

"No.	Name and Description. Volume One. In Los Angeles City.	Amount.
2149	Ella L. Moody, G. W. Morgan's Sycamore Grove Tr., Lot 17, Blk 6."	5 71

The notice stated that the figures appearing opposite, following and last after each description of property in the list "were intended to, and do, represent respectively in dollars or in cents, or in dollars and cents, as the case may be, the amount due for taxes and costs, in the manner, as follows, to wit: When or where two figures appear therein, cents were intended to be, and are, represented; when and where more than two figures thus appear therein, cents were intended to be, and are, represented by the last two figures, and the figures occupying and appearing at the left of the said last two figures and separated therefrom by a space were intended to, and do, represent dollars, so that the amount due for taxes and costs in the respective cases aforesaid are thus expressed in dollars and cents."

Section 3764 of the Political Code, as amended in 1913 (Stats. 1913, p. 556), provided, among other things, that the delinquent list to be published by the tax collector "must contain the names of the persons and a description of the property delinquent, and the amount of taxes, penalties, and costs due, opposite each name and description, * * *

The foregoing statement from the

findings shows that said delinquent tax list failed to set forth the amount due for penalties; although the notice of sale stated (as required by section 3765) that, "unless the taxes delinquent, together with the costs and penalties, are paid, the real property upon which such taxes are a lien will be sold." It thus appears that, although the proposed sale was conditioned upon nonpayment of penalties, the delinquent list as published was defective, in that it failed to state the amount of those penalties. Respondents contend, and apparently there is no answer thereto, that by reason of this defect the subsequent sale to the state was void, and that consequently the deed relied upon by appellant was likewise void.

For the foregoing reasons we are of the opinion that the title of the plaintiffs remains unaffected by any valid claims of the defendant in or to said real property.

The judgment is affirmed.

We concur: HOUSER, J.; CURTIS, J.

72 Cal. App. 151

EAMES et al. v. PHILPOT et al.
(Civ. 2852.)

(District Court of Appeal, Third District, California. April 2, 1925.)

1. Injunction $\S$ 118(3)—Complaint held sufficient to invoke power to enjoin continuing trespass on land.

Complaint, stating not merely legal conclusion that plaintiffs will suffer irreparable damages unless defendants are enjoined from removing wood from plaintiff's land, but that plaintiffs are owners and in possession of specified quantity of wood on their land, and that defendants have removed part and threatened to remove and dispose of all of it, held sufficient to invoke power of court of equity to enjoin continuing trespass.

2. Injunction $\S$ 52—Will lie against removal and disposition of wood from plaintiffs' land, to avoid multiplicity of actions against purchasers.

Injunction, against removal and disposition of wood from plaintiffs' land, will lie to prevent multiplicity of actions of claim and delivery or for value of wood against purchasers thereof from defendants, though legal remedy may be adequate for each single act.

3. Bankruptcy $\S$ 138(1)—Lessors held entitled to possession of wood, not paid for by lessee in default, though scheduled as asset in bankruptcy by lessee.

Lessors, reserving right to take possession of land and retain wood not paid for by lessee, on latter's default, held entitled to wood unpaid for immediately on lessee's voluntary surrender of lease and abandonment of possession after default, though lessee included wood in schedule of assets in bankruptcy, at least until trustee established, by proper court proceeding, his right to possession thereof, by reason of les-

see's ownership at time of petition to be adjudicated bankrupt.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Victor J. Eames and another against R. S. Philpot and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

H. W. Zagoren, of Sacramento, for appellants.

Fred J. Harris and Thomas B. Lceper, both of Sacramento, for respondents.

HART, J. The plaintiffs, on the 7th day of July, 1921, by a writing, leased to one Mrs. M. G. Wilson, a widow, for the term of two years, beginning with the 1st day of July, 1921, and ending on the 30th day of July, 1923, a certain specifically described quarter section of land situated in El Dorado county, and known as the "Silverthorn Ranch," at an annual rental of \$350, of which, for the first year, the sum of \$116.66 was paid on the day of the execution of the indenture, and the balance payable on the 1st day of November, 1921. By this lease the second party (Mrs. Wilson) was "granted the privilege of cutting cordwood on the east 80 acres of said premises," she agreeing that "she will, during the term of this lease, cut not less than 40 acres of all timber standing on either the north or south 40 acres of the east 80 acres of said described premises, but not in the center thereof, at her option." It was further stipulated in the lease that:

"Said cutting is to begin in the wood-cutting season, in the fall of 1921 and 1922, and not later than November 1st, and shall continue during the entire cutting season of each year of said term. Said second party agrees that not less than 40 acres shall be cut during the year of 1921, and not less than 40 acres cut during the year 1922. The party of the second part agrees to pay the parties of the first part 75 cents per cord, 4' x 4' x 8', for all pine and other soft wood so cut, and \$1.50 per like cord for all oak and other hard wood so cut. All cord wood to be measured and paid for before being sold or removed from the premises."

The lease proceeds:

"It is understood that the foregoing provisions relating to the cutting and removal of wood on said east eighty (80) acres of the above-described premises is one of the material considerations for making of this lease, and any default in the performance of the specified terms and conditions by said second party shall, upon notice to them, give the first parties the right to terminate this lease, and to re-enter all of said premises and to remove all parties therefrom, and all considerations paid hereunder may thereupon, at the option of the first parties, be retained by them as settled and liquidated damages, it being hereby expressly agreed that it is impossible to ascertain the actual damage resulting from any breach hereof,

and time is hereby expressly made the essence of this agreement."

It appears that the lessee failed to pay the rent specified in the lease as required by that instrument, and also failed to pay the lessor for wood cut on the premises as likewise required. After some discussion of and negotiations concerning these defaults on the part of the lessee, the parties, on November 19, 1921, entered into an agreement, reduced to writing, whereby the lessee surrendered her lease to the premises to the lessors. On the same date, the lessors executed in writing a release of the surrender of the lease. These documents were deposited in escrow in a bank in the city of Sacramento, with instructions that, if the lessee, on or before December 20, 1921, paid the amount of the rent in which she was then in arrears and stumpage, and performed some other acts not pertinent to this inquiry, the surrender of the lease by her was to be canceled or returned to her, and she to continue in possession of the premises under the lease as originally drafted and executed. The written release of the lessee from the effect of her surrender of lease set forth the instructions so given the bank. The lessee failed to meet the terms and conditions upon which her surrender of the lease was to cease to be of force. It appears, however, that the lessee and her husband (the former having, subsequently to the execution of the lease, intermarried with one Myron E. Sage) continued to hold possession of the premises, and that the plaintiffs (lessors) served or caused to be served upon the former a written notice, dated March 28, 1922, stating that rent in the sum of \$233.44 was long past due, that the lessee had failed to pay for the wood cut by her on the premises, the sum due lessors for such wood being the sum of \$255, and that the lessee in other respects breached the terms and conditions of the lease and demanding that the latter pay the rent due and for the wood cut within 3 days from the date of the service of said notice upon them, or, in default of such payments being so made, that they deliver to the lessors possession of the premises; that, in case the lessee, within the time stated in said notice, failed to comply with the one or the other of the alternatives so specified, the lessors would institute appropriate legal proceedings to oust them of such possession. A few weeks prior to the time of the service of this notice, an attachment, issued in a case brought against the lessee and her husband by one Keefe, in the superior court of Sacramento county, was levied on the wood cut by the lessee under the terms of her lease of the premises, and which lien still subsisted at the time of the service of said notice. It also appears that on the 19th day of March, 1922, the lessee and her husband filed a petition and schedule in bankruptcy in the United States

District Court for the Northern District of California, and on the same day were adjudicated bankrupts; that thereafter, at a meeting of the creditors of the bankrupts, the defendant Prior was appointed trustee of the estates of said bankrupts.

It further appears that the lessee and her husband had given a chattel mortgage on some stock then on the premises in question to two parties by the names of LeRoy and Bell, to secure a certain loan of money by the latter to the former and evidenced by a promissory note. This note, it seems, had fallen due, and proceedings to foreclose the mortgage instituted. LeRoy and Bell, pending the determination of the foreclosure proceedings, placed one Garvey in charge of the mortgaged stock on said premises. On the 18th day of April, 1922, the lessee and her husband packed all their household belongings and departed from the demised premises. On the 20th day of April, 1922, the plaintiffs put said Garvey in charge of said premises. On the 29th day of April, 1922, said Prior, as trustee in bankruptcy of the estate of the lessee and her husband, sold to the defendant R. S. Philpot all of the cut wood on the leased premises, the attachment lien on the wood, above spoken of, having been released. Said Philpot thereupon proceeded to remove said wood from said premises, and had taken therefrom six cords of wood when the plaintiffs brought the present action for an injunction to prevent the defendants, their agents, and assigns from removing any of said wood from said premises, and for judgment for the value of the wood removed therefrom by said Philpot. The complaint, after stating that the plaintiffs are the owners of the demised premises, and also of 177 cords of oak wood and 23 cords of pine wood, located on said premises, alleges as follows:

"That on the 4th day of May, 1922, the above-named defendants forcibly entered upon said premises and forcibly removed some of said wood from said premises; that plaintiffs refused to allow defendants possession of said wood and refused to allow them to remove same, but defendants, over the objection of plaintiffs, continued to remove said wood; that defendants threaten to and will, unless restrained by this court, remove all of said wood from said premises and will deprive plaintiffs of the possession and use of same.

"That the exact amount of said wood is unknown to plaintiffs at this time; that defendants are now removing said wood from said premises and hauling the same to the city of Sacramento, and there disposing of the same; that unless defendants are immediately restrained from so entering upon said premises and hauling said wood, plaintiffs will suffer great and irreparable damages; that such damages will result to plaintiffs before notice of application for an injunction can be served upon defendants.

"That the said pine wood is of the value of \$5 a cord; that the value of said oak wood is \$10 per cord."

An injunction pendente lite was issued upon the averments of the complaint and served upon the defendants.

A demurrer, on both general and special grounds, was interposed by the defendants to the complaint, and the same overruled by the court, whereupon the defendants filed an answer in which they specifically denied all the material allegations of the complaint, and affirmatively alleged that the lessee under the lease in question and her husband were, at all times mentioned in the complaint, owners of 100 cords of wood on said premises; that they petitioned to the United States District Court to be declared and adjudicated bankrupts; that they were so declared and adjudicated; that the creditors appointed defendant Prior trustee of said bankrupts; and that said Prior, as such trustee, on the 29th day of April, 1922, sold to defendant Philpot all said wood, and that the latter "is now the owner of and entitled to the possession of all said wood."

The court found in favor of the plaintiffs, and upon its findings rendered and caused to be entered judgment, making the temporary injunction permanent as prayed for and awarding judgment against Prior and Philpot in favor of plaintiffs for the sum of \$30 as for the value of the six cords of wood which it was found that Prior and Philpot wrongfully removed from the premises, as hereinabove indicated. The defendants have appealed from said judgment and support the appeal by a record prepared according to the requirements of the so-called alternative method.

The points made in support of the appeal are: (1) That the complaint does not state facts sufficient to show that the plaintiffs will or would suffer irreparable injury by reason of the alleged threatened acts of the defendants; (2) that the plaintiffs have an adequate remedy in the ordinary course of law; (3) that the evidence is insufficient to support the findings.

[1] 1. The defendants declare that there is no other statement in the complaint looking to equitable relief by way of injunction than that involved in the averment that the plaintiffs will, unless the defendants are enjoined from removing the wood, suffer "irreparable damages." Of course, such a statement, taken alone, is a mere legal conclusion, and, in the absence of a statement of facts substantiating or supporting it, would not justify a court of equity in extending its aid by way of preventive relief to a suitor for such aid. The complaint, however, goes further than merely stating the legal conclusion referred to. It alleges that the plaintiffs were and are the owners and in possession of a specified quantity of wood, located on land belonging to them, and that the defendants have removed a portion of said wood from said land, and threaten to move all of said wood and dispose of the same. This clearly

presents a case in which a continuing trespass will be suffered by the complainants. We can think of no case in which the interposition of the injunctive power of a court of equity could more appropriately be invoked.

[2] 2. Counsel say, however (this is the point they secondly urge and which is virtually considered above), that the plaintiffs may resort to the action of claim and delivery and so recover the wood as it is from time to time taken from them, and thus they are afforded an adequate remedy at law. The complaint states that the defendants would, unless restrained from so doing, remove the wood and dispose of it, which averment means that they intended to put it on the market and sell it to such persons as might desire to buy it. It is hence obvious that it would be necessary to bring an action in claim and delivery against each of such persons as might purchase a portion of the wood from the defendants. The same would be true as to any action of law which might be brought to obtain, not the specific property, but only the value thereof. The case here clearly comes within the rule as it is announced by Professor Pomeroy, in his work on Equity Jurisprudence, section 1357, as follows:

"If the trespass is continuous in its nature—if repeated acts of wrong are done or threatened—although each of these acts, taken by itself, may not be destructive, and the legal remedy may therefore be adequate for each single act if it stood alone, then also the entire wrong will be prevented or stopped by injunction, on the ground of avoiding a repetition of similar actions. In both cases the ultimate criterion is the inadequacy of the legal remedy."

See, also, *Blevins v. Mullally*, 22 Cal. App. 519, 135 P. 307, citing *Daubenspeck v. Grear*, 18 Cal. 447; *Kellogg v. King*, 114 Cal. 378, 46 P. 166, 55 Am. St. Rep. 74; *Mendelson v. McCabe*, 144 Cal. 233, 77 P. 915, 103 Am. St. Rep. 78; *Danielson v. Sykes*, 157 Cal. 686, 109 P. 87, 28 L. R. A. (N. S.) 1024; *Sailors' Union, etc., v. Hammond L. Co.*, 156 F. 454, 85 C. C. A. 16; *Northern Pac. Ry. Co. v. Cunningham (C. C.)* 103 F. 708.

The defendants cite the following cases as sustaining their view of the complaint: *DeWitt v. Hays*, 2 Cal. 463, 56 Am. Dec. 352; *Gregory v. Hay*, 3 Cal. 332; *Hager v. Shindler*, 29 Cal. 47; *Waldron v. Marsh*, 5 Cal. 119; *Mechanics' Foundry v. Ryall*, 75 Cal. 601, 17 P. 703. None of these cases is in point here, as a perusal of the opinions therein will readily disclose.

[3] 3. The above statement of the facts is sufficient to show that the findings are well supported. As already shown, under the agreement of lease, the lessee was to forfeit her right to the possession of the premises thereunder upon her failure to comply with any of the vital terms thereof, and the lessors were thereupon entitled not only to enter into the possession thereof but, as stated, to retain whatever money that might have been paid by the lessee to them on account of the rent and also all the wood which had been cut, and for which the lessee had not paid plaintiffs at the rates stipulated by the lease. As seen, she was given by plaintiffs ample notice of her several defaults under the lease, and an opportunity after such defaults to comply with her agreement and so proceed according to the terms thereof. She did not avail herself of the privilege thus granted to her, but, to the contrary, not only voluntarily surrendered the lease and all the considerations thereof which had, in part, been performed by her, but later abandoned her possession of the premises and so forfeited all rights she might have claimed under the lease had she complied with the terms and conditions thereof. Under all these circumstances, the right to the possession of the premises and the considerations for the lease which had, in part, been performed by her, at once, or upon the happening of all those acts, reverted to the plaintiffs. The fact, if it was a fact (and it does not directly appear from this record that it was a fact), that the lessee included within her schedule of assets and liabilities in bankruptcy the wood in question did not and could not have the effect of divesting plaintiffs of the right to the possession or the possession of the wood. The lessee, it is quite obvious, had no right to include as among her assets in said schedule the property of others, and if she did do that with respect to the wood in question, the plaintiffs were nevertheless legally authorized to hold such possession until the trustee established, if he could, by a proper proceeding in court (by claim and delivery, for instance), that he was entitled by virtue of his office as such trustee to the possession of the wood by reason of the lessee's ownership thereof at the time she petitioned the federal court to be adjudicated a bankrupt.

In our opinion this appeal is wholly devoid of merit.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

71 Cal. App. 421

PEOPLE ex rel. RYAN v. CITY OF SAN DIEGO. (Civ. 4789.)

(District Court of Appeal, Second District, Division 1, California. Feb. 25, 1925. Hearing Denied by Supreme Court April 23, 1925.)

1. Judgment ⇨702—Judgment against municipality in matter over which state has conferred jurisdiction on municipality is binding on state.

When a judgment against an officer or agency of the state is pleaded as bar in proceeding instituted by state, latter is not bound by such judgment when it involves a purely state matter, but when it relates to matter of municipal concern, jurisdiction over which the state has committed to administration of a municipality, then such municipality represents the state, and judgment is binding and conclusive on state.

2. Judgment ⇨702—State's general interest in enforcement of laws does not constitute it a party in interest in proceeding to enforce such laws.

Though the state in its governmental capacity has a general interest in seeing that proper observance is accorded to all its laws, such general interest does not constitute state a party in interest in every proceeding instituted for purpose of enforcing such laws, or in determining whether they are complied with.

3. Judgment ⇨702—State held bound by judgment against board of trustees directing calling of special election for purpose of consolidation of cities.

The matter of consolidation of the city of East San Diego with city of San Diego, as provided by St. 1913, p. 577, being of municipal interest primarily, and as state has clothed board of trustees of city of East San Diego with authority to represent it in all consolidation proceedings, held that the state is bound by a judgment of court of competent jurisdiction, rendered against such board of trustees, directing it to call a special election pursuant to the consolidation statute, and is estopped from testing validity of such election by proceeding in quo warranto.

4. Judgment ⇨576(1)—Court held to have acquired jurisdiction in mandamus action to compel board of trustees to call election for consolidation of cities.

Where complaint in mandamus action under Code Civ. Proc. § 1085, alleged filing of a sufficient petition with board, requesting a consolidation of cities under St. 1913, p. 577, and its refusal to call election required by law, court acquired jurisdiction to determine whether or not a valid and sufficient petition had been filed, and, if on hearing it sought additional evidence, such error would not affect court's jurisdiction, and its judgment, even if erroneous, when not appealed from, was binding and conclusive upon parties thereto.

5. Mandamus ⇨172—Authority of court to compel calling of election as to consolidation of municipalities implies authority to determine whether necessary preliminary steps have been taken.

The authority with which the superior court is vested under St. 1913, p. 577, relating to

consolidation of municipalities, to compel calling of election by board of trustees, submitting question of consolidation to electors, necessarily implies that court has authority to determine whether all necessary preliminary steps have been taken.

6. Municipal corporations ⇨34—Determination by board of trustees as to sufficiency of petition for consolidation conclusive, in absence of fraud.

The determination by board of trustees as to sufficiency of petition requesting consolidation of cities under St. 1913, p. 577, is final and conclusive, and superior court cannot go beyond or behind action of board, except in case of fraud.

7. Mandamus ⇨74(2)—If petition for consolidation of cities is valid, court's duty to issue writ of mandamus compelling board of trustees to act on petition as provided by law.

If in a mandamus action, under Code Civ. Proc. § 1085, to compel board of trustees to call election as to question of consolidation of cities, under St. 1913, p. 577, it was shown that a valid petition had been filed with board, court would not only have jurisdiction of the matter, but it would be its duty to issue writ, compelling board to act on petition in manner provided by law.

8. Courts ⇨1—"Jurisdiction" does not depend on rightfulness of decision made.

"Jurisdiction" is power to hear and determine, and does not depend on rightfulness of decision made.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jurisdiction (Of Courts).]

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Quo warranto by the People, on the relation of William Edward Ryan, against the City of San Diego. Judgment for defendant, and plaintiff appeals. Affirmed.

U. S. Webb, Atty. Gen., and Sloane & Sloane, F. G. Blood, and Crouch & Sanders, all of San Diego, for appellant.

S. J. Higgins, City Atty., and Arthur F. H. Wright, Deputy City Atty., both of San Diego, for respondent.

CURTIS, J. The facts leading up to the judgment in this proceeding, it is conceded by appellant, are fairly summarized in respondent's opening brief, and as stated therein are as follows:

"On August 3, 1922, there was presented to the board of trustees of the then city of East San Diego a petition purporting to be signed by more than one-fourth of the qualified electors of said city, asking that an election be called upon the question of consolidating the cities of East San Diego and San Diego, which were adjacent. This petition was filed pursuant to the terms and provisions of the Municipal Consolidation Act of 1913 (Stats. 1913, p. 577, Deering's General Laws, Act 2383a). The petition was referred by the board of

trustees to the city clerk of East San Diego, who was directed to investigate the sufficiency of the petition.

"On September 7, 1923, the clerk reported to the board of trustees that the petition 'showed a total of 733 sufficient signatures.' Thereupon the trustees by resolution declared the petition insufficient. Thereafter, during the month of October, 1922, Dora V. Drumhiller and Mattie Benbow, residents, electors, and taxpayers of the city of East San Diego, instituted a proceeding in the superior court of the county of San Diego, wherein the court was asked to issue a peremptory writ of mandate directing the board of trustees of the city of East San Diego to forthwith call a special election for the purpose of submitting to the electors of said city of East San Diego the question of consolidating the city of San Diego with the city of East San Diego, and on the 26th day of March, 1923, a judgment in said action was rendered by the superior court of the county of San Diego in favor of said petitioners, and a peremptory writ of mandamus was issued compelling the board of trustees of the city of East San Diego to call a special election, as petitioned for on the 7th day of September, 1922. In this proceeding the sufficiency of the petition was gone into by the court, and after the presentation of evidence the court determined that the petition had been signed by more than one-fourth of the qualified electors of the city of East San Diego. The court found that, while the trustees had not been guilty of actual fraud, nevertheless they had been guilty of abusing their discretion, in that they had arbitrarily disregarded names which should have been considered, and that this was done without warrant of law.

"Pursuant to this writ of mandamus the board of trustees called the special election which was held in the city of East San Diego on the 26th day of June, 1923, at which election a majority of the voters of East San Diego voted in favor of consolidating with the city of San Diego.

"Thereafter a special election was held in the city of San Diego on the 23d day of October, 1923, at which time the electors of the city of San Diego voted in favor of the question of consolidation, and on the 29th day of December, 1923, a certificate of said election and a record of the proceedings was filed with the secretary of state, and thereupon the city of San Diego proceeded to take over, assume, and exercise municipal jurisdiction over the territory formerly comprising the city of East San Diego.

"Thereafter, on the relation of one William Edward Ryan, the Attorney General of the state of California instituted this present proceeding of quo warranto to test the validity of the election held in East San Diego and to inquire into the authority of the city of San Diego to exercise municipal jurisdiction over the territory formerly comprising the city of East San Diego.

"In the court below the city of San Diego in defense of its jurisdiction presented two contentions: First, that the state of California, either on its own initiative or upon the relation of some taxpayer, was estopped to inquire into the validity of the election upon the grounds set forth in the complaint in quo warranto of the Attorney General, namely, the insufficiency of the petition, for the reason that the question of the sufficiency or insufficiency of the peti-

tion had been determined by a court of competent jurisdiction of the state of California, and that the question had become *res adjudicata*. Second, that the complaint in quo warranto did not state a cause of action in quo warranto. The court below held that the people of the state of California were bound by the former judgment, and thereupon rendered judgment in favor of the city of San Diego, from which judgment the relator now appeals."

In behalf of the appeal appellant contends: First, that the former judgment, if valid, was not an estoppel against the people of the state of California to maintain an action in quo warranto for the reason that the people were not parties to nor represented in said action; and, second, that the superior court of San Diego county was without jurisdiction in the mandamus proceeding, relied upon by the defendant as an estoppel in this action, to review the action of the board of trustees of the city of East San Diego in finding the petition for the consolidation proceedings insufficient for want of the required number of qualified signers.

In support of the action of the trial court in holding that the people of the state of California were estopped by the judgment in the mandamus action instituted by Dora Drumhiller and Mattie Benbow against the board of trustees of the city of East San Diego, respondent relies in the main upon the case of *People v. Holladay*, 93 Cal. 241, 29 P. 54, 27 Am. St. Rep. 186, and other rulings of our Supreme Court following *People v. Holladay*. The *Holladay* Case was instituted by the Attorney General in the name of the people of the state upon the relation of one Bryant to determine the right of S. W. Holladay, the defendant in said action, to maintain certain buildings and fences upon a tract of land situated in the city and county of San Francisco, and claimed by the plaintiff in said action to have been dedicated to the public as a public square, and known as Lafayette Park. The defendant Holladay in his answer denied that the land in question had ever been dedicated to the public as a public square, and further alleged that prior to the beginning of said action by the people of the state of California he had instituted an action against the city and county of San Francisco to quiet his title to said tract of land, and that judgment had been rendered in said prior action, quieting his title to an undivided nineteen-twentieths of said land as against said city and county, and pleaded said judgment as a bar to the later action instituted in the name of the people of the state of California. On appeal the Supreme Court, in the course of the opinion rendered therein, on page 247 (29 P. 56) thereof asks the following questions:

"The pleadings in that case [*San Francisco v. Holladay*], being sufficient to put in issue the question of dedication involved herein, what is the effect of such judgment upon the rights of

the present plaintiff? Are the people of the state thereby estopped from asserting that the defendant in that action, the city and county of San Francisco, did hold and now holds the legal title to the land in controversy in trust for the use of the people of the state as a public square?"

These questions are answered by the court in the following manner on page 249 of said opinion:

"We entertain no doubt that the city and county of San Francisco has the authority to maintain an action for the purpose of preserving the rights of the general public to the use of squares, or land claimed as such, within its limits, and that in such action it is authorized to put in issue the alleged rights of the people to such easement, and that the state itself is bound by the result of such litigation, if the same is not collusive. And we see no reason why these same rights might not also be tried and determined in an appropriate action in which the municipality might be a defendant—as, for instance, ejectment, where it had ousted the claimant from the possession; or by injunction, where it threatened to remove his buildings or trees or a portion of the soil from the land claimed by it as a public square—and the public would be bound by the final judgment therein if the action was conducted in good faith on the part of the city. The rule that the citizen shall not be twice vexed for the same cause of action is as binding upon the state as upon other litigants; and the Legislature, in conferring upon the city power to maintain and defend in the courts the rights of the state to streets and squares within its limits, must be presumed to have done so with reference to this well-known maxim, and to have intended that the state should be bound by the result of such litigation."

The case of *People v. Holladay*, supra, has been cited with approval in a number of later cases by the courts of this state.

People v. Smith, 93 Cal. 490, 29 P. 57, 247, was an action instituted by the people of the state of California upon the relation of one Chandler to remove certain obstructions upon land claimed to be a public street of the city of San Francisco. The trial court rendered judgment in favor of plaintiff, but on appeal the Supreme Court reversed the judgment on the ground that a judgment rendered in a prior action in favor of Smith, the defendant, against the city and county of San Francisco, was a bar to said action instituted in the name of the people. The Supreme Court in this case said as follows:

"At the trial, among other matters, the defendant introduced in evidence the judgment roll in the action of *A. B. Smith v. the City and County of San Francisco*. * * * As one of its findings of fact, the court found that the allegations of the defendant's answer, as to the matters therein set forth with reference to the action brought by Smith (the defendant here) against the city and county of San Francisco, were true, but held that the people of the state were not a party to said action, and that consequently the judgment therein ren-

dered was no bar to this action, and thereupon ordered judgment for plaintiff. This identical question was involved in the recent case of *People v. Holladay*, ante, p. 241, and there decided contrary to the views held by the trial court in this case. The judgment being a complete bar to the cause of action, it becomes unnecessary to examine other assignments relied upon. Upon the authority of *People v. Holladay*, * * * the judgment and order are reversed."

In *Strand Improvement Co. v. Long Beach*, 173 Cal. 765, 161 P. 975, the court, in discussing the effect of a judgment rendered against the city of Long Beach, uses the following pertinent language:

"The judgment is a determination, conclusive upon the city and the public, that the land in question is free from public use. * * * It bars both the city and the state," citing *People v. Holladay*, supra, and other cases.

In the late case of *Guaranty Trust & Savings Bank v. City of Los Angeles*, 186 Cal. 110, 118, 199 P. 35, 39, upon the authority of *People v. Holladay*, supra, the court states the law upon this question as follows:

"Such a judgment declaring that property held by a city for public use is the property of a private individual is, after it has become final, conclusive upon the city and the public."

Two other late cases from our Supreme Court, although not decided directly upon the authority of *People v. Holladay*, are pertinent to the question before us, and they may aid in its solution. The first of these cases is *Bernhard v. Wall*, 184 Cal. 612, 623, 194 P. 1040. In this action the validity of certain patents to state school lands was involved. It became necessary for the court in this action to pass upon the effect of a judgment rendered in a former action against the surveyor general of the state, commanding him to receive and file an application to purchase said lands. In deciding this case the Supreme Court said:

"Unquestionably that judgment was a final adjudication of the right of *Bernhard* binding on the surveyor general in his official capacity. He is the state official in charge of all matters pertaining to the disposal of the public lands of the state. * * * In any proceeding against him to compel him to perform an official duty in disposing of the public land, he represents the state and the judgment rendered in such proceeding is in all respects binding and conclusive against the state to the same extent that it binds the officer in his official conduct with respect to the matter decided. Such a judgment bars the state from afterwards setting up to the contrary of what is there adjudicated."

In *Reynolds v. Churchill Co.*, 187 Cal. 543, 546, 202 P. 865, 866, the court said in deciding a similar question:

"We have reached the conclusion that the mandamus proceedings are conclusive of the rights of the respondent to purchase the land under its certificates of purchase. In the man-

damus proceedings the surveyor general of the state of California represented the state, and the judgment in the case as to the validity of the defendant's certificate of purchase is binding upon the state."

As against these authorities appellant has cited the following cases from the courts of our own state: *People v. Rodgers*, 118 Cal. 393, 46 P. 740, 50 P. 668; *People v. Bass*, 15 Cal. App. 62, 113 P. 655; *People v. Linda Vista Irrigation District*, 128 Cal. 477, 61 P. 86; *People v. Beaudry*, 91 Cal. 213, 27 P. 610; and also the following cases from other jurisdictions: *Peck v. State*, 137 N. Y. 372, 33 N. E. 317, 33 Am. St. Rep. 738; *State v. Stock*, 38 Kan. 154, 16 P. 106; *State v. Burton*, 47 Kan. 44, 27 P. 141. We will briefly refer to these cases. *People v. Rodgers*, supra, was an action instituted in the name of the people of the state of California by the Attorney General upon the relation of one Warren T. Drew for the purpose of ousting the defendant Rodgers from the office of the chief of police of the city of Sacramento. The court admitted in evidence the judgment roll in the case of *Drew v. Rodgers*, the latter case having been instituted by an elector of said city, named Drew (although of the same name, he was not the relator in the action of *People v. Rodgers*) to contest the election of Rodgers for the same office as that involved in the proceeding of *People v. Rodgers*. The Supreme Court held that this was error, as "the judgment was not between the parties to the present action, nor was it between the relator and the defendant."

People v. Bass, supra, was an action in quo warranto brought by the Attorney General, claiming that the defendant Bass had usurped and was unlawfully holding the office of supervisor of the county of Lassen. Bass filed an answer alleging that Leavitt, the relator, had, after a trial of an action entitled *Bass v. Leavitt* (instituted under section 1124, Code Civ. Proc., providing for the contesting of an election where the result was a tie vote), consented to the holding of a special election, and at said election became a candidate for said office, and claiming that by said acts and conduct "Leavitt had abandoned his contest then pending in the superior court, and was estopped from resorting to this or any other proceeding to gain possession of said office." The court, upon this state of facts, held, that the action then pending "is by the people who are entirely different parties from those who were parties to the contest, and who cannot be estopped by the conduct or acts of Leavitt, either in the original contest or subsequent thereto. He could not, by consenting to the special election, estop the people from disputing the declared result or from inquiring into the validity of the certificate given to Bass." We fail to find anything in either

People v. Beaudry, supra, or *People v. Linda Vista Irrigation District*, supra, which is of any great service in the decision of the question now under consideration. In our opinion, if these cases can be considered as authorities in the present action, they are favorable to respondent's rather than appellant's contention. In fact, if we understand appellant's position correctly, the most that can be claimed for any of the authorities above referred to, from the courts of our own state, is that the principle contended for by appellant is recognized by the court in these cases.

Turning now to the authorities from other jurisdictions, cited by appellant, we will first consider the case of *State v. Stock*, supra, decided by the Supreme Court of the state of Kansas. In this case the question involved was the legality of an election called for the purpose of locating the county seat of Rush county. It was instituted in the name of the state, upon the relation of the Attorney General, against the county officers of said county, to compel them to remove their several offices from the town of La Crosse to Walnut City. As a defense to said action the defendants pleaded a judgment previously rendered in an action instituted by the state of Kansas upon the relation of an elector and taxpayer of said county, named Hammond, against F. E. Garner, county clerk of said county, for the purpose of compelling said county clerk to remove his office from Walnut City to the town of La Crosse. It was claimed in said action that the county seat of said county had been located at the town of La Crosse, and by said judgment it was decreed that the town of La Crosse was the legal county seat of said county, and said county clerk was directed to remove his office thereto, and thereafter to keep the same at said town of La Crosse. The Supreme Court of the state of Kansas held that the judgment rendered against the county clerk of the action brought against him in the name of the state of Kansas upon the relation of said Hammond was not a bar to the subsequent action brought by the state of Kansas upon the relation of the Attorney General against the county officers of said county. The real point considered and decided in that case was whether, in an action brought by the state upon the relation of the Attorney General, the state was concluded by a judgment rendered in an action instituted by the state upon the relation of a private person. The Supreme Court held that the prior action, instituted in the name of the state by a private person under the statute of the state of Kansas, permitting such an action to be brought by any elector who considered himself aggrieved by the result of any election held for the purpose of relocating the county seat, was a proceeding begun by a private person, and that

the state was not concluded nor bound by the judgment rendered therein. No such question is involved in the present action. In the Kansas case, the question whether or not the county clerk represented the state, so that a judgment against him was binding upon the state, was neither discussed nor decided.

In the case of *State v. Burton*, supra, also decided by the Supreme Court of the state of Kansas, precisely the same point was before the court and decided by it upon the authority of *State v. Stock*, supra.

In *Peck v. State*, supra, the New York Court of Appeals held that the state was not bound nor estopped by a judgment rendered against the board of managers of the Buffalo state asylum. The action was brought to recover upon a claim for materials furnished in the construction of the asylum. A contract had been entered into between plaintiffs and the said board of managers, whereby plaintiffs agreed, for a stated consideration, to furnish said materials. A dispute arose between plaintiffs and said board of managers as to the amount due plaintiffs. As a result of said dispute, plaintiffs instituted an action and obtained a judgment in mandamus against the board of managers, requiring them to issue a certificate in favor of plaintiffs showing the amount due plaintiffs. Plaintiffs thereafter brought suit against the state to enforce their claim, and rested their claim upon the judgment rendered against the board of managers and the certificate of said board issued in compliance with the requirements of said judgment, and introduced no further evidence in proof of their claim. On appeal, a judgment in plaintiffs' favor was reversed, the court stating the law to be as follows:

"A state cannot be sued in its own courts, except by its consent; and this rule is founded upon public policy of great importance, and it would be greatly impaired, and could be largely nullified, if the state could be bound by judgments rendered against its agents or officers. Such judgments may bind the officers, and compel them to discharge their duties, and thus frequently they enable claimants to obtain payments of their claims against the state and other rights to which they are entitled by law. But the adjudication in such actions never estops the state on the principle of *res adjudicata*"—citing authorities.

Appellant insists that the rule enunciated by the New York court is applicable in the present case, and should be followed to the exclusion of the decisions rendered by the Supreme Court of our own state. If there is any conflict between the decisions of the courts of other states and those from our own, it is of course the duty of this court to accept and follow the rulings of our own Supreme Court. We doubt, however, whether any such conflict exists. In the case of *Peck v. State*, supra, the controversy grew

out of a purely and strictly state matter. The claim of the plaintiffs in that action represented a demand against the treasury of the state of New York. While it was based upon a contract, which the board of managers of the Buffalo state asylum had authority to make on behalf of the state, yet its payment, if finally adjudged by the court, rested with the state of New York, and must be made with state funds. It was therefore an action in the outcome of which the state was primarily and vitally interested, and in this respect it materially differs from the case of *People v. Holladay*, supra. In the *Holladay* Case the court held that the state had conferred upon the city of San Francisco jurisdiction over the public squares within its territorial limits, and that the ownership of such squares was a matter principally of municipal concern, and therefore that a judgment against said municipality as to the ownership of any particular piece of land claimed to be a public square was binding upon the state and the public. The other cases from our Supreme Court, and to which we have already alluded, were decided upon practically the same principle. In each of these cases the state had conferred upon the municipality, or officer, jurisdiction over the subject-matter of the controversy, and for that reason our courts have held that in any litigation involving such subject-matter the municipality, or officer, represented the state, and that the latter is bound by any judgment rendered against its representative. In our opinion, therefore, there is no conflict between the decision of *Peck v. State*, supra, and the rulings of the courts of our state.

[1-3] The rule to be drawn from these decisions would therefore appear to be that, when the judgment against an officer or agency of the state is pleaded as a bar in a proceeding instituted by the state, the state is not bound by said judgment when the same involves a purely state matter, but, when the judgment relates to a matter of municipal concern, and to a matter, jurisdiction over which the state has committed to the administration of a municipality or officer, then such municipality or officer represents the state in said action, and said judgment is binding and conclusive upon the state. In applying this rule to the facts in the present controversy, it becomes necessary to determine the nature of the subject-matter involved in the mandamus action. Was it a matter in which the state was chiefly concerned, and did the judgment in said action affect the state primarily and directly, or was it a proceeding in which the city of East San Diego was principally concerned, and will the result of said action more directly affect said city and its inhabitants? We think it quite evident that the controversy involved in said action was of but sec-

ondary concern to the state as a whole. The decision of the question involved therein, one way or the other, was of but little importance to the state at large. It is true that the state in its governmental capacity has a general interest in seeing that a proper observance is accorded to all of its laws by the people of the state, and particularly by its officers and such agencies as it has constituted for the better administration of such laws, but this general interest does not constitute the state a party in interest in every proceeding instituted for the purpose of enforcing said laws or of determining whether they are in all instances complied with. On the other hand, the only parties vitally and directly interested in the question of whether or not the cities of San Diego and East San Diego shall be consolidated, are these two municipalities and their inhabitants. If there are any benefits to accrue from such consolidation, such benefits will be reaped solely by the people of these two communities. At the same time, if there are any burdens growing out of such union, such burdens will fall to the lot of the people of the enlarged municipality of the city of San Diego. Neither the state at large nor any of its inhabitants, outside of those residing, or owning property, in said city, will be affected by the result of the proceedings to unite these two cities. The question is therefore, in our opinion, one of local concern rather than one of state interest. We think that the state has recognized this fact in the nature of the provisions adopted by it governing the consolidation of municipalities. The provisions made by the state of California upon this subject are those found in the act under which the proceedings here in question were instituted (an act to provide for the consolidation of municipal corporations, Stats. 1913, p. 577; Deering's General Laws [1923 Ed.] Act 5166, p. 1939). In this act it is provided that whenever a petition signed by one-fourth of the qualified electors of a city is presented to the legislative body thereof asking that such municipal corporation and any other municipal corporation contiguous thereto, designated in such petition and having a greater population, be consolidated, said legislative body shall call an election therein and submit to the electors thereof the question of consolidation. The act further provides that said legislative body shall cause notice of the holding of such election to be given to the electors of said city. Said legislative body shall establish voting precincts in said city to be used in said election and appoint election officers to conduct said election. It shall canvass the returns of said election and declare the result thereof, and cause a record thereof to be made in its minutes. If the result of said election is in favor of consolidation, the clerk of said legislative body shall make a duplicate copy

of the record of said canvass and deliver the same to the clerk of the municipal corporation with which consolidation is sought. It then becomes the duty of the last-named municipal corporation to call and hold an election and submit to its electors the question of consolidation. It will thus be seen that by this statute a complete plan or scheme has been provided by the Legislature of the state for the consolidation of municipal corporations, in which the legislative bodies of the cities sought to be consolidated are clothed with all the authority necessary to carry into effect said plan or scheme. In the exercise of this authority, the legislative body of the city in which said proceedings have their inception is the agent of the state, and represents the state in every stage of the proceedings, from the time the original petition is filed with it until the final record of the canvass is made in its minutes. In the class of municipal corporations to which the city of East San Diego belonged, this legislative body is the board of trustees of said city. Our conclusion, therefore, upon this branch of the case is that, as the matter involved herein is of municipal interest primarily, and not of general state concern, and as the state has clothed the board of trustees of the city of East San Diego with authority to represent it in all consolidation proceedings, it is bound by the acts of its agent in such proceedings, and by any judgment of a court of competent jurisdiction rendered against said board of trustees directing it to perform the duties enjoined upon it by the statute providing for said proceedings.

[4, 5] The second point made by appellant is that the superior court of the county of San Diego was without jurisdiction in the mandamus proceeding to review the action of the trustees of the city of East San Diego in its determination that the petition for consolidation was insufficient for the want of the required number of qualified signers. The mandamus proceeding was directed against the board of trustees requiring them to call an election on the ground that a valid petition had been filed with said board, asking for the consolidation of the two municipalities. Upon the filing of such a petition the statute governing consolidation of cities, heretofore referred to, provides that said legislative body shall without delay call a special election and submit the question of consolidation to the electors of said city. Upon the failure of said legislative body to call said election, the superior court, upon complaint of any person aggrieved thereby, is authorized to compel said board to act upon said petition as required by law. This authority is conferred upon the court by section 1085 of the Code of Civil Procedure providing for the issuance of the writ of mandamus. Said section provides that such a writ may be issued by the court to any board

to compel the performance of an act which the law specially enjoins. As we have seen, the law specially enjoins upon the board of trustees the calling of the election when a valid petition has been filed. The authority with which the court is vested to compel the calling of the election by the board necessarily implies that the court has authority to determine whether all the necessary preliminary steps have been taken which would make it obligatory upon the board to issue the call for the election. In this case these necessary steps include a valid petition to be filed with the board of trustees. For the purpose of this decision we may concede that a valid petition, according to the terms of the statute and the rulings of our courts upon these and similar statutes, is a petition that has been found sufficient by the board of trustees. *People v. Town of Loyalton*, 147 Cal. 774, 82 P. 620; *People v. Los Angeles*, 133 Cal. 338, 65 P. 749; *People v. Town of Ontario*, 148 Cal. 625, 84 P. 205.

[6, 7] The determination by the board as to the sufficiency of the petition was final and conclusive, and the court could not go beyond or behind the action of the board, except in case of fraud, and no charge of fraud was made against the trustees of said city of East San Diego. But the court, in order to determine whether it shall issue its writ of mandamus, must first ascertain whether there has ever been filed with the board of trustees a valid petition as provided by the statute and as defined by the above decisions from our Supreme Court. Unquestionably, if in such an action it be shown that a petition, valid in the sense we are here considering it, had been filed with the board of trustees, then not only would the court have jurisdiction of the matter, but it would be its duty to issue its writ compelling said board to act upon said petition in the manner provided by law. If the court is vested with jurisdiction to determine the fact that a valid petition has been filed, does it lose jurisdiction of the action upon proof of the fact that no valid petition has been filed? "Jurisdiction is the power to hear and determine." 7 Cal. Jur. 584; *Bennett v. Wilson*, 133 Cal. 379, 385, 65 P. 880, 85 Am. St. Rep. 207; *Crew v. Pratt*, 119 Cal. 139, 148, 51 P. 38. As was said by the court in *Baines v. Zemansky*, 176 Cal. 369, 373, 168 P. 565, 567:

"Under well-established principles of law it cannot be denied that if the Superior Court has jurisdiction, upon any possible state of facts, to prohibit or enjoin the registrar of voters from proceeding with such recall petitions in the manner prescribed in the charter, the sufficiency of the petition or complaint upon which that court acts, so far as the facts stated therein are concerned, cannot be inquired into by this court in this collateral proceeding, but that, on the contrary, its writs and orders must be

upheld so far as this case is concerned, and can only be questioned when presented by way of appeal after the final judgment of said court in the cause."

[8] We have already seen that there was a "possible state of facts" upon which an action against the board of trustees of the city of East San Diego, to compel said board to call an election, might have been based. This state of facts consisted of the filing of a sufficient petition with said board, and its refusal to call an election as required by law. These facts were alleged in the complaint in the mandamus action, and by virtue thereof the court acquired jurisdiction to hear and determine the cause of action as alleged. The court in such an action would have power to pass upon the question and determine whether or not a valid and sufficient petition had been filed and to render its judgment either that the writ issue or be denied, according to the facts of the case. We do not mean by this that the court could determine the sufficiency of the petition, except by accepting the determination already reached by the board of trustees. As we have already seen, the determination by the board of trustees, as to the sufficiency of the petition, was final, and the court must abide by such determination. If, however, the court, upon the hearing of said action, acted otherwise, and sought other and additional evidence upon this subject, this might be error on the part of the court, but it would not be such error as would affect its jurisdiction. Having acquired jurisdiction to hear and determine the cause, it has power to decide the cause incorrectly as well as correctly. *Dahlgren v. Superior Court*, 8 Cal. App. 622, 97 P. 681. "Jurisdiction is the power to hear and determine, and does not depend upon the rightfulness of the decision made." *Sherer v. Superior Court*, 96 Cal. 653, 31 P. 565. As was said in the case of *People v. Holladay*, supra:

"The judgment in *Holladay v. City and County of San Francisco*, and which we hold to be equally binding upon the state as upon the city of San Francisco, was undoubtedly erroneous under the law as declared by this court, subsequently, in the cases of *Sawyer v. San Francisco*, 50 Cal. 370, and *Hoadley v. San Francisco*, 70 Cal. 324, but its force as an adjudication of the rights of the parties thereto, and those in privity with them, is not affected thereby. *Carr v. Beauregard*, 101 U. S. 688."

The court also in the case of *Baines v. Zemansky*, supra, on page 373 (168 P. 567) states the rule to be:

"If that court has jurisdiction, it may decide the wrong as well as the right in the matter, and its decision is binding on all other persons, officers, and courts, save upon an appeal to the court having appellate jurisdiction of the cause."

The superior court of the county of San Diego, having jurisdiction to hear and de-

termine said mandamus proceeding, its judgment therein, even if erroneous, when not appealed from, was binding and conclusive upon the parties thereto in the same respect as it would have been had said judgment been free from error.

The Attorney General relies with much assurance upon the cases of *Baines v. Zemansky*, supra, and *Watts v. Superior Court*, 36 Cal. App. 692, 173 P. 183, as well as on the other authorities cited in his brief in support of his second contention. We will only refer, and that briefly, to the two cases of *Baines v. Zemansky* and *Watts v. Superior Court*. The court in these two cases had under consideration proceedings which were in many respects similar to the mandamus action involved in the present case, and in each of these cases the court held that the superior court was without jurisdiction in the particular proceeding before it, but the proceeding involved in each of those cases is distinguishable from the one now before us in a very material and essential particular. Each of these proceedings was a direct attempt to have the court substitute its action for that of the officer in a matter in which the determination of the officer was final and conclusive. In other words, it was a direct attack upon the determination of the officer, whose action the statute made final and conclusive, and over whose action the court could have no jurisdiction under any possible state of facts. The action in mandamus, involved in the present proceeding, was directed against the board of trustees of the city of East San Diego, not to review the action of the board in reference to the petition filed with them, but was a proceeding directed against the members of said board to compel them to perform a duty enjoined upon them by law, to wit, the calling of an election, and was based upon a statement of facts which, if true, entitled the plaintiff therein to the relief prayed for. These authorities cannot be considered as controlling the action of the court in the present action, as they were decided upon a state of facts differing materially from those before us.

Judgment affirmed.

We concur: CONREY, P. J.; HOUSER, J.

heirs cannot be maintained, and all heirs must join as plaintiffs, and heirs refusing so to join may be made defendants.

3. Death ⚡101 — Distribution of damages based on pecuniary loss to each heir.

While recovery in action by heirs for wrongful death is lump sum for all heirs, aggregating pecuniary loss of each heir who has suffered pecuniary loss by reason of death, yet distribution of damages recovered among heirs must be on basis of pecuniary loss to each.

4. Death ⚡101—Complaint by omitted illegitimate child for share in judgment for mother's death held not to state cause of action.

Complaint alleging that plaintiff was illegitimate child of deceased wife of defendant, that defendant recovered judgment for wrongful death of plaintiff's mother in action in which defendant had not joined plaintiff as party, and praying that plaintiff be declared part owner of judgment recovered for mother's wrongful death, without alleging that plaintiff attempted to intervene in death action, or that defendant acted fraudulently in excluding plaintiff as party, or that defendant knew of plaintiff's existence, does not state cause of action.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Edwardine Curtis Roach, a minor, by William Roach, her guardian ad litem, against L. Montague Drew. Judgment for defendant on demurrer to complaint, and plaintiff appeals. Affirmed.

D. E. Perkins, of Visalia, for appellant.

Arthur H. Drew, of Fresno, for respondent.

FINCH, P. J. The defendant's demurrer to the complaint herein was sustained, and judgment was entered in his favor. This appeal is from the judgment.

The complaint alleges that the plaintiff is the illegitimate child of the deceased wife of defendant and "was born at the county of Los Angeles, state of California, on or about May 29, 1917"; that her mother "intermarried with defendant" on the 10th of January, 1921, and was thereafter his wife until her death; that on the 9th of December, 1922, plaintiff's mother was killed in an automobile accident, due to the negligence of the driver of the machine in which she was riding; that on the 4th of September, 1923, the defendant recovered judgment for damages for the wrongful death of plaintiff's mother, which judgment is in full force and effect and unpaid; that in the action in which the judgment was given the defendant herein did not make plaintiff a party, "and did not disclose the existence of plaintiff, and thereby did debar and prevent this plaintiff from commencing any action * * * for damages caused by the death of her mother"; that the defendant "refuses to account to this plaintiff for any part or por-

72 Cal. App. 45

ROACH v. DREW. (Civ. 2877.)

(District Court of Appeal, Third District, California. March 26, 1925.)

1. Death ⚡41—Action must be brought in names of persons to whom right of action is given.

Action for death must be brought in names of persons to whom right of action is given by Code Civ. Proc. § 377, giving heirs or personal representatives of persons negligently killed right of action for death.

2. Death ⚡42—All heirs must join as plaintiffs.

Under Code Civ. Proc. § 377, providing that heirs of persons negligently killed may maintain action for wrongful death, action by portion of

tion of the judgment * * * and refuses to admit that plaintiff is entitled to the benefit of said judgment or of any part thereof, but, on the contrary, claims the whole of said judgment and of all the rights and benefits thereof for his own use and benefit"; that the plaintiff has suffered damages by reason of her mother's death in a sum at least four times as great as that suffered by defendant; and that plaintiff and defendant are the only heirs of plaintiff's mother. The prayer is that plaintiff be adjudged to be the owner of and entitled to four-fifths of the amount recovered by defendant, less certain special damages, and that he be held as trustee thereof and required to pay to plaintiff four-fifths of any moneys which he may receive under the judgment, after deducting the amount of such special damages. It is not alleged that plaintiff attempted to intervene in the defendant's action for damages, or was in any manner prevented from becoming a party plaintiff therein. There is no allegation that defendant acted fraudulently in failing to make plaintiff a party to the action for damages or to disclose therein the existence of plaintiff as an heir of her mother. Neither is it alleged that defendant ever knew of plaintiff's existence. It cannot be inferred from the facts alleged that the defendant knew that his wife was the mother of an illegitimate child. Certainly no inference or presumption arises to that effect from the mere fact of the marriage. It would not be unnatural, under circumstances such as here disclosed, for a woman to conceal from her husband knowledge of the fact that she was the mother of an illegitimate child which had been born out of wedlock several years prior to their marriage.

[1-3] Section 377 of the Code of Civil Procedure provides that the "heirs or personal representatives" of a person whose death has been caused by the wrongful act or neglect of another "may maintain an action for damages against the person causing the death."

"So far as the heirs are concerned, a single joint cause of action is given. The language of our statute permits no other construction. The right of action in such a case being entirely statutory, the action must be brought in the names of the persons to whom the right is given by the statute. * * * The cases from other states holding that the action may be maintained by one or more beneficiaries without joining all, are based upon statutes construed as giving the right of action to one or more for the benefit of all, just as our own statute gives the right to the personal representatives of the

deceased for the benefit of all of the heirs. * * * An action by a portion only of the heirs is not the action authorized by our statute. All the heirs should therefore join as plaintiffs in an action by heirs, and, if the consent of any one who should be so joined cannot be obtained, he may be made a defendant." *Salmon v. Rathjens*, 152 Cal. 290, 294, 92 P. 733, 735; *Robinson v. Western States Gas, etc., Co.*, 184 Cal. 401, 410, 194 P. 39, 43.

"While there can be but one action brought or one recovery had either by the personal representative of the deceased or the heirs, * * * and while the recovery in such an action should be of a single 'lump sum' for all, * * * the total recovery to be had is the aggregate of the pecuniary loss of each of the heirs who has suffered a pecuniary loss by reason of the death of the deceased. * * * It is obvious that the distribution among 'heirs' of damages recovered by the statutory trustee must be upon the basis of the pecuniary loss of each." (*Estate of Ricconi et al.*, 185 Cal. 458, 462, 197 P. 97, 98 [14 A. L. R. 509]).

In appellant's opening brief it is said: "For the purposes of this appeal plaintiff admits that the only damages alleged in the complaint (in defendant's action for damages) were for medical and burial expenses and for the loss by said L. Montague Drew of the services, society, comfort and care" of the deceased. Since the damages recovered were those only which the defendant herein suffered, and did not include those sustained by plaintiff herein, it is not perceived upon what principle of law the defendant can be deprived of any part of the amount recovered, in the absence of a showing of wrongful conduct on his part. If the defendant knew of the existence of plaintiff during the prosecution of his action for damages, he might be subject to an action for fraud in omitting her as an heir in his suit. *Daubert v. Western Meat Co.*, 139 Cal. 480, 486, 69 P. 297, 73 P. 244, 96 Am. St. Rep. 154. In *Parmley v. Pleasant Valley Coal Co.* (Utah) 228 P. 557, 562, it is said:

"If * * * any number less than the whole number of heirs bring the action and willfully conceal the fact that there are other heirs, then those who recover damages are liable to the excluded heirs for their proportionate share of the estate, and may be liable for such further damages as the latter may have sustained."

[4] The demurrer was properly sustained on the ground that the complaint does not state a cause of action.

The judgment is affirmed.

We concur: PLUMMER, J.; JONES, Justice pro tem.

72 Cal. App. 18

LIEBERMAN et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR ORANGE COUNTY et al. (Civ. 4944.)

(District Court of Appeal, Second District, Division 2, California. March 26, 1925.)

1. Prohibition ⚡3(5)—Remedy by appeal from order appointing receiver held inadequate as affecting right to writ.

Remedy by appeal from order appointing receiver held inadequate as affecting right to writ of prohibition where the question involved was not merely whether the receiver appointed by the alleged void order should take or retain possession of the property, but in addition whether another receiver, appointed by another court, should have that possession in his stead.

2. Receivers ⚡35(3)—Order appointing person receiver, if void as to one petitioner for writ of prohibition, was void also as to other petitioners not parties to suit in which appointment was made.

On application for prohibition to restrain proceedings to punish petitioners for interference with possession of receiver, when only one petitioner was party to suit in which receiver was appointed, and others acted as her agents or under order of another court appointing another receiver, if the order appointing the first receiver was void as to her for non-compliance with mandatory requirements of Code Civ. Proc. § 566, for want of notice and failure to give undertaking, it was void as to all petitioners.

3. Judgment ⚡497(1)—Generally validity of judgment of court of superior jurisdiction not subject to collateral attack, unless lack of jurisdiction appears on face of record.

Generally the validity of an order or judgment of a court of superior jurisdiction is not subject to collateral attack, unless lack of jurisdiction appears on face of record.

4. Judgment ⚡495(1)—When record shows what was done to acquire jurisdiction, it will not be presumed something additional or different was done.

To the general rule that a court of superior jurisdiction will be conclusively presumed, upon collateral attack, to have had jurisdiction to make an order or render a judgment unless the want of jurisdiction appears upon the record, there is an exception; that is, where the record purports to show what was done for the purpose of acquiring jurisdiction, it will not be presumed in aid of the court's action that anything different or additional was done.

5. Judgment ⚡495(1)—Petition held insufficient as basis for application of rule that, when record shows what was done, no presumption indulged that something different was done.

Petition held insufficient as basis for the application of the rule that, when the record purports to show what was done for the purpose of acquiring jurisdiction—that is, for instance, shows what service was had as a basis for the order made or judgment rendered—

it will not be presumed in aid of court's action that anything additional or different was done.

6. Judgment ⚡480—Motions ⚡61—Rule against collateral impeachment of judgments applies generally to all varieties of judgments, decrees, or orders.

Rule against collateral impeachment of judgments applies generally to all varieties of judgments, decrees, or orders made by courts of competent jurisdiction in all kinds of judicial proceedings.

7. Judgment ⚡521—Writ of prohibition constitutes direct attack only when operation of order or judgment assailed is sought to be prevented by writ.

Writ of prohibition constitutes direct attack only when operation of order or judgment assailed is sought to be prevented by the writ.

8. Receivers ⚡59—Attack on order appointing receiver held not "direct attack," but collateral impeachment of order; "collateral attack."

Writ of prohibition to prohibit a threatened punishment of petitioners for contempt, for interfering with receiver's possession of property, was not direct attack on the order appointing the receiver, but merely a collateral impeachment of it, a direct attack on a judicial proceeding being an attempt to avoid or correct it in some manner provided by law; any proceeding provided by law for the purpose of avoiding or correcting a judgment being a "direct attack," while an attempt to do the same thing in any other proceeding is a "collateral attack," which will be successful only upon showing a want of power; an assault upon an order or judgment by means of a writ of review is a direct attack.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Collateral Attack; Direct Attack.]

9. Mines and minerals ⚡104—Directors of oil corporation held to sustain trust relation to beneficial owners of aliquot shares of output of oil well owned by corporation.

Directors of oil corporation held to sustain trust relation to beneficial owners, by virtue of contracts with corporation, of aliquot shares of output of oil well owned by corporation.

10. Corporations ⚡553(8)—Violation by directors of oil corporation of corporate agreement with primary beneficiaries of oil output of well held to justify order appointing receiver.

Violation by directors of oil corporation of corporate agreement with primary beneficiaries of oil output of well, owned by corporation, held to justify order appointing receiver.

11. Corporations ⚡553(8)—Complaint held to state ample grounds for appointment of receiver of oil corporation.

Complaint of contract beneficiaries of oil output of well owned by defendant corporation, alleging fraud of corporate directors and conspiracy, in connection with trust fund, arising from a sale of such output, sequestration of past profits, deterioration in value of well by remaining idle, and praying for disposition of

the well and the holdings in connection therewith, held to state ample grounds for the appointment of a receiver.

Original application for writ of prohibition by Muriel Strode Lieberman and others against the Superior Court in and for the County of Orange and others. An alternative writ issued, and a return was made by demurrer. Demurrer sustained, alternative writ vacated, and peremptory writ denied.

Roland G. Swaffield and Phil M. Swaffield, both of Long Beach, for petitioners.

Ben F. Gray, of Los Angeles, Ben E. Tarver, James L. Davis, and James L. Allen, all of Santa Ana, and George S. Hupp, of Los Angeles, for respondents.

WORKS, J. A. J. Charle, one of the respondents in this proceeding, and others who are also among the respondents, commenced an action in the superior court for Orange county, also one of the respondents. In that cause, which will henceforth be called the Charle action, the defendants were a corporation named the Pacific Corporation, its directors, and various other natural persons, including Muriel Strode Lieberman.

It was alleged in the complaint in the Charle action that the plaintiffs and a large number of others, about 150 in all, "have purchased an interest in a certain lease and an interest in the production of a certain oil and gas well located on the premises described in said lease, known as Pacific Corporation oil well No. 16," which will hereafter be termed the oil well; that the plaintiffs sue for themselves and the others making up the 150 individuals; that certain named defendants, who will henceforth be called the directors, are the directors of Pacific Corporation, which will hereafter be called the corporation; that the corporation "has ceased to function as a corporation, and that" the directors were "its last-named officers and directors, and by reason thereof, and as provided by law, became the trustees for" the corporation; that prior to the time the corporation ceased to exist it was the owner and holder of certain oil and mining leases on certain particularly described lands, and had drilled thereon the oil well to an approximate depth of 4,000 feet; that thereafter the corporation divided the production of all gas, oil, and other hydrocarbon substances saved or produced from the oil well into small parts of units, each of which represented a 1/2160 interest in and to the production of the well; that these interests were by the corporation and directors sold to plaintiffs at the rate of \$100 each; and that, prior to the time the corporation ceased to do business, it entered into a written contract with plaintiff Charle for the consideration of \$1,000, whereby it agreed to sell to Charle 10/2160 parts of the gross production of all oil, gas, and other hydro-

carbon substances produced and saved from the well. A copy of this contract is attached to the complaint as an exhibit.

The agreement recites that the corporation owns a certain lease on the real property above mentioned, that the corporation has started the drilling of the oil well on the property, the same having been drilled approximately 4,000 feet and into the oil sand approximately 150 feet, and that it is the desire of the corporation to sell to Charle the 10/2160 parts above mentioned at the rate of \$100 for each 1/2160 interest, and that Charle desires to purchase the same. After these recitals it is provided in the contract that the corporation does sell to Charle for \$1,000, the receipt of which is acknowledged, the 10/2160 parts mentioned. It is further provided in the contract that the corporation "will continue drilling and such other operations as may be necessary to be done, and diligently prosecute the same until the said well is put on production, and producing oil in commercial quantities, or until it is determined by the party of the first part that no oil could be obtained by further drilling on said well." There are other provisions of the contract which need not be stated, as they are not material to a determination of the present appeal. The complaint further alleges that the corporation entered into a contract identical in form with that above mentioned with each of the plaintiffs, whereby they each purchased from the corporation certain of the units above specified and of an identical character with those purchased by Charle; each purchase being for a cash consideration, the amount of which is set forth in the pleading. It is also alleged that like units were sold for similar considerations to the other persons making up the 150 individuals, along with plaintiffs, in whose behalf the action is prosecuted. It is further alleged that the corporation and the directors sold in all approximately 800 of the units.

It is averred, also, that the corporation "further agreed to sell and market all oil, gas, and other hydrocarbon substances as so produced from said well as aforesaid, and, after the sale thereof and the deduction of the chargeable proportionate share of each unit or interest in the cost of maintenance, operation, selling, and marketing of all oil and gas therefrom, to pay unto each unit holder the balance to which he was entitled as evidenced by said written agreement"; that the corporation did continue the drilling of the oil well "until oil and gas were found and discovered in paying quantities, and that said well as aforesaid was properly put upon production for the benefit of unit holders and said corporation as aforesaid"; that the corporation "failed to carry out the terms of its said contract with these plaintiffs, in that it failed to sell, market, and dispose of the oil and gas produced there-

from for the benefit of plaintiffs and other unit holders as provided in said contracts"; that the corporation, the directors, and certain other named defendants "collogued, confederated, and designedly entered into a conspiracy and did conspire to cheat, wrong, and defraud the plaintiffs and said unit holders out of their just rights of and from participating in the returns from the sale of the production" of the oil well as provided in the contracts already mentioned; that in furtherance of the conspiracy the corporation, the directors, and the other defendants last mentioned turned over unto a certain one of those defendants the management of the oil well and the sale of all oil and gas therefrom; that the defendant last mentioned "collected large sums of money from sales of oil and gas from said well as aforesaid; that the exact amount to these plaintiffs at this time is unknown"; that the defendant last mentioned "claims to have disbursed and paid out for the benefit of said unit holders large sums of money, all of which these plaintiffs are without knowledge, information, and belief, and therefore allege that said sums so paid out were not just and correct sums and not claims legally due or owing from" the oil well, but that those sums were due, if at all, from other wells of the corporation, and were debts, if any, of the corporation and not of the plaintiffs or of the oil well; that thereafter, and in furtherance of the conspiracy, the defendants who are alleged to have been parties to it turned over the management of the oil well and the proceeds of sales of oil and gas therefrom to two of the conspirators, "who took charge of the operations of said well and the production thereof, and who sold the oil and other products therefrom and received large sums of money from such sales," and that during a certain month the two defendants last mentioned collected and received approximately the sum of \$24,000, all of which belonged to the unit holders of the oil well; that thereafter, and in furtherance of the conspiracy, "the said defendants as aforesaid turned over the management of said property and the sale of all oil and gas, and the proceeds therefrom," to a fourth party to the conspiracy, "who took possession of said property, sold the oil and gas therefrom, and received large sums of money from the sales of said oil and gas" from the oil well, amounting approximately to \$125,000; that in furtherance of the conspiracy all of the conspirators, during four certain months, "received from the sale of oil and gas so sold from said well as aforesaid large sums of money, the amount of which at this time is unknown to these plaintiffs, but plaintiffs allege" that the sum so received was approximately \$100,000, "and that the defendants nor any of them have rendered any accounts of the receipts or expenditures of such sum or sums"; that no account has ever been

made to the plaintiffs or to any of the unit holders in and to the oil well by any of the conspirators, and that each of them "claim to have disbursed and paid out for the benefit of said unit holders large sums of money, all of which these plaintiffs are without knowledge, information, and belief, and therefore allege that some of said sums so paid out were not just and correct sums and not claims legally due and owing from" the oil well, but that those sums were due, if at all, from other wells of the corporation and were debts, if any, of the corporation and not of the plaintiffs or of the unit holders of the oil well; that the conspirators "have collected and received from the sale of oil and gas from said well since the same has been put upon production, the total amount" of \$250,000, and that the conspirators have applied said sums to the use and benefit of the corporation and of themselves, "which sum or sums as so applied greatly exceed the proportion due the said defendants as unit owners or otherwise, or to which they or either of them were or are entitled, and which was and is the property of plaintiffs and other unit holders"; that one of the named natural person defendants has in his possession approximately \$10,000 "as funds received from the sale of the units or interests to the unit holders in the production of said corporation, and of the sale of oil and gas from said well or otherwise, all of which is the property of the unit holders and defendant corporation"; that the conspirators "continue to collect the proceeds from the sale of oil and gas and other commodities from the said well, and appropriate the same to their own use, greatly in excess of their proportion to which they or either of them are entitled, all to the detriment of the business of" the oil well, "the interests and lawful rights of these plaintiffs, and other holders of units" in the oil well; that "at this time there is no one in authority to act for said corporation, or the unit holders" of the oil well, and that on a certain day the oil well was "closed down and not permitted to flow or is not at this time being pumped, nor is said well allowed to produce oil and gas"; that the oil well "is not being cared for; that the production of said well is not being conserved, but is allowed to go to waste, and the business of" the oil well "and the property and production thereof is being lost and destroyed; that the unit holders and plaintiffs herein have been and are now being sued in the courts of this state for claims and obligations claimed to be due from these plaintiffs as unit holders, all of which plaintiffs are without any information or belief as to the legality thereof; and that, unless a receiver be appointed, said well will deteriorate and become a total loss to plaintiffs and the unit holders in and to said well, and said unit holders will sustain irreparable losses and injury"; and that to conserve the pro-

duction of the oil well to the plaintiffs and the assets of the unit holders in and to the well, and their interests in and with the corporation, it will be necessary that a receiver be appointed to take charge of and manage the business and conserve the production of the oil well.

The complaint closes with a prayer for an accounting of the business of the oil well "from the commencement thereof of all moneys received and paid out by said defendants and each and all of them in relation thereto"; that "a receiver of said property and business be appointed with the usual powers"; that the defendants be enjoined from interfering with the moneys, credits, properties, or effects of the oil well; that the property of the oil well "and the holdings in connection therewith, both real and personal, be sold, and the debts and liabilities, if any, be paid, and that the surplus thereof, if any, be divided among the unit holders according to their respective interests therein"; and that the plaintiffs be granted such further relief as to the court may seem just and equitable.

Upon the allegations of this complaint respondent court appointed one Ben E. Tarver, a receiver, for the purpose of taking charge of the property mentioned in the pleading, as well as of all the appurtenances, assets, and books of account pertaining thereto. The order appointing the receiver also directed him to operate the oil well and make sale of the oil produced therefrom.

After Tarver had entered upon the duties of his receivership, Muriel Strode Lieberman, one of the defendants in the Charle action, but not one of the alleged conspirators mentioned in the complaint therein, commenced a certain unlawful detainer action in the superior court for Los Angeles county. The subject of this action was the real property described in the complaint in the Charle action, and upon which the oil well was situated. In the unlawful detainer action the Los Angeles county court appointed one James M. Clune a receiver to take possession of the real property described in the complaint in both actions. After Clune had qualified as such receiver, he, one Howard Murche, and Roland G. Swaffield, an attorney for plaintiff in the Los Angeles county action, according to the allegations in a certain contempt proceeding now to be mentioned, forcibly ejected Tarver from his possession of the oil well as receiver in the Charle action. Proceedings were then instituted in the Orange county court for the purpose of punishing petitioners in this proceeding for contempt of court in invading the alleged possession of the court through its receiver. Thereupon petitioners filed their petition here for a writ of prohibition to prevent the Orange county court from meting out the punishment for contempt, on the ground that the order appointing Tarver receiver

was void, and an alternative writ issued. Return was made by demurrer to the petition.

[1] It is contended by respondents that petitioners have an adequate remedy in the ordinary course of law by appeal from the order of the Orange county court appointing Tarver, and that they cannot therefore have the writ of prohibition. A question akin to the one here suggested has lately been passed upon by us in *Campbell v. Superior Court*, 228 P. 354. There the writ of prohibition was sought to prevent the appointment of a receiver, and, in denying the writ on the ground that the petitioner would have an adequate remedy without resort to the extraordinary powers of the court if a receiver were appointed, we said:

"If petitioner shall appeal from any order of respondent court appointing a receiver, that order will become innocuous upon the giving of an undertaking for the purpose of staying the operation of the order. The receiver cannot then enter upon the performance of his duties, and especially cannot take possession or control of the properties involved in the action, nor exercise dominion over them."

In our opinion in that case, however, we quoted an expression from *Jacobs v. Superior Court*, 133 Cal. 364, 65 P. 826, 85 Am. St. Rep. 204, to the effect that—

There "might, perhaps, be exceptional facts in a case which would call for a writ of prohibition notwithstanding an appeal from an order appointing a receiver."

We think those exceptional facts appear in the present case, although we held that they did not appear in *Campbell v. Superior Court*. Here the question is not merely whether a receiver designated by an alleged void order shall take, or retain, the possession of property, but in substance at least, and in addition to that question, whether another receiver, appointed by another court, shall have that possession in his stead. An appeal from the order appointing Tarver, granting for the sake of argument that an undertaking on the appeal would serve to divest the possession already lodged in him as receiver, apparently would not have the effect to vest the possession in Clune, the receiver named by the Los Angeles county court. At any rate, if it did have that effect, and if Clune should take possession, or, now having possession, should retain it, he could maintain such possession only until the appeal were determined, if it should so happen that the order appointing Tarver were finally affirmed. In the meanwhile, Clune would have controlled and managed the property during the period without right, a situation which might possibly result in grave consequences, not only upon the score of the accounting then to be required of him, but in the matter of liability upon his bond as receiver, to say nothing of the possibility of questions arising under the law of damages in its va-

rious phases. If an appeal from the order appointing Tarver should not so operate as to entitle Clune to take possession or to remain in possession, and the appeal should result in a reversal of that order, then petitioner Lieberman would have been unduly postponed in her right to have the property in question in both actions lodged and kept in the possession of Clune. We are of the opinion that the exigencies of such a situation cannot, as a matter of law, justly await the determination of an appeal from the order appointing Tarver and the giving of an undertaking to stay the operation of the order. It appears to us, under all the circumstances above stated, and whether the appeal would smother or would protect Clune's right of possession as receiver, that it must be said that the remedy by appeal from the order appointing Tarver is inadequate, considering that question alone as affecting the right to the writ of prohibition.

[2] It is insisted by petitioners that the order appointing Tarver was void as to them, for the reason that it was made without notice to petitioner Lieberman, and without the giving, as required by section 566 of the Code of Civil Procedure in the case of an *ex parte* application for a receiver, of "an undertaking * * * to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment" of a receiver, "and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause." It is to be observed in this connection that the petitioner Lieberman is the only one of the petitioners who was a party to the action in which the appointment of Tarver was made; the other petitioners all having been her agents only, or having acted in the matter constituting the alleged contempt only under the order of the Los Angeles county court appointing Clune receiver. Therefore, if the order appointing Tarver is void as to that particular petitioner on the grounds stated, it is also void as to the other petitioners. The requirement of section 566 is plain, and the enactment is mandatory. *Van Alen v. Superior Court*, 37 Cal. App. 696, 174 P. 672. Does the section apply in the present instance?

[3] The order appointing Tarver recited that, "on due proof of service of motion, and on motion" of counsel for plaintiff and counsel for a defendant who appeared at the hearing, "it is ordered" that Tarver be appointed. It is insisted by respondent that this recital cannot be contradicted by petitioner Lieberman in this proceeding, and that she cannot be heard to assert the fact that no notice was given her. It is said that the present assault upon the order is a collateral attack, and that the recital is for that reason conclusive. It is also contended that the order is conclusive without the quoted

recital, on the ground that on collateral attack the order, having been made by a court of superior jurisdiction, will be indisputably presumed to have been validly made; no lack of jurisdiction to make it appearing on the face of the record. We shall consider these two points in the inverse order; that is, we shall first view the order appointing Tarver as if it contained no recital as to notice. It is the undoubted rule that the validity of an order or judgment of a court of superior jurisdiction cannot be assailed by collateral attack on the ground that it was made in excess of jurisdiction, unless the lack of jurisdiction appears on the face of the record. To put the rule differently, the jurisdiction will be deemed to exist in the face of such an attack unless the record affirmatively shows that the tribunal had not jurisdiction to make the order or to render the judgment in question. This rule is so well established, and is so universally understood, that we do not scruple to state it without citation of authority. Really our only concern just here is to determine what constitutes the "record" contemplated by the rule in the present instance, and thereafter to ascertain what, if any, showing is made by that record concerning service or lack of service upon petitioner Lieberman of notice of the hearing at which Tarver was appointed. The first branch of this inquiry we shall settle by assumption. We shall concede, for the sake of argument, without deciding, that the files of respondent court in the *Charle* action may be searched for any return or affidavit of service of notice upon petitioner Lieberman, or for any entry or showing by constituted authority that no service was made, and that whatever is found upon that search, added to the text of the order itself, will constitute the record to be examined. What is there before us—and the question brings us to the second branch of the inquiry—as the result of such a search? Upon this head a most peculiar situation in many particulars is shown by the petition for the writ. The *Charle* action was commenced on March 31, 1924, and on that day a summons was issued, and the court made an order to show cause, returnable on April 11, why a receiver should not be appointed. This order, as it is averred, was served on a number of the defendants, not including petitioner Lieberman. It is to be understood, however, that the petition does not allege that there is on file any return, or that there is any other record, showing a service of the order on the defendants alluded to, nor is the source given of the information had by petitioners as to the service, but it is alleged only that it was made. On April 11 the court continued the hearing on the order to show cause to April 15, and on that date one Curry was appointed receiver. He thereafter qualified and entered upon the discharge of the duties of his office. On May 2 an alias summons

was issued in the cause, and on the next day it was served on petitioner Lieberman. This was the first service upon her of any process in the action. On June 9 the court made an order determining that Curry had faithfully discharged his duties as receiver, that it was useless longer to continue the receivership, and exonerating Curry's bond given upon qualifying for the office of receiver. On June 11 petitioner Lieberman entered her appearance in the action by filing demurrer to the complaint. The court, on August 12, made a second order appointing Curry receiver, but he never qualified under that appointment. On September 12 an order was made vacating the second appointment of Curry and appointing Tarver. This is the order to which reference has heretofore so often been made. This last order, in addition to the matter already quoted as to "proof of service of motion," recited that it was made upon "the summons and complaint in this action and upon all the papers and proceedings heretofore served or filed herein."

[4, 5] There is an exception to the rule that a court of superior jurisdiction will be conclusively presumed, upon collateral attack, to have had jurisdiction to make an order or render a judgment unless the want of jurisdiction appears upon the record. This variant from the rule is that, where the record purports to show what was done for the purpose of acquiring jurisdiction, that is, for instance, shows what service was had as a basis for the order made or judgment rendered, it will not be presumed in aid of the court's action that anything additional was done. It has been tersely stated that "when the record shows what was done it will not be presumed that something different was done." 15 Cal. Jur. tit. Judgments, § 151. It is quite likely that this variant from the general rule preserving the sanctity of the judgments and orders of courts of superior jurisdiction from collateral attack would apply in the present instance if the order to show cause had been made returnable on September 12, the day upon which Tarver was appointed, or if the hearing thereon had been regularly continued from an earlier return day, fixed in the order, to that date, and if, in addition, the petition alleged that the records of respondent court showed that a service of the order had been made upon defendants other than petitioner Lieberman. Under such circumstances it probably could not be presumed that a service had been made upon her. But does the limitation upon the rule apply with the record of respondent court as we actually find it, assuming for the moment that the record shows what the petition alleges? We think not, for several reasons. In the first place, we cannot escape the conclusion that the order to show cause became functus upon the day upon which the first appointment of Curry was

made. There was no attempt, by continuance or otherwise, to keep it alive after that date. In fact, it is doubtful whether it could have been kept alive, although we need not decide that it could not have been. The order contemplated a hearing at which a receiver was to be appointed unless cause should be shown why the appointment should not be made. Curry was appointed upon the date to which the return day was extended by continuance, and we are convinced, on the whole, that the order to show cause, and all notice given under it, expired with the making of the order appointing him. To state a parallel between the particular proceeding now in question and an action: The court had issued its process, the process had been served, the parties served had known their day in court, or could have been present, and the court had pronounced its judgment. It seems certain that no other receiver could have been appointed later without the service of other notice, or, in default of such service, without the giving of the undertaking required by section 566 of the Code of Civil Procedure. In addition to the showing upon which this conclusion is reached, we may look to later occurrences shown by the record. The receivership of Curry was terminated upon a finding that the necessity for a receiver no longer existed, Curry was discharged as receiver, and his bondsmen were exonerated. These conditions surely put an end to all proceedings for the appointment of a receiver under the order to show cause. The notice to the defendants who had been served with the order, which was made nearly six months from the first appointment of Curry, more than three months after the termination of his receivership, and exactly one month after the abortive attempt to appoint him the second time, could not therefore have furnished a basis for the appointment of Tarver, which would have bound even the defendants served. How, then, can it be said, having in mind the variant rule above stated, and overlooking a matter to be mentioned in the next succeeding paragraph, that there is any showing of record of anything done for the purpose of giving notice, to any defendant, of the proceeding or hearing which eventuated in the appointment of Tarver?

We have several times pointed out that there is no allegation in the petition that the record of respondent court in the receivership proceedings showed that service of the order to show cause was made upon any defendant. The pleading merely avers the fact of service upon some of them. Under what we have termed the variant rule, as already stated, it is only when the record of the court actually shows something that was done in an attempt to acquire jurisdiction, that it cannot be presumed that a different thing was done. The petition, then, is utter-

ly insufficient as a basis for the application of the so-called variant rule.

It remains yet to consider the recital in the order appointing Tarver that it was made "upon all the papers and proceedings heretofore served or filed herein." We are of the opinion that it cannot be said that this language was intended to include, or that the court in using it had in contemplation, the service of the order to show cause said to have been made upon defendants other than petitioner Lieberman before the time when Curry was appointed, even if it were alleged that the files of respondent court showed that service was made upon them. This is so because of the considerations to which we have already adverted. The quoted language of the court, being part of the order appointing Tarver, as it was, cannot be so construed as to refer to papers or proceedings filed as precursors to the appointment of Curry. For the reasons we have stated, such papers or proceedings led up to that appointment only, and could have had no efficacy or force after the order appointing Curry was made, and especially after his receivership was terminated. Clearly, to our minds, it cannot be assumed that respondent court intended by its order appointing Tarver to refer to that defunct *mesne* process as a basis for the appointment. It is not to be forgotten, in this connection, that, as already pointed out, the petition does not allege that the record in respondent court shows a service of the order to show cause on defendants other than petitioner Lieberman.

It is to be noted, also, that in the language quoted from the order appointing Tarver, set forth in the next preceding paragraph, the reference is to papers or proceedings "served or filed." The use of the italicized conjunction makes the expression comport thoroughly with the idea that the court had before it, as a basis for the order appointing Tarver, "papers or proceedings" which were served but which were not filed. This being so, it must be assumed, under the general rule protecting the orders of courts of general jurisdiction from unwarranted collateral attack, that, if the quoted expression related to service at all, the service was made upon all interested parties, including petitioner Lieberman.

On the whole, and for the various reasons which we have considered, we are of the opinion that there was no attempt made by respondent court, in the "record" of the proceeding which ended in the appointment of Tarver, to show anything whatever as to what was done by way of service of process in that proceeding. Therefore that to which we have constantly referred as the variant rule can have no application.

It will be remembered that thus far, and in reaching the conclusion just announced, we have considered the order appointing

Tarver as if the recital, "on due proof of service of motion," were not contained in it. As we have already noted, respondents, in addition to their claims as to the sanctity of the order from collateral attack when considered without the recital, take the ground that the recital itself closes the mouths of petitioners against the contention which they would make to the effect that no notice of the motion which eventuated in the appointment of Tarver was ever served on petitioner Lieberman. This point we need not decide. Whether we consider the term "service of motion" as sufficiently comprehensive to import a service of notice of motion, or whether we do not, we can see nothing in the recital which detracts from the views which we have expressed in our consideration of the order as if it contained nothing upon the subject of service.

[6] Petitioners insist, concerning the rule to the effect that the pronouncements of courts of superior or general jurisdiction are not subject to collateral attack unless the want of jurisdiction appears on the face of the record, that it has no application to orders, but relates only to judgments. This contention is without merit.

"The rule against the collateral impeachment of judgments applies generally to all varieties of judgments, decrees, or orders made by courts of competent jurisdiction, in all kinds of judicial proceedings." 34 C. J. p. 514.

"The rule against collateral attack applies to orders and judgments made by the courts in special proceedings taken before them, although not in the nature of contested actions, or purely *ex parte*, provided the matter involves a judicial determination and carries the sanction of the court's authority." 34 C. J. p. 517.

Leaving these general statements, and looking to adjudications of our own Supreme Court, the rule has been applied to an order of sale of personal property in a probate proceeding, under a statute providing that the proceedings of probate courts should "be construed in the same manner, and with like intendments, as the proceedings of courts of general jurisdiction" (*Halleck v. Moss*, 22 Cal. 266); to an order of the probate court determining the amount of a stamp to be affixed to a will upon its being admitted to probate (*Satterlee v. Bliss*, 36 Cal. 489); to an order made upon proceedings supplementary to execution, requiring a third party to pay to the plaintiff money in his hands which was the property of the defendant in the action (*Bronzan v. Drobaz*, 93 Cal. 647, 29 P. 254); to an order setting aside a judgment for the purpose of making corrections in it (*Galvin v. Palmer*, 134 Cal. 426, 66 P. 572); and to a judgment or order admitting a will to probate (*Estate of Ryan*, 177 Cal. 598, 171 P. 297).

[7, 8] Petitioners contend that the attack which they seek to make on the order ap-

pointing Tarver is not collateral but direct. In support of this view they cite *Van Fleet, Collateral Attack*, § 2. At the place cited prohibition is stated to be one of the methods by which a direct attack may be launched. Granting, what we need not decide, that this text contains a correct statement of the law, it can apply only when the operation of the order or judgment assailed is sought to be prevented by the writ. Here the endeavor is not to halt proceedings under the order appointing Tarver, but petitioners would prohibit a threatened punishment for contempt under a distinct proceeding based upon that order. It has been directly decided that such an attempt is a collateral and not a direct attack. *Frey v. Superior Court*, 22 Cal. App. 421, 134 P. 733. Moreover, the present proceeding comes not within the recognized definitions of the term direct attack.

"A direct attack on a judicial proceeding is an attempt to avoid or correct it in some manner provided by law. * * * Any proceeding provided by law for the purpose of avoiding or correcting a judgment is a direct attack which will be successful upon showing the error; while an attempt to do the same thing in any other proceeding is a collateral attack, which will be successful only upon showing a want of power." *Van Fleet, Collateral Attack*, §§ 2, 3.

The same definition, in effect, will be found in another publication. 34 C. J. 520. As showing the application of the rule, it has been said:

"When we speak of a direct attack upon the judgment we usually refer to some proceeding in the action in which it was rendered, either by a motion before the court which rendered it, or an appeal therefrom, whereas an attempt to impeach the judgment by matters dehors the record is a collateral attack." *Parsons v. Weis*, 144 Cal. 410, 77 P. 1007.

To carry the same idea further, an assault upon an order or judgment by means of the writ of review is a direct attack. *Gt. Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 P. 35. We are satisfied that the attempt here is not directly to render void or to set aside the order appointing Tarver, but merely to collaterally impeach it. Therefore, and notwithstanding what we have already said as to the inadequacy of the right of appeal when considering that question alone as affecting the right to the writ of prohibition, petitioners must find some means other than the present by which to attack the order.

[9, 10] The order is assailed on other grounds. It is contended that the complaint in the *Charle* action was insufficient as a basis for the appointment of a receiver. This point is divisible into two distinct questions. The first of these is founded upon several decisions of the Supreme Court, notably *Havemeyer v. Superior Court*, 84 Cal. 327, 24 P. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192, and *Elliott v. Superior Court*, 168

Cal. 727, 145 P. 101, the contention of petitioners being that under the complaint the appointment of Tarver was an attempt, at the suit of those who were not stockholders, to deprive the directors of the possession and control of the property of the corporation, a possession and control which are lodged in the directors by law, and to intrust to a receiver the duty of operating it, which duty under the law cannot be taken from the directors. The appointment of receivers of corporations, however, has frequently been made in actions which to our minds are more nearly like the *Charle* action than are the cases relied upon by petitioners. The views expressed in *Wickersham v. Crittenden*, 93 Cal. 17, 28 P. 788, *California F. G. Ass'n v. Superior Court*, 8 Cal. App. 711, 97 P. 769, and *Boyle v. Superior Court*, 176 Cal. 671, 170 P. 1140, L. R. A. 1918D, 226, seem to uphold the allegations of the *Charle* complaint as sufficient to support the appointment of a receiver. We need not be concerned over the fact that the plaintiffs in the action were not stockholders of the corporation. The facts alleged in the complaint were such as to show that the directors owed to them a duty similar to that which was owing to the stockholders. The plaintiffs were the beneficial owners of parts of—we might justly say of aliquot shares of—the output from the oil well. Not only were their rights under their contracts somewhat similar to the right to dividends which the stockholders enjoyed under the law, but, in point of priority at least, they were superior to that right. Undoubtedly the division to be made between the plaintiffs and those situated like them, of their part of the proceeds from the production of the oil well, must from time to time legally have been made before the right of the stockholders to dividends could attach. The directors were then charged with the duty of administering a trust in which, so far as the record here discloses, the plaintiffs in the *Charle* action were the primary beneficiaries. These considerations bring the action directly within the doctrine of *Wickersham v. Crittenden*, supra. It was there held that the right of a stockholder to the appointment of a receiver of a corporation may justly be founded upon the trust relationship existing between stockholders and directors, and the right to a receiver under the complaint there in question was upheld on the ground that the trust so existing had in that case been violated. The allegations in the *Charle* complaint showed a similar violation of trust. We cannot conceive a state of the law, under the enlightened principles which govern the exercise of the jurisdiction of courts of equity, which would deny the appointment of a receiver, under the allegations of the *Charle* complaint, merely upon the ground that the plaintiffs were not stockholders of the cor-

poration. The difference between them and the plaintiff in the action which was the subject of consideration in *Elliott v. Superior Court*, supra, is at once apparent. Their situation was such as to appeal peculiarly to the ear of the chancellor. What great wrongs might they suffer if the appointment of a receiver were denied them, wrongs which must otherwise in a great measure go undressed.

[11] The allegations of the complaint in the Charle action are comprehensively set forth in the statement of facts at the outset of this opinion, and it is not necessary here to repeat them in considering the point of petitioners which is now under examination, but a few circumstances may be stated to show the similarity of that action with certain features of *Wickersham v. Crittenden*, supra, and the two other cases cited with it above. Intrinsically, the relief asked by the plaintiffs was made necessary by the acts of the directors and of those with whom it is alleged they conspired in violation of their trust. No substantial complaint was made against the corporation itself, although some of the allegations were in form directed against that entity. There was no attempt to wind up the affairs of the corporation, but only to dispose of the oil well "and the holdings in connection therewith." On this head it is contended by petitioners that the complaint must be regarded as if the conduct of the oil well were the sole business of the corporation, but we cannot adopt that view. There was no allegation to that effect. Not only so, but there were a few statements in the pleading which aid in justifying a contrary construction. The oil well was alleged to be known as the corporation's well No. 16; this averment tending in some degree to indicate that the corporation owned other wells. It was also alleged that certain debts paid out of the trust fund in which the plaintiffs were interested were due from other wells of the corporation, and were its debts and not those of the oil well. On the whole, then, we cannot accede to the contention of petitioners as to the interpretation which is to be placed upon the complaint in this regard. Pursuing further our endeavor to show features of the Charle action which are similar to those of the cases which we have cited, we observe that the averments of the complaint show by positive and decided allegation that the directors of the corporation, through the conspiracy alleged, are not only allowing the oil well to remain idle and thus to deteriorate in value, with the result that all income of the plaintiffs under their contracts is cut off and in future endangered, but that the past profits from their investments have been sequestered and appropriated. From these particular allegations, which we must, upon the demurrer to the

petition, assume to be true, it is evident that it is impossible for the corporation to carry on to advantage that portion of its business relating to the oil well. The complaint seems to us to state ample grounds for the appointment of a receiver.

The concluding contention of petitioners, the second branch of their point that the complaint in the Charle action was insufficient to justify the appointment of a receiver, is that the suit "is essentially one for money so far as the material allegations of the complaint are concerned." This point has in a large measure been met by what we have already said, but, if it is not entirely so covered, we now dismiss it with the remark that in our view the complaint will bear no such limited construction as that contended for.

Demurrer sustained. The alternative writ of prohibition is vacated, and a peremptory writ is denied.

We concur: FINLAYSON, P. J.; CRAIG, J.

**PARKER et al. v. COLBURN, Commissioner
of Public Health, etc., et al.**
(S. F. 11029.)

(Supreme Court of California. May 21, 1925.)

1. Livery stable and garage keepers ⇨4½—

One desiring to erect public garage held required to procure permits from building inspector and city council.

Under Ordinance of City of Oakland, No. 418 (N. S.) §§ 2, 5a, before one may erect a public garage he must secure a permit from building inspector pursuant to building ordinances of city, and also a permit from city council authorizing the maintenance of a public garage, and neither is sufficient without the other; it being of no consequence which permit was first issued.

2. Livery stable and garage keepers ⇨1—

Charter held not to limit city's power to require permit to construct building for public garage.

Oakland City Charter, art. 9, § 51, subd. 11, does not limit power of city to adopt regulations requiring permit to construct or maintain a building to be used for business, such as public garage, lawful in itself, but which may under certain conditions be detrimental to public health, safety, comfort, and welfare, and irrespective of charter, city is vested with full power to make and enforce police regulations; such power being derived directly from Const. art. 11, § 11.

3. Municipal corporations ⇨622—Lawful business cannot be arbitrarily prohibited.

A lawful business properly conducted and located, not injurious to persons, property, or public welfare, cannot be arbitrarily prohibited by means of regulatory measures.

4. Nuisance ⇨5—No one has inherent right to conduct business constituting nuisance.

No man has an inherent or constitutional right to maintain a building or premises or conduct a business which is a nuisance, or which under certain conditions may become a nuisance.

**5. Livery stable and garage keepers ⇨4½—
Ordinance regulating public garage held valid.**

A public garage, because of inflammatory substances usually kept therein and unusual noises emanating therefrom, is such an institution as may be regulated and even prohibited in exercise of police power, and fact that discretionary power is vested in council to grant or refuse a permit to erect public garage does not render ordinance invalid.

6. Municipal corporations ⇨63(1)—Decision of legislative body as to necessity of regulatory measure conclusive.

The decision of legislative body as to necessity or reasonableness of a regulation is conclusive, unless it can be said that regulatory measure has no just or reasonable relation to object which it purports to carry out.

In Bank.

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Action by M. Parker and another against Frank Colburn, Commissioner of Public Health and Safety of City of Oakland, and others, to enjoin enforcement of an ordinance regulating erection and maintenance of public garages. Judgment for plaintiffs, and defendants appeal. Reversed.

Leon E. Gray, City Atty., and Markell C. Baer, Asst. City Atty., both of Oakland, for appellants.

Bernard Silverstein, John W. Collier, Sydney J. Silverstein, and Silverstein, Collier & Silverstein, all of Oakland, for respondents.

SHENK, J. This action was commenced to enjoin certain officials of the city of Oakland from enforcing an ordinance the alleged purpose of which was and is to regulate and control the erection and maintenance of public garages in said city. The defendants answered. The plaintiffs moved for judgment on the pleadings. The motion was granted, and a judgment of injunction as prayed for in the complaint was entered. From this judgment the defendants have appealed. On the motion for judgment it was admitted that on the 17th day of November, 1921, the plaintiffs acquired and now own certain parcels of real property in said city particularly described as lots 34 and 40 and a portion of lots 35 and 36 of the Pacific Theological Seminary tract No. 2. One parcel fronts on and is known as 3420 Telegraph avenue, one of the main business thoroughfares of said city. Located on this parcel is a one-story brick building, 60 by 100 feet in dimensions, and which has been used for 10 years or more as a public garage. The other parcel fronts on Elm street, a residential street, and abuts the first parcel at the rear thereof. Subsequent to the construction of the brick building on Telegraph avenue, two wooden sheds were erected on the Elm street property. These sheds were in the rear of said brick building, but were not physically connected therewith. They were about 16 feet wide, 10 feet high, were entirely open in front, and faced inwardly. They were used for the purpose of protection of automobiles from the rain and weather, and access thereto was gained through a large door in the rear of the brick garage. On November 21, 1922, the plaintiffs through their representatives made application to the building inspector of the city for a permit to erect a building to be used for public garage purposes, 50 by 100 feet in dimensions, one story in height, with metal skylight, a tar and gravel roof, and with an entrance on Elm street. Upon presentation of the plans and specifications for the structure the applicant was advised by the inspector that the ordinances of the city of Oakland required a permit from the city council before a person could lawfully construct a building to be used as a public

garage. Upon assurance from plaintiffs' agent that the proposed structure was not a new building but merely an addition, with alterations and repairs, to the existing brick building fronting on Telegraph avenue, the inspector issued the building permit under the belief that the city ordinances did not in such cases require a permit from the city council in addition to the building permit. Plaintiffs immediately began to tear down the wooden sheds, and by the construction of forms prepared to pour cement for the foundation of the new garage building. Numerous protests were then presented to the city council, objecting to the construction of the new building. Pending the determination of said protest, the chief of the fire prevention bureau of the city submitted a report that he had visited the premises and ordered the work stopped on the ground that the permit had not been granted by the city council pursuant to the ordinance requiring the same; that the proposed structure was in reality a new garage (50 by 100 feet) facing on Elm street; that the location of the garage on Elm street was in a residential zone; and that the building permit theretofore issued calling for additions was merely a subterfuge, and recommended that the building permit be revoked.

On December 4, 1922, the commissioner of public health and safety recommended to the council that the building permit be revoked for the reasons specified in the report of the chief of the fire prevention bureau. The city attorney advised the council that the construction of the building on Elm street in the manner proposed was the construction of a new garage building in a new location, and that the owner should first secure a permit from the city council for the construction and maintenance of the same as a public garage. The council conducted a public hearing on the question of whether or not the building permit should be revoked. The plaintiffs were notified of the hearing and appeared. After such hearing the council adopted a resolution purporting to revoke the said building permit. Thereafter the plaintiffs made application to the superior court for a writ of review to annul the order of the council revoking said permit. The superior court annulled the order on the ground that the council possessed no authority to revoke the building permit, and its action in that respect was in excess of its jurisdiction. The plaintiffs resumed construction work on the Elm street lot, whereupon their contractor was arrested and charged with a violation of ordinance No. 418 (N. S.), in that he was proceeding with the erection of a building to be used as a public garage without first having secured a permit therefor from the city council as required by said ordinance. The present injunction proceeding followed. The plaintiffs

have not obtained, nor have they applied to the council for, a permit to construct and maintain a public garage at the location of the proposed new structure, and the council has never been called upon either to grant or deny an application for such a permit.

Ordinance No. 418 (N. S.) was adopted February 13, 1913. Section 2 thereof as originally adopted, and as in effect at the time of the issuance of the building permit, provided as follows:

"It shall be unlawful for any person, firm or corporation hereafter to conduct or maintain any building or premises to be used as a public garage * * * without first obtaining a permit therefor from the council, specifying the name of the permittee, the location of the premises to be used, and the amount of gasoline permitted; provided, however, that the council in granting or refusing such permit shall exercise a reasonable and a sound discretion, taking into consideration the character of the applicant, and the intended location."

This permit was in addition to the usual building permit required by another ordinance of the city.

It is alleged in the answer, and therefore also an admitted fact, that the plans and specifications presented to the building inspector called for the construction of a class C building under the provisions of the building ordinances of the city. In 1915 section 5a was added to said ordinance No. 418 (N. S.) providing as follows:

"All public garages hereafter erected shall be of class 'A' or class 'B' construction, except that public garages of class 'C' construction not more than one story high and having a cement floor will be permitted if all other provisions of this ordinance are complied with."

[1] It is alleged in the complaint that on the 21st day of November, 1922, the building inspector approved the application of the plaintiffs for a permit "to erect, alter, or repair the said building in the manner and form" provided by ordinance. The answer admits the approval of the application for a permit but alleges affirmatively that the said application was for a permit "not to make repairs or alter" the building but "to erect" a new public garage building. It is therefore also an admitted fact that the application was for a permit "to erect" a new building to be used as a public garage. By the terms of said section 5a the construction of a public garage building of the class C type was permitted only if all other provisions of said ordinance be complied with. One of the requirements of section 2 thereof was that it should be unlawful for any person, firm or corporation "to conduct or maintain any building or premises to be used as a public garage * * * without first obtaining a permit therefor from the council." Two things were therefore essential in order that the plaintiffs might lawfully pro-

ceed with the construction of the building and the maintenance of the premises to be used for the purpose of a public garage as proposed: (1) A permit from the building inspector pursuant to the building ordinances of the city; and (2) a permit from the city council authorizing the plaintiffs to conduct and maintain the establishment as a public garage. Neither was sufficient without the other. Under said section 5a the building permit to construct a class C building would be entirely ineffectual unless and until the permit from the city council was obtained to maintain the building as a public garage pursuant to section 2 of the ordinance. Assuming that the superior court correctly decided that the building permit when issued was beyond the power of the municipal authorities to recall it is the proper construction of the ordinances in effect at the time the building permit was issued that it was of no consequence as to which permit was first issued, but neither was effectual as authority to the plaintiffs to accomplish their purpose without also the issuance of the other. Ordinance No. 418 (N. S.) was amended subsequent to the issuance of the building permit so as to provide that a permit issued by the building inspector in accordance with the building ordinance of the city for any building described in ordinance No. 418 (N. S.) should be invalid until the additional permit had been secured from the city council. Counsel for plaintiffs indulge in much argument as to the purpose of this and other amendments to said ordinance adopted after the issuance of the building permit, but in view of our conclusions as to the requirements of the ordinances of the city at the time the building permit was issued it is not necessary to discuss the effect of the amendments.

[2] It is contended by plaintiffs that under the Oakland charter the city does not possess the power to require a permit for the use of a building for a lawful purpose; that its power is limited by the charter to the regulation of the construction and maintenance of buildings to the end that they may not be insecure or unsafe. The contention is based on section 51 of article 9 of the charter, and particularly on subsection 11 of that section (Stats. 1911, pp. 1584, 1585). The provisions referred to are as follows:

"Sec. 51. Except as herein otherwise expressly provided, the council shall exercise all the general powers of the city herein set forth and all powers now held by or that may hereafter be given to the city under the Constitution or the laws of the state; but only in the manner and under the conditions of this charter, and subject to all the provisions thereof. In addition to all such powers, the council, subject to the provisions and restrictions of this charter, shall have power: * * * (11). To regulate the construction of and the materials used in all buildings, * * * to prevent the erection and maintenance of insecure or un-

safe buildings, * * * and to provide for their summary abatement or destruction.
* * *

It is insisted that the regulations governing the "construction" of buildings are embodied in the building ordinance pursuant to which the building permit was issued to the plaintiffs, and that by reason of the fact that the city was so authorized and has so acted it has, in effect, within its charter limitations, exhausted its legislative power on the subject, and that the use to which the building may be put after the building permit is issued and the building has been constructed is not the concern of the city and cannot be considered here. The contention is untenable for several reasons. There is nothing in the charter which limits the power of the city to adopt regulations requiring a permit to construct, or maintain a building to be used for a business, lawful in itself, but which may under certain conditions be detrimental to the public health, safety, comfort, and welfare. Such regulatory measures are enacted in the exercise of the police power. 18 Cal. Jur. 839, and cases cited. Subsection (1) of said section 51 of the charter provides that the city council shall have power "to make and enforce local, police, sanitary and other laws and regulations." But even in the absence of such a charter provision the city is vested with full power to make and enforce police regulations. Such power is derived directly from section 11 of article 11 of the Constitution. *In re Montgomery*, 163 Cal. 457, 125 P. 1070, Ann. Cas. 1914A, 130.

But it is the contention of the plaintiffs that a public garage is a lawful business; that in the ordinance requiring the permit from the city council there are no prescribed standards or regulations applying indiscriminately to all existing or contemplated public garages, and that without such definitely prescribed standards and regulations the granting or refusal of such a permit is subject to the arbitrary whim and caprice of the council. It is the position of the defendants that under the law of this state the city has the power to require such a permit as a police regulation; that a reasonable discretion is vested in the council to grant or refuse the same, and that in the absence of a showing by the plaintiffs of unreasonable or unlawful or arbitrary discrimination on the part of the council in denying the permit they are not entitled to the relief sought in this action.

[3] It may be assumed that a lawful business properly conducted and located, not injurious to persons, property, or public welfare, cannot be arbitrarily prohibited, by means of regulatory measures. Application of *Dart*, 172 Cal. 47, 155 P. 63, L. R. A. 1916D, 905, Ann. Cas. 1917D, 1127. Plaintiffs' counsel state that a public "garage business is surely a lawful business; it is not injurious to per-

sons, property, or public welfare; otherwise the business itself wherever and however conducted would be a nuisance." But they have truly classified the plaintiffs' business in the statement immediately following, wherein they say: "True, the conduct of the business in certain localities or under certain conditions might become hazardous." If, therefore, its tendency be to increase the fire hazard in the particular locality, or be otherwise injurious to persons or property, it is subject to regulation or prohibition. *Odd Fellows' Cem. Ass'n v. San Francisco*, 140 Cal. 226, 73 P. 987; *Boyd v. City of Sierra Madre*, 41 Cal. App. 520, 183 P. 230. No case seems to have arisen in this state involving the right to require a permit for the construction and maintenance of a public garage probably for the very obvious reason that, because of the inflammatory substances usually kept therein and the unusual noises emanating therefrom, it has been generally conceded that such a business was subject to regulation under the police power and might be prohibited in certain localities and under certain conditions. There are, however, numerous cases in other jurisdictions holding that public garages may, under certain conditions, be nuisances and subject to such regulation. *Diocese of Trenton v. Toman*, 74 N. J. Eq. 702, 70 A. 606; *Hunter v. Wood*, 277 Pa. 150, 120 A. 781; *People v. Ericsson*, 263 Ill. 368, 105 N. E. 315, L. R. A. 1915D, 607, Ann. Cas. 1915C, 183; *People v. Village of Oak Park*, 266 Ill. 365, 107 N. E. 636; *In re McIntosh*, 211 N. Y. 265, 105 N. E. 414, L. R. A. 1915D, 603; *Ninth Street Improvement Co. v. Ocean City*, 90 N. J. Law, 106, 100 A. 568; *Schait v. Senior*, 97 N. J. Law, 390, 117 A. 517; *Myers v. Fortunato*, 12 Del. Ch. 374, 110 A. 847; *General Baking Co. v. Board*, 242 Mass. 277, 136 N. E. 245; *Storer v. Downey*, 215 Mass. 273, 102 N. E. 321. The plaintiffs' comment on the cases in other states cited and relied on by the defendants is that in the main they involved the exclusion of public garages by zoning ordinances. But, if this were true as to all of them, such fact would not of itself avoid their effect as authority that a public garage is such an institution as may be regulated and even prohibited in the exercise of the police power. Zoning regulations are promulgated in the exercise of that power. *Miller v. Board of Public Works* (Cal. Sup.) 234 P. 381.

The respondents endeavor to bring themselves within such cases as *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220, *Los Angeles v. Hollywood Cem. Ass'n*, 124 Cal. 349, 57 P. 153, 71 Am. St. Rep. 75, and *Matter of the Application of Dart*, supra. The rules laid down in those cases support the conclusion that, where a business is lawful and has no injurious tendency, any ordinance requiring a license or permit must

prescribe the standards or regulations applying indiscriminately to all who fall within the same class, and to which all similarly situated may conform. The rule is well stated in the Dart Case, where it is said in the concurring, which is in reality the majority, opinion, that:

"A law or ordinance by or under which a lawful occupation, in itself, when properly conducted, in nowise injurious to persons, property, or the public interest, may be absolutely prohibited at the dictation of any official body without cause than its own will or desire, is beyond the legislative power and to that extent void."

[4] As declared in *Re Flaherty*, 105 Cal. 558, 38 P. 981, 27 L. R. A. 529, the rule in such cases is "based upon the theory that the lawful, inherent rights of men cannot be entirely suppressed or destroyed by statute or ordinance, but can only be regulated, and that all regulations of such rights must be uniform." It is a commonplace that no man has an inherent or constitutional right to maintain a building or premises or conduct a business which is a nuisance or which under certain conditions may become a nuisance.

[5] There is a wide distinction between lawful occupations which have no injurious tendencies and those which are lawful in themselves, but which, because of their tendencies or their conduct under certain conditions or in certain localities, are likely to injuriously affect the public health, safety, comfort, or welfare. The necessity of regulating lawful occupations falling within the latter class was recognized in *Crowley v. Christensen*, 137 U. S. 90, 11 S. Ct. 15, 34 L. Ed. 620, wherein the court said:

"Some occupations by the noise made in their pursuit, some by the odors they engender, and some by the dangers accompanying them, require regulations as to the locality in which they shall be conducted."

See *Ex parte Quong Wo*, 161 Cal. 220, 118 P. 714; *Fischer v. St. Louis*, 194 U. S. 361, 24 S. Ct. 673, 48 L. Ed. 1018; *In re Holmes*, 187 Cal. 647, 203 P. 398. The business proposed to be conducted on said premises by the plaintiffs herein belongs to such classification, and the fact that discretionary power is vested in the council to grant or refuse a permit does not render the ordinance invalid. In *Lieberman v. Van De Carr*, 199 U. S. 552, 26 S. Ct. 144, 50 L. Ed. 305, in referring to cases involving the exercise of such discretion by administrative boards, the court said:

"These cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the state is not violative

of rights secured by the fourteenth amendment."

[6] It may be said with equal assurance that this discretion may be properly exercised when the power to exercise the same is lodged, not in a subordinate administrative board, but in the city council—the same public body which has ordained that the permit shall be required. See *Gaylord v. City of Pasadena*, 175 Cal. 433, 166 P. 348. Unless it can be said that the regulatory measure has no just or reasonable relation to the object which it purports to carry out, the decision of the legislative body as to the necessity or, reasonableness of the regulation is conclusive. *Odd Fellows' Cem. Ass'n v. San Francisco*, supra; *Boyd v. City of Sierra Madre*, supra. No question of arbitrary or unreasonable action on the part of the council in refusing a permit is here involved.

Wherefore it is concluded that under the law as applied to the admitted facts the judgment should be reversed, and it is so ordered.

We concur: **LAWLOR**, Acting C. J.; **RICHARDS, J.**; **SEAWELL, J.**; **WASTE, J.**; **LENNON, J.**; **HART**, Justice pro tem.

72 Cal. App. 136

CITY OF LOS ANGELES v. MORRIS et al.
(Civ. No. 4989.)

(District Court of Appeal, Second District, Division 1, California. April 2, 1925.)

1. Eminent domain $\Leftrightarrow$ 262(1)—Failure to serve codefendants with notice of intention to move for new trial not grounds for dismissing appeal from refusal thereof.

In condemnation proceedings, under Street Opening Act of 1903, providing for appeal from order denying new trial, § 13, which section is not expressly repealed by Code Civ. Proc. § 963, as amended in 1915, 1917, 1923, failure to serve notice of intention to move for new trial on other defendants, as required by Code Civ. Proc. § 659, will not constitute grounds for dismissal of appeal from an order denying motion.

2. Eminent domain $\Leftrightarrow$ 262(1)—Failure to give notice of intention to move for new trial may be sufficient reason for affirming order.

In condemnation proceedings, failure to give notice to other defendants of intention to move for new trial, as required by Code Civ. Proc. § 659, although not a recognized ground for dismissing appeal from an order denying motion, may constitute sufficient reason for affirming order on consideration of appeal upon its merits.

Proceeding by the City of Los Angeles against Dan Morris and others and Annie F. Young for condemnation for street purposes. From an interlocutory decree, and from an order denying motion for new trial, defend-

ant last named appeals. On motion to dismiss appeal. Denied.

W. W. Hyams and Meserve & Meserve, all of Los Angeles, for appellant.

Jess E. Stephens, City Atty., and Donald M. Keith, Deputy City Atty., both of Los Angeles (John A. Rush, of Los Angeles, of counsel), for respondent.

CONREY, P. J. [1, 2] In this action, the defendant Annie F. Young has appealed from an interlocutory decree of condemnation for street purposes of certain land owned by her. According to her notice of appeal she also has appealed or attempted to appeal from an order denying her motion for a new trial.

The condemnation was sought to be obtained pursuant to the Street Opening Act of 1903 (Deering's Gen. Laws [1923 Ed.] Act 8198). According to section 963 of the Code of Civil Procedure, as amended in the year 1915 (as well as under the amendments of 1917 and 1923), there is no right of appeal from an order denying a motion for a new trial. But, as provided by section 956, Code of Civil Procedure, the court on appeal from the judgment may review any order on motion for a new trial. But it is provided by section 13 of the Street Opening Act of 1903 (St. 1903, p. 376), that, in an action brought under that act, an appeal may be taken from any order granting or denying a new trial. Section 6 of the same act provides that:

"Said action shall in all respects be subject to and governed by such provisions of the Code of Civil Procedure now existing or that may be hereafter adopted, as may be applicable thereto, except in the particulars otherwise provided for in this act."

Counsel for appellants say that in this case they gave notice of appeal from the order denying the motion for a new trial, because they were not certain whether the enactment of section 963, Code of Civil Procedure, as amended, impliedly repealed the provisions of said section 13 of the Street Opening Act. For the purposes of decision of the present motion we shall assume (but without actually deciding the question), that the provisions of said section 13 remains in force, and that therefore appellant was entitled to appeal from the order denying her motion for a new trial, as well as to appeal from the judgment. Respondent has not elected to base its motion upon the ground that there is no right of appeal from the order denying a new trial, and we deem it unnecessary to give the point extended consideration at this time.

The notice of motion to dismiss and the motion as made request the court "to dismiss the appeal." In the motion itself respondent further asks that the court affirm the judgment. The sole ground of the motion is stated as follows:

"That it appears affirmatively from the record herein that the notice of intention to move for a new trial was directed to and served upon this plaintiff-respondent alone, and not upon any of the defendants, parties in interest herein, as required by section 659 of the Code of Civil Procedure."

Assuming the facts to be as stated in the motion, they do not furnish any reason for dismissing the appeal from the judgment. It also seems clear that the same facts, even if supported by the record, do not constitute a sufficient ground for dismissal of the appeal from the order denying the motion for a new trial, assuming that such an appeal lies in any case. It is the rule that a failure to give notice of intention to move for a new trial is not a recognized ground for dismissing an appeal from an order denying the motion; although such failure might constitute a sufficient reason for affirming the order, when we come to a consideration of the appeal upon its merits. *Turner v. Ten Winkel Co.*, 24 Cal. App. 213, 140 P. 1086; *Johnson v. Phenix Ins. Co.*, 146 Cal. 571, 80 P. 719.

The motion is denied.

I concur: CURTIS, J.

72 Cal. App. 276

EAGAN v. SYKES et al. (Civ. 4895.)

(District Court of Appeal, First District, Division 2, California. April 14, 1925.)

1. Municipal corporations ⇨200—Veterinary in fire department continuing after adoption of charter held a "member of fire department," entitled to retirement on pension.

A veterinary, who was a member of the fire department prior to its charter, continued thereafter in the same capacity and at the same salary; held that he was a "member of the fire department" within San Francisco Charter, § 3, c. 7, art. 9, for the purpose of retirement on a pension.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Member.]

2. Municipal corporations ⇨200—Veterinary's status as member of fire department unaffected by private practice.

A veterinary engaged in private practice, thus contravening that portion of San Francisco charter providing that "no member or employee of the fire department shall be engaged in any other employment," held that, in the absence of express provision to the contrary, such action, while subjecting him to dismissal, did not ipso facto destroy his status as a "member" for purpose of retirement on a pension.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Wm. F. Eagan against Frank C. Sykes and others for a writ of mandate com-

elling defendants, as Fire Pension Fund Commissioners of the City and County of San Francisco, to retire plaintiff on a pension from the position of veterinarian in the fire department. From a judgment ordering the writ, defendants appeal. Affirmed.

George Lull, City Atty., and Maurice T. Dooling, Jr., Asst. City Atty., both of San Francisco, for appellants.

William A. Kelly, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal from a judgment ordering a writ of mandate to issue, compelling appellants, as fire pension fund commissioners, to retire respondent, William F. Eagan, from the position of veterinarian in the fire department on a pension of \$50 a month.

Dr. Eagan was appointed to the position of veterinarian in the fire department on December 15, 1894. He served continuously in that position until the charter went into effect on January 8, 1900. From the time of the adoption of the charter in 1900 until November 25, 1921, the date of his application for retirement on a pension, Eagan continued to act as veterinarian of said department, and received a fixed compensation for his services as such.

[1] It is conceded by appellants that Dr. Eagan is entitled to be retired upon pension if he was an "officer or member" of the fire department within the meaning of those terms in section 3, chapter 7, article 9, of the charter of the city and county of San Francisco. It is conceded that Eagan was a member of the fire department under the statute in force prior to the adoption of the charter, and that after the adoption of the charter he continued to render the same service and receive the same compensation as before. These facts make applicable the cases of *Ahearn v. Davis*, 184 Cal. 579, 194 P. 1008, and *Hurley v. Sykes* (Cal. App.) 231 P. 748, which dispose of appellants' contention that Eagan was not an "officer or member" of the fire department at the time of his application for retirement.

[2] The only other question argued upon appeal is as to the effect of the circumstance that Eagan did not devote all his time to his work in the fire department, but, in addition to such work, engaged in private practice of his profession. Appellants direct our attention to section 10, chapter 1, article 9, of the charter, which provides: "No member or employee of the fire department shall be engaged in any other employment." We think the most that can be said with reference to this matter is that Eagan subjected himself to dismissal for disobedience of this provision, but failure to perform one's duties in a given status cannot have the effect, ipso facto, of changing one's status, in the absence

of any express provision of law to that effect. Appellants' argument upon this point amounts to such a contention.

There are no other matters requiring consideration, and the judgment is affirmed.

We concur: **PRESTON**, Justice pro tem.; **NOURSE, J.**

72 Cal. App. 90

WALLIS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.
(Civ. 4952.)

(District Court of Appeal, Second District, Division 2, California. March 31, 1925.)

1. Divorce ⇐210—Superior court had jurisdiction to make order for payment of alimony pendente lite after default entered.

Under Civ. Code, §§ 137, 138, an action of divorce is still pending after default, and orders for alimony and maintenance and support may be made at any time from commencement of action until its final determination and expiration of time for appeal, and hence superior court had jurisdiction to make an order for payment of alimony pendente lite after default decree of divorce was entered.

2. Divorce ⇐269(8)—Superior court without jurisdiction to adjudge one in contempt for failure to obey an order not served on him.

Superior court was without jurisdiction to adjudge one in contempt for failure to obey an order for payment of alimony, in a divorce action, which was not served on him nor made in his presence and of which he had no knowledge.

3. Contempt ⇐66(7)—Presumptions not indulged in support of judgments in contempt.

Presumptions and intendments that judgment was based on sufficient evidence and all proceedings before court below were regular are not to be indulged in support of judgments in contempt.

Certiorari by Abijah Tucker Wallis to review a judgment of the Superior Court in and for the County of Los Angeles and Hon. Walter Guerin, a Judge thereof, adjudging petitioner guilty of contempt. Judgment vacated and set aside.

William Ellis Lady, of Los Angeles, for petitioner.

George L. Hampton, of Los Angeles, for respondents.

CRAIG, J. Certiorari is here invoked to review the proceedings of the superior court of Los Angeles county, wherein petitioner was adjudged guilty of contempt of court for failure to comply with an order directing the delivery of a certain Velie automobile and the payment of money to petitioner's wife pendente lite, as attorney's fees, costs of suit, and for the maintenance and support of herself and minor child.

It is alleged in the petition of petitioner that he instituted an action for divorce, and

that his wife was served with process, and appeared by counsel; that thereafter an amended complaint was served and filed, and, no demurrer or answer having been filed thereto, a default was entered on or about October 6, 1924. On September 24, 1924, pursuant to an order to show cause, which the petitioner alleges was not served upon him, the trial court signed, and on October 11, 1924, filed a written order, reading in part as follows:

"Upon reading the affidavit heretofore filed by the defendant here and upon hearing the evidence adduced in support of the order to show cause on file herein, on the 24th day of September, 1924, at 2:00 o'clock p. m., the defendant being personally present in court and represented by her counsel, Geo. L. Hampton, and the plaintiff having made no appearance at all, either personally or by counsel, it is hereby ordered," etc.

This order purported to be one requiring the plaintiff in the action, the petitioner herein, to pay certain sums as alimony and suit money, and to deliver the automobile to the defendant.

On October 28, 1924, the defendant filed her affidavit, reciting the fact of the issuance of said order, that the same was "duly served upon plaintiff as shown by the affidavit of service of said order on file herein," and alleging that plaintiff had failed to comply with any of its requirements. Citation was thereupon issued to petitioner, directing that he appear before said superior court on November 12, 1924, then and there to show cause, if any he might have, why he should not be punished for contempt of court for disobedience of the order of September 24.

Aside from the defendant's statement above quoted, there is no evidence whatever in the record of the order of September 24, 1924, for payment of alimony, etc., having been served upon the plaintiff, petitioner herein, and he alleges in his petition that in response to said citation he appeared and testified, among other things, that he had not been served with said order to show cause, or with the order made pursuant thereto, and that he knew nothing thereof. However, he was adjudged guilty of contempt of court for not having complied with the terms of the latter order.

It is contended that the defendant moved the lower court to vacate the default, but that her motion was denied; that thereafter she moved for leave to renew said motion, and was permitted to do so; but that, following further hearing, the same was denied. Petitioner therefore assigns as grounds for this proceeding the fact that the relief granted defendant by the order of September 24, 1924, was not sought until after default had been entered, and that the superior court then had no jurisdiction to so order; and, secondly, that upon the facts presented here

and before the trial court that tribunal was without jurisdiction to adjudge him in contempt.

No briefs have been filed on behalf of either of the parties, though by stipulation and order additional time was allowed therefor. The only authorities cited are those presented by petitioner upon application for the writ of certiorari, and we do not feel called upon in every case to search records, which come to us without briefs or argument having been filed, to determine the merits of the contentions of the parties. *McFadden v. Dietz*, 115 Cal. 697, 47 P. 777; *Suman v. Archibald*, 116 Cal. 42, 47 P. 865; *Altschul v. Alexander* (Cal. App.) 224 P. 760.

However, the question of the jurisdiction of the trial court having been raised, and the allegations of the petition being neither denied by respondent nor refuted by the return made to our writ of certiorari, it appears that an important legal principle is necessarily involved, and that a proper disposition of the matter, in justice to the parties, requires its discussion and decision at this time. *Schubert v. Lowe*, 193 Cal. 291, 223 P. 550; *Maguire v. Cunningham*, 64 Cal. App. 536, 222 P. 838.

[1] We are not in accord with petitioner's contention in support of his first point that the superior court was without jurisdiction to make an order for payment of alimony pendente lite after default entered. Section 137 of the Civil Code provides:

"When an action for divorce is pending, the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself and her children, or to prosecute or defend the action."

Section 138, Civil Code, also provides that "during the pendency of the action, or at the final hearing, or at any time thereafter during the minority of any of the children of the marriage," the court may make any necessary or proper order for their custody, care, education, maintenance, and support, "and may at any time modify or vacate the same." Such an action is still pending after default (*Abadie v. Lobero*, 36 Cal. 390, 400), and orders under the sections mentioned above may be made at any time from the commencement of the action until its final determination and the expiration of the time for appeal. (*Dunphy v. Dunphy*, 161 Cal. 87, 118 P. 445; *Bruce v. Bruce*, 160 Cal. 28, 116 P. 66; *Ex parte Joutsen*, 154 Cal. 540, 98 P. 391. It has also been held that such orders may be made ex parte. *Ex parte Joutsen*, supra.

[2, 3] The power of the trial court, therefore, to make the order complained of, dated September 24, 1924, cannot be doubted, but we think it was without jurisdiction to adjudge the petitioner in contempt for failure to obey an order which was not served upon him, nor made in his presence, and of which he had no knowledge. *Young v. Su-*

perior Court (Cal. App.) 231 P. 347. Presumptions and intendments are not, as in the case of an ordinary judgment, to be indulged in support of judgments in contempt. *Platnauer v. Superior Court*, 32 Cal. App. 463, 163 P. 237. The presumption that a judgment was based upon sufficient evidence, and that all the proceedings before the court below were regular, therefore does not apply; and a failure to show, otherwise than by mere innuendo, as against positive testimony to the contrary, that the petitioner had notice of the making of the order, or that he knew of its existence, must be held to have necessitated his discharge, and the order adjudging him in contempt of court was void for want of jurisdiction.

The judgment of the superior court here in controversy is therefore vacated and set aside.

We concur: FINLAYSON, P. J.; WORKS, J.

72 Cal. App. 88

PEOPLE v. CLINTON et al. (Cr. 1247.)

(District Court of Appeal, First District, Division 1, California. March 31, 1925.)

1. Criminal law ☞1073—When it is trial court's duty to execute certificate of probable cause for appeal stated.

It is the duty of trial court to grant a certificate of probable cause for appeal where a case is presented in which the existence of prejudicial error in the proceedings resulting in conviction is a debatable question, on which honest differences of opinion may exist, and the appeal is not merely frivolous or vexatious.

2. Criminal law ☞1073—Court of Appeals is empowered and obligated to grant certificate of probable cause for appeal, where trial court erroneously refuses to issue it.

Court of Appeals is empowered and obligated to grant certificate of probable cause for appeal, where trial court erroneously refuses to issue it.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

James Clinton and two others were convicted of burglary of the second degree, and they appeal and apply for a certificate of probable cause, which the trial court denied. Certificate ordered to issue.

See, also, 233 P. 78.

Ernest B. D. Spagnoli and Walter F. Lynch, both of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

CASHIN, J. The defendants in this case were convicted in the superior court of San

Mateo county, Cal., of a felony, to wit, burglary of the second degree, and were sentenced to be imprisoned in the state prison. They have appealed from the judgment of conviction to this court, and the appeal has been perfected. The trial court, on application by appellants, refuses to grant a certificate of probable cause for the appeal, and they have applied to this court therefor.

[1, 2] Where a case is presented in which the existence of prejudicial error in the proceedings resulting in conviction is a debatable question and on which honest differences of opinion may exist, and the appeal is not merely frivolous or vexatious, it is the duty of the trial court to grant such certificate, and, upon its refusal so to do this court has the legal power, and it is its duty, to grant relief. In the *Matter of Harris Adams*, 81 Cal. 163, 22 P. 547; *People v. Gallanar*, 144 Cal. 657, 79 P. 378; *People v. Lane*, 96 Cal. 597, 31 P. 580; *People v. Ramirez*, 63 Cal. App. 510, 219 P. 73; In the *Matter of Mayen*, 49 Cal. App. 531, 193 P. 813.

Upon an examination of the record in this case, we find such facts to exist. Upon such finding appellants, as a matter of legal right, are entitled to such certificate, and we therefore order that a certificate of probable cause for appeal in this case be issued.

We concur: TYLER, P. J.; KNIGHT, J.

72 Cal. App. 196

PEOPLE v. HIGBEE. (Cr. 1258.)

(District Court of Appeal, First District, Division 1, California. April 6, 1925.)

1. Criminal law ☞1073—When accused is entitled to receive from trial court certificate of probable cause for appeal stated.

Accused is entitled to receive, from the trial court, a certificate of probable cause for appeal when the questions raised by the appeal are debatable and not frivolous.

2. Criminal law ☞1073—Appellate court will grant certificate of probable cause for appeal when trial court erroneously refuses to issue it.

Appellate court will grant certificate of probable cause for appeal when trial court erroneously refuses to issue it.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Merritt Higbee was convicted of burglary of the second degree, and he appeals and applies for a writ of probable cause, which the trial court denied. Writ granted.

See, also, 233 P. 79.

Ernest B. D. Spagnoli and Walter F. Lynch, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

CASHIN, J. [1, 2] The defendant in this case was convicted in the superior court of San Mateo county, Cal., of a felony, to wit, burglary of the second degree, and was sentenced to be imprisoned in the state prison. He has appealed from the judgment of conviction to this court, and the appeal has been perfected. The trial court, on application by appellant, refused to grant a certificate of probable cause for the appeal, denied appellant a stay of execution until such time as the record on appeal should be filed in this court, and appellant has been removed to the state prison as a result of said judgment and sentence.

In the record before us, several matters in the proceedings leading to his conviction are indicated by appellant, upon which he has based his appeal, and which are claimed by him to constitute prejudicial error.

From examination of this record we are convinced that the questions raised by appellant are debatable and not frivolous, and therefore the trial court, having failed to grant the relief to which appellant was entitled, it is ordered that a certificate of probable cause for appeal in this cause be issued.

We concur: TYLER, P. J.; KNIGHT, J.

72 Cal. App. 268

In re TRIEST'S ESTATE.

KOCH et al. v. TRIEST et al.

(Civ. 5111; S. F. 11117.)

(District Court of Appeal, First District, Division 1, California. April 14, 1925. Hearing Denied by Supreme Court June 11, 1925.)

1. Trusts ☞328—Denial of motion to vacate order settling trustees' accounts held not abuse of trial court's discretion under evidence.

Evidence held to show that decedent's widow received notice of entry of decree settling testamentary trustees' accounts and adjudging persons to whom estate should be distributed, and had prior thereto been represented by counsel who were familiar with her claim and with facts, and, though she had no notice or knowledge of proceeding and had not appeared therein, court did not abuse its discretion in denying her motion to vacate such order, made nearly 6 months after she received notice of decree.

2. Appeal and error ☞948—Action of trial court in denying motion to vacate its order presumed correct, and burden is on appellant to show court abused its discretion.

All presumptions will be indulged in favor of correctness of court's action in denying motions to vacate its orders and decrees, and burden is on appellant to show that court abused its discretion.

3. Appeal and error ☞946—Appellate court will not interfere with exercise of discretion by lower court unless it plainly appears that discretion has been abused.

Appellate court will not interfere with exercise of discretion by lower court, unless it plainly appears that discretion has been abused.

4. Wills ☞775—Bequest in trust held to have lapsed on death of beneficiary and designated remainderman prior to time of distribution.

Where will directed executors, as trustees of gift to grandson, to invest principal, pay to him so much of interest as they deemed necessary and advisable for his support, and, upon his reaching age of 40, or sooner if deemed advisable, pay to him principal and accumulated profits, and provided further that, in event executors have not paid said share prior to grandson's arrival at age of 40, and he should die prior to such payment of his share, such share should go to his brother, held that, on death of beneficiary without payment of share, his brother having predeceased him, the legacy lapsed.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of Bertha Triest, deceased. From an order denying motion to vacate an order settling the accounts of Jesse E. Triest and others, trustees, and a decree terminating the trust and adjudicating distribution, Olga Koch and J. D. Lederman, administrator of the estate of Walter C. T. Koch, deceased, appeal. Affirmed.

J. Delmore Lederman, of San Francisco, for appellants.

H. G. W. Dinkelspiel, Martin J. Dinkelspiel, and Heller, Ehrman, White & McAuliffe, all of San Francisco, for respondents.

CASHIN, J. Appeal by J. D. Lederman, as administrator of the estate of Walter C. T. Koch, deceased, and Olga Koch, surviving wife of deceased, from an order of the superior court of the city and county of San Francisco, denying a motion therein, made by appellants to vacate an order settling the account of respondent trustees, under a trust created by the will of Bertha Triest, deceased, and a decree terminating the trust and adjudging the persons to whom, and the proportions in which, the trust fund should be distributed.

The facts are as follows: Bertha Triest died on April 18, 1914. By her will she bequeathed and devised the residue of her estate—the only portion in which appellants claim an interest—in equal shares to various children, and to Walter C. T. Koch and Frank L. Koch, her grandchildren, the share which their deceased mother, a daughter of Bertha Triest, would have taken had she been alive, and provided with reference to

the share of said Walter C. T. Koch as follows:

"Fourth: I give, devise and bequeath all the rest, residue and remainder of my property, real and personal, of every kind and character * * * to my children, Julius S. Triest, Jesse E. Triest, Stella Koch, Irma T. Cahn, Martin Triest, Elsa T. Guggenheim, and my two grandchildren, Walter C. T. Koch and Frank L. Koch, as the representatives of and to take the share their deceased mother, Hilda Koch, would have taken had she been alive. * * *

"The part or portion thereof given to said Walter C. T. Koch is and shall be subject to the following conditions, to wit: I direct my executors to invest the part or portion of my estate hereby willed by me to said Walter C. T. Koch for the benefit of said Walter C. T. Koch, and to devote and pay over to said Walter C. T. Koch such of the income thereof for the support of said Walter C. T. Koch as in the judgment of my said executors is necessary and advisable for his support, the principal of said share, together with the accumulated profits thereon, to be paid over to said Walter C. T. Koch upon his reaching the age of forty (40) years, or sooner should my executors deem it advisable. In the event that my executors have not paid said share prior to the time said Walter C. T. Koch reaches the age of forty (40) years, and said Walter C. T. Koch shall die prior to the delivery of said share to him, I direct that his said share go to his brother, Frank L. Koch."

On May 24, 1914, the will was duly admitted to probate in said court, and Martin, Frank, and Jesse E. Triest were appointed as executors thereof, and duly qualified and acted. Thereafter, on January 11, 1916, the court distributed the portion of the estate in which Walter C. T. Koch was interested to the three trustees named in the will, who accepted the trust; the executors of the will not being discharged as such. One of them, Martin Triest, died on May 3, 1922, and the surviving trustees are among the respondents here. Said Frank L. Koch, one of the grandchildren, died on December 24, 1917, and the said Walter C. T. Koch on February 10, 1920, leaving surviving him his wife, appellant Olga Koch. No part of the principal of the trust fund in money or property had been paid or delivered by the trustees to Walter C. T. Koch at the time of his death, but portions of the income therefrom had been from time to time paid. Thereafter the surviving trustees, as such, on May 3, 1922, filed in said court their first account and report, and their petition for settlement thereof, the termination of the trust, and the determination by the court of the persons to whom and the proportions in which the trust fund should be distributed. The time for hearing the matter was duly set by order of the clerk of the court for May 17, 1922, who duly posted notices of such hearing in three public places in said city and county more than ten days before the day fixed, and no further notice was ordered by

the court. (It is not contended here that the notices were legally insufficient.)

The matter was heard on that day, and thereafter an order approving the account was made dated May 17, 1922, and entered in the minutes of the court on July 15, 1922, and also the decree of the court dated May 17, 1922, and entered on July 17, 1922, in the minutes of the court, the latter describing the property of the trust fund, adjudging the trust terminated, and ordering that to the estate of Walter C. T. Koch, deceased, should be distributed one-twentieth thereof. Appellant Koch, who resided in the city of New York, was not present or represented at the hearing; and it is conceded that she had at the time no actual notice or knowledge of the proceedings, and that she had theretofore never appeared or been represented at any of the proceedings in the Triest estate. Appellant Lederman had not at that time been appointed administrator and was not representing appellant Koch. Thereafter, on January 5, 1923, after proceedings duly had, letters of administration on the estate of Walter C. T. Koch, deceased, were in said court issued to appellant Lederman, and on the same day notice of motion to be made on January 15, 1923—the order on which gives rise to this appeal—was served on attorneys for the respondents, supported by affidavits, one being an affidavit of merits, and a proposed unverified answer to the account and petition of the surviving trustees alleging that certain claimed expenditures in the account had not been made; that certain acts of the trustees had resulted in loss to the estate; that the legacy mentioned had not lapsed; and that the whole of the trust fund belonged to the estate of Walter C. T. Koch, deceased. The matter came on for hearing on the day fixed, was continued from time to time, affidavits in opposition were filed by the respondents, and the motion finally denied on June 11, 1923, the motion was served and filed within six months after the entry of the order and decree complained of.

It is the contention of the appellants that the order and decree sought to be vacated were taken as against appellant Koch through her excusable neglect, surprise, mistake, and inadvertence; that the motion was made within a reasonable time; that appellants acted with diligence in the premises, and that the motion to vacate made under section 473 of the Code of Civil Procedure should have been granted; that the provision in the Triest will for Walter C. T. Koch created in him a vested interest to that extent in the residue of the estate which did not, in view of the facts then existing, revert to the Triest estate upon his death; that the whole of the trust fund belongs to his estate; and that the decree of the court determining that but one-twentieth thereof should be distributed to his estate and the balance to the surviving children of Bertha

Triest was improvidently made, and deprived the estate of Walter C. T. Koch and appellant Koch of substantial rights.

Before any discussion of the merits of the claim of appellants for a greater portion of the trust fund than that adjudged by the decree, it must be determined whether the order of the court in denying the motion, and thereby holding that the motion was not made within a reasonable time after knowledge of the entry of the order and decree, was an abuse of its discretion in the premises, or, in other words, that there was a lack of evidence sufficient to sustain its conclusion. *Watson v. Columbia Basin Development Co.*, 22 Cal. App. 556, 135 P. 511; *Bond v. Karma Ajax Consolidated Min. Co.*, 15 Cal. App. 469, 472, 115 P. 254; *Smith v. Pelton Water Wheel Co.*, 151 Cal. 394, 90 P. 934.

[1] It appears from the affidavits filed by respondents that during the month of June, 1920, after the death of Walter C. T. Koch, an attorney at law—in one affidavit named O. T. Keppler and in another Tobias Keppler, a member of the law firm of Keppler & Lochman, with offices in the city of New York—called on the attorneys for the trustees and various of the residuary legatees under the Triest will in the city of San Francisco and negotiated during a considerable period for a settlement of the claim of appellant to the whole of the trust fund, on the theory advanced by him that the same had vested in Walter C. T. Koch, and that said appellant was his sole heir, the claim being then denied by respondents expressly on the ground that the legacy in question had lapsed; that said Keppler thereafter, during the month of July, 1922, further negotiated in person with Henry G. W. Dinkelspiel, one of the attorneys for the trustees, at Atlantic City, N. J., to the same end, leading to no result, the California heirs and their attorneys in all interviews denying the right of appellant to more than the proportion decreed by the court. The fact of these interviews is not denied by appellants, nor the inference therefrom that Keppler then represented said appellant Koch, and the inference is supported by the affidavit of appellant Lederman that he was first consulted in the matter by a attorney of New York city, known by affiant as T. A. Keppler. Among the affidavits filed by respondents is that of Milton Dammann, an attorney at law, with offices in the city of New York, who represented respondents during the month of July, 1922, in connection with the claim of appellant Koch, in which he deposes that said appellant was then represented in another proceeding pending in New York by attorneys Strongman and Ward of New York city, and in which affiant, as attorney, was also interested, but not for appellant, and in which he also deposes that during said month he addressed two letters to said appellant, sign-

ed by him, at her then residence, 648 West 160th street in said city, the first dated July 13, 1922, and the second July 17, 1922, advising her of the fact that he then held for her a check of respondent trustees, payable to her order, in the sum of \$659.63. The material portions of the letters are as follows:

"Re Estate of Bertha Triest.—I have received from Mr. Jesse E. Triest a check for a sum of money representing a share of the estate of Bertha Triest, with a request to see that it reaches you personally. If you will write me in reply to this letter giving me your present address I will see that the remittance is sent to you."

"Re Estate of Bertha Triest.—I acknowledge your favor of July 14th, 1922. We are in receipt of a communication from Mr. Henry G. W. Dinkelspiel, attorney, San Francisco, Cal., inclosing check of Triest Company to your order for \$659.63 the amount payable to you under a decree entered in the estate of Bertha Triest, in the superior court of the state of California, city and county of San Francisco, being one-twentieth of the lapsed legacy payable to Walter C. T. Koch, deceased. I am requested to hand you this check personally against your signature to a receipt prepared by Mr. Dinkelspiel which I inclose."

To these letters said appellant within a day or two replied by telephone, refusing to accept the money, and stating that the matter was in the hands of her attorneys, who would take care of her interests.

The facts stated in the foregoing affidavits are not denied by appellants, but appellant Koch, in her affidavit in support of the motion, states that she had no knowledge of the proceedings leading to the order and decree, or of the making or entry thereof, until November 15, 1922. We call attention to the foregoing to show that the court had ample evidence before it which, if believed, supported the conclusion that appellant Koch received notice of the decree of the court as early as July 20, 1922; that she was then and had prior thereto been represented by counsel, who were then familiar with the nature of her claim and the facts existing; that as early as June 20, 1920, she held the same theory of her rights in the trust fund as asserted in the motion. No reason was shown by appellants for the delay between July 20, 1922, and January 5, 1923, the date of filing the motion, except the fact that appellant Koch has never resided in California, and her allegation of want of knowledge of the facts until November 15, 1922, on which, as we have seen, the evidence would support the conclusion that she had such knowledge as early as July, 1922; further, that she was without means to employ counsel, though, as shown, counsel had undertaken long before to represent and continued to represent her in connection with the matter; and also that appellant Lederman recommenced negotiations with respondents during the early

part of November, 1922, and the fact that it was proper to obtain letters of administration on the estate of Walter C. T. Koch before making the motion.

It is apparent from the record that the last negotiations for settlement were not commenced by respondents, and that they did not expressly nor impliedly consent to the delay. Appellant Lederman, as attorney for Mrs. Koch, was, as we may assume, unfamiliar with the situation when first consulted by Attorney Keppler, and was not advised of the knowledge of existing facts then possessed by Mrs. Koch and her New York attorney. Instead of being authorized to act he apparently was only empowered to negotiate; his principals knowing that negotiations had long since failed of result, and that respondents had for more than a year prior to July, 1922, elected to stand on their claimed legal rights, from which position they had not receded.

[2, 3] All presumptions will be indulged in favor of the correctness of the court's action, and the burden in all cases is upon appellant to make it appear that the court abused its discretion. The appellate court will not interfere with the exercise of discretion of the lower court, unless it be plainly made to appear that such discretion has been abused. *Moore v Thompson*, 138 Cal. 23, 70 P. 930; *Smith v Pelton Water Wheel Co.*, supra. We cannot say from the whole record in this case that the superior court abused its discretion in holding, as it must have done, that the motion was not filed, all the evidence considered, within a reasonable time; and we are satisfied from the record that the evidence fully sustains the conclusion of the court that the motion should be denied.

[4] Without entering into a discussion of the reasons for our conclusion, we are further of the opinion that the construction placed by the trial court on the language of the will of Bertha Triest, and adjudging in effect that the legacy lapsed, was correct, and that the estate of Walter C. T. Koch, deceased, was given by the decree the proportionate share of the trust fund to which it was legally entitled.

The order appealed from is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. Appellants' petition to have the above-entitled cause heard and determined by this court, after judgment in the District Court of Appeal, is denied.

In view of the conclusion that the trial court was justified in holding, under the circumstances in evidence, that the application for relief was not made within a reasonable

time, the question whether or not the legacy here in question lapsed is not necessary to the determination of this appeal, and we express no opinion thereon.

72 Cal. App. 212

PATTERSON v. CITY OF LYNWOOD et al.
(Civ. 5071.)

(District Court of Appeal, Second District, Division 1, California. April 7, 1925.)

Mandamus → **Application for writ of mandate will be denied where matter in question has been adjudicated in another case and appeal taken.**

An application for writ of mandate to compel city trustees to set a date for recall election will be denied, where another citizen has previously made the same application, a peremptory writ has been granted thereon by the superior court, and an appeal therefrom has been taken by the city trustees.

Application by Cochran C. Patterson for a writ of mandate to be directed against the City of Lynwood and others. Writ denied.

Carl V. Hawkins and Jonah Jones, Jr., both of Long Beach, for petitioner.

CONREY, P. J. Petitioner made application to the Supreme Court for a writ of mandate commanding respondent trustees of the city of Lynwood to provide for and set a date for an election, pursuant to certain petitions for the recall of Frank M. Downey, Chas. F. Reed, and Lars C. Anderson, as trustees of said city. The matter has been transferred to this court.

Since the city of Lynwood is a city of the sixth class and therefore can have only five trustees, the fact that the names of Downey and Reed are not found among the five names of persons sued as trustees of the city, may need some explanation; but the explanation is not contained in the petition.

It is not necessary to closely examine or analyze the facts alleged and relied upon to establish a cause of action. The petition shows that an action was brought by another citizen of Lynwood, in the superior court of Los Angeles county, to obtain a writ of mandate compelling the trustees of the city of Lynwood to call the election in accordance with these same recall petitions; that a peremptory writ has been ordered by the superior court, and that the trustees of the city have appealed from that decision.

Petitioner stated as his reason for making a separate and direct application to the Supreme Court, that he seeks to avoid the delay which he fears will be incident to the appeal in that case. He claims that the Supreme Court and the District Courts of Appeal have original jurisdiction in cases of this kind, even when an appeal has been

taken as to the same matter, and cites *Scott v. Boyle*, 164 Cal. 321, 128 P. 941, as authority for the proposition. In *Scott v. Boyle*, the Supreme Court allowed a writ of mandate to compel the payment of a salary of a municipal office, notwithstanding that the same questions of law were involved in a pending appeal in which the validity of the ordinance providing for said salary was to be considered. But it did not appear that the other case, which was an injunction suit, related to the same demand. It merely involved the validity of the same ordinance.

But in the case at bar, we have the petitioner's admission that the very matter at issue, to wit, the duty of the trustees of the city of Lynwood to provide for and set a date for the said recall election, has been adjudicated in an action in the superior court, and that the judgment in that case is now subject to an appeal. In view of these facts, and assuming that we would have the necessary jurisdiction to act on the merits of the petition, we think that one litigation of the same cause of action is enough. If the facts are such that the interest of the public is involved, and that the city is entitled to the earliest possible disposition of the appeal, some relief could be obtained by advancing that case on the calendar when it is ready for hearing.

For the reasons above stated, the petition is denied.

I concur: CURTIS, J.

72 Cal. App. 124

PEOPLE v. GEORGE. (Cr. 1236.)

(District Court of Appeal, First District, Division 1, California. April 2, 1925.)

1. Criminal law § 699—Peremptory challenge may be predicated on manner of jurors' answer.

Although jurors' answers on voir dire indicate mental fairness, peremptory challenge may be predicated on manner of answer, without subjecting counsel to criticism of court.

2. Criminal law § 1037(2), 1055—Remarks of court concerning method of examining jury not considered, in absence of exception or requested instruction to disregard.

Although court improperly remarked that method of council in examining jury on voir dire and in exercising peremptory challenge seemed foolish and trifling with time of court, error would not be considered, in absence of exception or request that jury be instructed to disregard.

3. Criminal law § 1037(2)—Assignment of misconduct and request for jury to disregard ordinarily necessary.

Ordinarily assignment of misconduct and request that jury be instructed to disregard objectionable statements are necessary as foundation for complaint of misconduct.

4. Criminal law § 1169(11)—Testimony so prejudicial that it could not be cured by instruction held to require reversal in spite of failure to request instruction.

In prosecution under Pen. Code, § 288, for lewd and lascivious acts with young girl, testimony in rebuttal of character witnesses that accused had been said to have committed similar acts with other young girls, which was objected to generally, held so prejudicial that effects could probably not be overcome by instruction to jury to disregard, and would require reversal, notwithstanding failure to request such instruction.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Charles B. George was convicted of lewd and lascivious acts with a young girl, and he appeals. Reversed.

James C. Espey, of San Francisco (Edwin V. McKenzie, of San Francisco, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

CASHIN, J. Appellant was charged by indictment with the commission of a felony, to wit, violation of section 288 of the Penal Code, tried in the superior court of the city and county of San Francisco, convicted, sentenced to San Quentin, and has appealed from the judgment and the order of the court denying his motion for a new trial.

Appellant was accused of lewd and lascivious acts with a six year old girl named Etta Peterson. The offense was alleged to have been committed during the afternoon of April 9, 1924, in an outhouse situated on Hale street, a half block from the residence of Etta Peterson, who resided with her parents, her grandmother Louise Francen, and her sister Annie Peterson, aged four years, on Holyoke street, all in the city of San Francisco. Appellant is a married man, and had been residing with his wife and minor child in the city of San Francisco for about four years prior to the alleged offense. During the last two years of that period he had been in the employ of the United States as a mail carrier, and his route of delivery covered the portions of San Francisco in which the Peterson family on April 9, 1924, resided, and passed the Peterson house and the outhouse mentioned below. Previous to his employment by the government he had been in the military service of the United States for two years, having been discharged in 1920, and immediately thereafter married his present wife.

The testimony of the witnesses for the prosecution in its case in chief—who were Minnie Peterson, the mother; Louise Francen, the grandmother, Katherine Eisenhart, a policewoman connected with the police

department of San Francisco, and said Etta Peterson—was, in substance, that on the afternoon of April 9, 1924, Etta Peterson and her sister Annie complained to their mother that a man had mistreated Etta that afternoon in an outhouse in the neighborhood situated in the yard of an unoccupied dwelling house, by placing his hands on her private parts; that on the Thursday following the mother and grandmother, in the presence of Etta and Annie, upon the arrival of appellant at the Peterson home in the course of his duties, charged the appellant with the offense, and the two children then identified him as the offender. Appellant denied the charge. Thereafter, on April 12, 1924, the date of the arrest of appellant, the witness Eisenhart, in the presence of Corporal Maher of the San Francisco police department, the mother, and the two children and appellant, asked the child Etta if appellant was the person who had taken her to the toilet. The child replied, "Yes," to which appellant made no reply. Louise Francen, the grandmother, testified that she visited with the child Annie the place of the alleged offense, and found on the floor a substance which she described as a "muss," and the mother testified that on the bloomers worn by the child Etta on April 9, 1924, were found on April 10, 1924, certain stains. No analysis of the substance found was made, and no evidence adduced of its character other than as above stated. The child Etta testified, describing acts done by the appellant, which, assuming her testimony to be true, constituted an offense under section 288 of the Penal Code; and further testified that after the acts described there remained on the floor of the toilet a substance, which she described. The child Annie was not called as a witness due to the fact of her tender age. No witnesses saw appellant with the children or the children or appellant at the toilet or within the lot in which the toilet is situated. Appellant at the trial denied the offense and called on his own behalf witnesses who testified that his reputation for morality had been good.

Appellant bases his appeal on numerous grounds, among which are certain conduct and rulings of the court and the conduct of the prosecuting officer, which he assigns as error. None of these do we consider to constitute error or find necessary to discuss except the following:

[1, 2] During the examination of certain jurors on their voir dire counsel for the appellant asked certain questions as to their state of mind with reference to appellant and to persons in his position under a like charge, and as to their freedom from bias and prejudice. The answers indicated mental conditions of fairness and impartiality, whereupon counsel for appellant challenged them peremptorily. The court thereupon remarked that this action meant that the an-

swers indicated to counsel that the two jurors challenged were lying, and that his method of proceeding seemed to be foolish and trifling with the time of the court. Counsel replied that the manner in which jurors answered might have something to do with the exercise of a peremptory challenge. In this counsel stated the correct theory, and now assigns the remarks of the court as prejudicial misconduct.

The remark was not excepted to or assigned as error or misconduct at the time, and the court was not then or thereafter requested to instruct the jury to disregard it. We are of the opinion that had such action been taken by counsel, and the court had so instructed the jury, any possible prejudicial effect upon them would have been removed. Under these circumstances the defendant will not here be heard to complain of the alleged error.

A further contention is made by appellant as to certain conduct of the prosecuting officer in the course of the trial, as to which, although counsel for defendant failed at times to take and make proper exceptions or requests of the court, yet he insists was of such a nature that no action by the court or counsel could remove its prejudicial effect from the minds of the jury. The prosecuting officer in his opening statement to the jury said:

"The children came home. They gave the dime to the mother; they told the mother where they had received it, and a little while afterwards the younger of the two children told the mother that the older girl, Etta, was afraid of the mailman, and then the mother asked Etta what was the matter, and Etta began to cry."

To this counsel for appellant objected on the ground that any statement by the child Annie in the absence of appellant would be hearsay. The court sustained the objection and instructed the prosecuting attorney that the statement of the child Annie would have to be eliminated.

Counsel did not request the court to instruct the jury to disregard the statement made by the prosecuting attorney.

[3, 4] In rebuttal of the testimony of the character witnesses called by appellant the prosecution called Annie Lockhart and, immediately following her, Mrs. Peterson, the mother of Etta, who testified respectively as follows:

Testimony of Mrs. Lockhart:

"Mr. Hagerty: Q. Have you a little daughter by the name of Margaret Brandis? A. Yes, sir.

"Q. How old is she? A. She was 9 last July.

"Q. Have you ever discussed the reputation of Charles George, the defendant in this case, for morality? A. With my little girl. He asked her to go into a lavatory—

"Mr. Espey: Just a moment. If the court please, I object to that line of examination of the witness in case which has nothing to do with the one with which the defendant is charged. This is not part of the res geste.

"Mr. Hagerty: All right.

"Q. Have you discussed the reputation of this man with your child Margaret Brandis for morality? A. Yes, sir.

"Q. Have you discussed it with some other ladies in that neighborhood? A. Well, not with anybody.

"Q. Do you know a Mrs. Didier? A. I know a Mrs. Didier, yes.

"Q. Have you ever talked with Mrs. Peterson about the reputation of this man? A. Yes, sir.

"Q. Have you talked with Mrs. Didier? A. Mrs. Didier, I don't know her—not for about two years ago.

"Q. Do you know what his general reputation for morality is in this community? Answer that, 'Yes,' or 'No.' A. No, sir; I don't.

"Q. Have you ever heard it discussed? A. Yes; I have.

"Q. And from that—from hearing that discussion of it, what would you say it was—good or bad? A. I would say bad."

Testimony of Mrs. Peterson:

"Mr. Hagerty: Q. Mrs. Peterson, do you know Mrs. Didier? A. Yes; Mr. Hagerty.

"Q. Do you know Margaret Brandis? A. Yes; I do. Q. Do you know Mrs. Anna Lockhart? A. Yes; I do.

"Q. Have you ever discussed with those people the reputation of this defendant for morality? A. Well, with Mrs. Didier, but not with Mrs. Lockhart and Margaret Brandis.

"Q. You understand what I mean by morality, as to a person being clean sexually and morally. You know what I mean? A. Well—

"Q. In other words, their reputation for morality, that is, that they believe in preserving decency in their conduct and in their actions and in their acts, and observing it. Do you understand that? A. Well, I don't quite.

"Q. Have you ever talked with either or any of those people relative to this defendant's reputation for interfering with little children outside of your own? A. No; I didn't. We don't know anything about that.

"Q. Where did you discuss this defendant with Mrs. Lockhart? A. Well, Mrs. Lockhart came to my house.

"Q. And your discussion with Mrs. Lockhart was on his reputation, wasn't it? A. Well, yes; she came to my house to tell me about her little girl.

"Q. And that was for conduct with a little girl, wasn't it?

"Mr. Espey: Just a moment, your honor. I wish to object at this time. I don't think—

"The Court: Sustained.

"Mr. Hagerty: I think you are right. I think I made a mistake in asking such a question.

"Mr. Espey: It is really to prejudice the jurors' minds.

"The Court: Sustained.

"Mr. Hagerty: Yes; and I ask, if your honor please, that I be forgiven myself about that. I don't like to do those things, but it was just through possibly an agitation of having met with a situation that I didn't expect to meet.

"Q. Now, in your discussion with Mrs. Lockhart, wasn't that discussion with reference to the morality of this defendant? A. Yes; it was.

"Q. And, having had that discussion with Mrs. Lockhart and the others, what would you say the reputation of this defendant was—good or bad? A. Well, I thought it was bad."

This testimony was not admissible on any ground. The objections, though general, sufficiently called the attention of the court and prosecuting officer to its incompetency. The latter expressly admitted the validity of the objection, and apologized to the court for eliciting the testimony. When we recall the nature of the case; the extreme danger, as shown by experience, of convicting men on the testimony of a child of the tender years of Etta Peterson, unless strongly corroborated by competent evidence, and how little is required to turn the scale in the minds of the jurors, naturally inflamed by the revolting character of the offense charged, we cannot but believe that this testimony did have a profound effect upon the jury, and that, as a fair probability, it outweighed in their minds the testimony of the appellant in denial, the evidence of his previous good character, his associations and employment, his domestic situation, and the inherent improbability that he, in view of these facts, would commit the crime charged. That the prosecuting officer throughout was fully aware that the questions and answers were incompetent we cannot but believe. The record shows and his position demands legal ability, of a high order on his part; and, while we cannot say that he was actuated by bad faith or by a desire to take an unfair advantage of appellant, yet he willfully persisted in questions of the same character, eliciting from the witness incompetent and prejudicial testimony, and the result of his overzealous desire to convict was the same as though this course was purposely followed.

It is true, as stated, that appellant's counsel did not in terms except to the acts, assign them as misconduct or request the court to instruct the jury to disregard the testimony; yet he did object to the whole line of testimony on the ground that it was hearsay, and did protest against it as designed to prejudice the jurors' minds. The matter was thus fairly called to the court's attention by the objections and protests of appellant's counsel and the apology of the prosecuting attorney.

It is the general rule that an assignment of misconduct and a request that the court admonish the jury to disregard the objectionable statements are necessary as a foundation for a complaint of misconduct in the appellate court (*People v. Routh*, 182 Cal. 561, 189 P. 436; *People v. Shears*, 133 Cal. 154, 65 P. 295; *People v. Babcock*, 160 Cal. 545, 117 P. 549; *People v. Ye Foo*, 4 Cal. App. 743, 89 P. 450; *People v. Amer*, 8 Cal. App. 143, 96 P. 401; *Grossetti v. Sweasey*, 176 Cal. 793, 169 P. 687; *Scott v. Times-Mirror Co.*, 181 Cal. 345, 184 P. 672, 12 A. L. R. 1007); the reason for the rule being, as stated, that the trial court may be given an opportunity to prevent by suitable in-

struction the harmful effect on the minds of the jury. Where, however, the record fairly shows—as we think it does in this case—that the acts complained of are of such a character as to have produced an effect which, as a reasonable probability, could not have been obviated by any instructions to the jury, the absence of such assignment and request will not preclude the defendant from raising the point on appeal (*People v. McDonald*, 167 Cal. 551, 140 P. 256; *People v. Edgar*, 34 Cal. App. 459, 167 P. 891); and, according to the decisions cited, *supra*, and to the views of the court in *People v. Frank*, (Cal. App.) 236 P. 189. Such cases furnish ground for reversal; and where it fairly appears, as here, all the evidence considered, that the irregularities complained of in all probability largely influenced the jury in arriving at their verdict of guilty, such result is a miscarriage of justice. We conclude, after a full examination of the entire record, including the evidence, that such a case is presented, and that it is our duty to reverse the judgment. It is so ordered.

We concur: TYLER, P. J.; KNIGHT, J.

73 Cal. App. 283

ARMSTRONG et ux. v. RAU et ux.
(Civ. 4374.)

(District Court of Appeal, Second District, Division 1, California. April 15, 1925.)

1. Appeal and error ⇐714(1)—Facts outside record not considered on appeal.

That a trial judge was about to retire from office, and therefore prepared the findings in great haste, were circumstantial facts outside the record, and, although true, would not influence consideration on findings as written.

2. Appeal and error ⇐886—Appellate court cannot amend findings.

The Court of Appeal cannot amend findings of the trial court.

3. Trial ⇐395(2)—Finding held insufficient for award of damages.

In an action for damages for inducing plaintiffs to exchange properties by defendants' representation that their property was larger and more valuable than it actually was, a finding that, had the property been the size represented, "it would have been of the value of \$9,360," without any additional statement of comparative values of both properties, was insufficient upon which to award damages.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by J. P. Armstrong and wife against Walter F. Rau and wife, for damages for inducing an exchange of properties by deceit. From a judgment for plaintiffs, defendants appeal. Reversed.

Rush M. Blodget and Victor T. Watkins, both of Los Angeles, for appellants.

George P. Adams and W. W. Orme, both of Los Angeles, for respondents.

CONREY, P. J. This appeal is presented on the judgment roll alone. The action was brought to recover damages for deceit alleged to have been practiced by the defendants, whereby they induced plaintiffs to accept certain real property in San Bernardino county in exchange for other property owned by the plaintiffs in Los Angeles county. The complaint, without stating the value of any of the property involved in the transaction, alleged that the defendants represented that the quantity of land conveyed by them to the plaintiffs amounted to 55 acres, of which 35 acres were in bearing navel orange trees and 10 acres were in bearing Valencia orange trees, whereas in fact the quantity of land conveyed was only 44.59 acres, of which only 24½ acres were planted to navel oranges and only 9½ acres were planted to Valencia oranges, and that there were no other orange trees on said land. The complaint then alleged that, if the land and orange grove had existed in accordance with said representations, "it would have been of the value of \$20,000 more than it then was worth or is now worth, to plaintiffs' damage in the sum of \$20,000."

The findings of fact declare that said representations were made as above stated, whereas in fact the acreage of the tract was only 44.59, of which less than 25 acres were planted to navel oranges and less than 8 acres were planted to Valencia oranges, and that there were no other orange trees on said land.

The answer, besides denying that defendants made the alleged statements, alleged facts showing certain visits made by the plaintiffs to the land in San Bernardino county and certain investigations made by them, and denied that the plaintiffs or either of them relied solely or at all upon the alleged or any representations or statements of the defendants. The findings, after referring to certain visits which the plaintiffs had made to said land, state:

"That it is not true that the plaintiffs or either of them made inquiry or personal investigation of said ranch except said visits, or inquired of friends or acquaintances as to the advisability of purchasing said ranch or as to the method or manner of ascertaining the size of acreage of orange ranch. And that it is true that the plaintiffs or either of them relied solely or entirely or at all upon their own judgment as to acreage or upon the advice of their friends or acquaintances or any of them in making the exchange for the said ranch."

In another part of the findings, however, it is stated that each of the plaintiffs at the time of the transaction believed all of the

said statements and representations of the defendants, and relied wholly and solely thereon, and believed that the land described in said deed from the defendant to the plaintiffs embraced 55 acres of land, and that 45 acres thereof was planted in growing oranges as represented and stated by the defendants.

Upon the issue relating to the intention of the defendants to deceive, the court found that, at the time of said exchange of properties, the defendants knew that said land contained only 44.59 acres, and knew that there were less than 25 acres of navel oranges and less than 8 acres of Valencia oranges thereon, and knew their said representations and statements as to acreage so made to the plaintiffs as aforesaid were false and untrue, "and were not made by the defendants to the plaintiffs for the purpose of deceiving or defrauding plaintiffs, but nevertheless plaintiffs were deceived and defrauded thereby, and were thereby induced to make said exchange."

Upon the issue as to damages and amount of damages sustained by reason of the alleged deceit, the court without making any statement showing the comparative values of said properties, or any statement of their values other than as contained in the following quotation, found as follows:

"That, had said land embraced 55 acres, and had it contained 35 acres of navel oranges and 10 acres of Valencia oranges, as it was so stated and represented to the plaintiffs by the defendants, and as the plaintiffs each of them believed it to contain, it would have been of the value of \$9,360, no part of which has been paid to the plaintiffs or either of them, or to any one for them or either of them or to or for the use of them or either of them."

[1-3] It is suggested by respondents that some of the findings to which we have referred were inadvertently made. In explanation thereof it is stated that the judge who tried the case had resigned and was about to retire from office, and that the findings were prepared in great haste. While these circumstances of excuse no doubt did occur, they are facts outside of the record, and in no way diminish our obligation to decide the case upon the findings as written. It is conceded, as it must be, that this court is without power to amend the findings. The court awarded damages in the sum of \$9,360, with interest from the date of the transfer, and it is from this judgment that the defendants appeal. It is perfectly clear that the facts as found furnish no basis whatever for damages in the sum stated or in any amount. It may be that the judge intended to find that, if the property conveyed to the plaintiffs had been of the quantity and in the condition represented, it would have been of a value \$9,360 more than the amount that it actually was worth. But on the record we do not

know that fact. This alone is a sufficient ground for reversing the judgment. To the suggestion that a reversal on account of this defect would result in a miscarriage of justice, the obvious reply is that it would be a miscarriage of justice to award a large sum in damages without first establishing the facts which alone would control the amount of such damages.

There are several other questions presented in argument by counsel. For instance it is contended by appellants that, this being definitely an action at law for deceit, an intent to defraud is an essential element of the right to recover, and that, as the court found that there was no intent to defraud, judgment should have been for the defendants. Also it is contended that the judgment cannot stand because it does not appear that the quantity of land to be conveyed by the defendants constituted one of the principal conditions of the contract. And it is further contended that the court erred in allowing interest on the principal amount of the award from the date of the transfer. We deem it unnecessary to attempt a decision on these questions at this time.

The judgment is reversed.

I concur: CURTIS, J.

72 Cal. App. 241

PACIFIC STATES CORPORATION v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 5003.)

(District Court of Appeal, Second District, Division 1, California. April 10, 1925.)

1. Justices of the peace $\S$ 141(2)—Failure of justice to transmit fee paid to him to superior court did not deprive court of jurisdiction.

When defendant, appealing from justice court to superior court, had paid to justice fees, as required by Code Civ. Proc. $\S$ 981, it was error to dismiss cause for want of jurisdiction because justice had failed to transmit fees to county clerk, when defendant, on learning, after expiration of time for appeal, of clerk's failure to file papers, again paid fee to county clerk.

2. Justices of the peace $\S$ 141(1) — Court could not divest itself of jurisdiction by erroneous order of dismissal.

When appellant had done all required of him under Code Civ. Proc. $\S$ 981, to place his cause before the superior court, and court had acquired jurisdiction, it could not divest itself of jurisdiction by erroneous order dismissing appeal because not presented in time.

3. Mandamus $\S$ 31—Mandamus held proper remedy to compel superior court to exercise jurisdiction.

When appellant had done all required of him under Code Civ. Proc. $\S$ 981, to place his cause before the superior court, and court errone-

ously dismissed cause because of failure to appeal within time, mandamus was an appropriate remedy to compel superior court to exercise jurisdiction.

Petition by the Pacific States Corporation against the Superior Court of California in and for the County of Los Angeles and Hon. Hugh J. Crawford, Judge thereof, for writ of mandate to compel respondent to assume jurisdiction of, and hear and determine, an appeal from the justice's court. Writ granted.

Howard S. Lewis, Clarence E. Fleming, and John M. Martin, all of Los Angeles, for petitioner.

James McLachlan, of Los Angeles, for respondents.

CONREY, P. J. In an action filed against petitioner herein in the justice's court of Pasadena township, in the county of Los Angeles, judgment was rendered in favor of Redman, plaintiff, against Pacific States Corporation, defendant. The corporation appealed. On motion of Redman the superior court dismissed the appeal upon the ground that the same had not been perfected within the time provided by law. Thereupon said corporation filed its petition in this court for a writ of mandate to compel the superior court to exercise jurisdiction over said appeal, and to proceed to hear and determine said action upon its merits. The questions of law involved in this proceeding are raised by demurrer to the petition.

Section 981 of the Code of Civil Procedure reads as follows:

"No appeal effective unless fees for filing are paid. No appeal taken from a judgment rendered in a police or justice court in civil matters shall be effectual for any purpose whatever unless the appellant shall, at the time of filing the notice of appeal, pay in addition to the fee payable to the justice of the peace on appeal, the fees provided by law to be paid to the county clerk for filing the appeal and for placing the action on the calendar in the superior court. Upon transmitting the papers on appeal, the justice or judge shall transmit to the county clerk the sum thus deposited for filing the appeal in the superior court and for placing the action on the calendar. No notice of appeal shall be filed unless the fees herein provided for are paid in accordance with the provisions of this section."

In the Redman case the defendant, in perfecting its appeal, complied with the requirements of section 981, and actually paid to the justice all of the fees referred to in said section. The justice transmitted to the county clerk the papers on appeal, but omitted to transmit therewith the sum deposited by appellant for filing the appeal and for placing the action on the calendar in the superior court. A few days later the justice died

without having transmitted said moneys to the county clerk. For this reason the clerk omitted to file the papers, and placed them in a pigeonhole, where the appellant was unable to locate them until the 26th day of October, 1923. On that day, and on demand of the county clerk, the corporation again paid the fees payable to the county clerk. Thereupon said cause was entered by the clerk on the docket of the superior court.

The sole question presented by counsel for determination relates to the ruling of the superior court that said appeal was not perfected until October 26, 1923, and that for that reason the superior court was without jurisdiction of the cause. It should further be explained that, according to the allegations of the petition herein, the defendant brought the case to trial within less than one year from October 26, 1923, the date of filing of the appeal in the superior court; that on that day, on stipulation entered in the minutes of the court, and at the special instance and request of the attorney for Redman, the cause was continued to January 15, 1925; that afterwards, on January 19, 1925, the court dismissed the appeal for want of jurisdiction of the cause, as hereinabove stated.

In another action wherein a similar question was presented for consideration this court said:

"Assuming, as claimed by petitioner, that the notice of appeal could not be deemed filed until payment of the fees in question was made, then, since it was left with the justice whose duty it was to file it upon payment of the fees, it should be deemed filed as of the date on which the fees were paid, and since this was within the thirty days after the rendition of judgment, it would seem to be a sufficient compliance." *Simmons v. Superior Court*, 30 Cal. App. 252, 157 P. 817.

[1] It is a recognized principle in court practice that, where a party has done all that the law requires of him in any matter which is a part of the proceedings in an action, he should not be made to suffer by reason of the neglect of an officer of the court to perform an official duty in the completion of that particular proceeding in the action. Therefore we hold that, when the Pacific States Corporation had paid into the hands of the justice all of the required fees in connection with its notice of appeal, and had given its sufficient undertaking on appeal, the appeal was thereby perfected so as to vest jurisdiction thereof in the superior court. This jurisdiction could not be lost by the mere failure of the justice to transmit the filing fees to the county clerk.

[2, 3] It is a definitely settled rule that, where a court has jurisdiction of a cause, it should not be permitted by an arbitrary or erroneous order to divest itself of jurisdiction, but it should be compelled to proceed with the case to judgment. Mandamus is an appropriate remedy. *Golden Gate Tile*

Co. v. Superior Court, 159 Cal. 474, 114 P. 978.

Let the peremptory writ issue.

I concur: CURTIS, J.

72 Cal. App. 255

COWSERT v. STEWART. (Civ. 5160.)

(District Court of Appeal, First District, Division 2, California. April 11, 1925.)

Sheriffs and constables § 118—Constable liable for releasing goods, where sufficient undertaking against third party given.

Where plaintiff, in attachment proceedings, indemnified sheriff against third party claim by undertaking of two good and sufficient sureties, as required by Code Civ. Proc. § 689, the constable was bound to hold the goods, and the fact that he rejected the sureties as insufficient was no defense to a subsequent action for wrongful release.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Action by V. R. Cowsert against B. F. Stewart. From a judgment for plaintiff, defendant appeals. Affirmed.

Loren A. Butts, of Fresno, for appellant.
Kitt Gould, of Clovis, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment for \$304 against him, as constable, in an action brought to recover damages because the defendant released an automobile from the lien of an execution issued upon a judgment secured by plaintiff against one Jack Zero.

The facts are presented by the findings, and are that the plaintiff had duly secured a judgment against Jack Zero in the sum of \$299 and costs. Thereafter an execution was issued and delivered to the defendant constable, with instructions to levy said execution upon a certain Dodge commercial truck in the county of Fresno, state of California, and within the jurisdiction of said constable. The constable made the levy and took the truck into his possession under and pursuant to the writ of execution, and on the 16th day of June, 1923, posted notice of constable's sale to be held on June 22, 1923. On June 18, 1923, Michael Pecci claimed to be the owner of said truck and filed a third party claim and demanded the release of the truck. Thereupon the constable demanded of plaintiff an undertaking, pursuant to section 689, Code of Civil Procedure, of the state of California, in the sum of \$1,500, which demand was complied with by plaintiff on June 20, 1923, by furnishing an undertaking in said sum signed by Kitt Gould and Rhoda M. Gould as sureties. On June 22, 1923, the defendant demanded a new undertaking giving as his reason that Kitt Gould was an attor-

ney at law, and could not legally execute an undertaking. Plaintiff provided no other bond, and the constable released the truck, and the judgment in plaintiff's favor was never satisfied. The sureties upon the undertaking were good and sufficient sureties.

It would seem that a recital of these facts is all that is necessary to determine the appeal. The appellant argues that the constable had the right to declare the bond insufficient, regardless of the fact, and that the testimony shows that the sureties were, in fact, insufficient. The latter point is completely disposed of by the findings, which are supported by the evidence.

The former contention; i. e., that the constable may arbitrarily accept or reject a bond furnished under the provisions of section 689, Code of Civil Procedure, presupposes a construction of that section which would leave a litigant completely powerless and without legal right. The section itself provides that, in a situation such as was presented in this case, "the sheriff is not bound to keep the property unless the plaintiff, or the person in whose favor the writ of execution runs, on demand, indemnifies the sheriff against such claim by an undertaking by at least two good and sufficient sureties," etc. Clearly, then, if the undertaking is furnished as provided, the sheriff is "bound" to keep the property. In the case of Kellogg v. Burr, 126 Cal. 38, 58 P. 306, it was said, in reference to the filing of a third party claim under section 689, Code of Civil Procedure, that the question of the sufficiency of the notice of such claim is a question between the sheriff and the plaintiff in attachment. "If the plaintiff found the notice which was the basis of the sheriff's demand for indemnity insufficient, he might refuse to give it, and thus place the responsibility of an improper release upon that officer." By the same reasoning, if the plaintiff in attachment properly complied with the demand for indemnity, as found in the instant case, and the sheriff, nevertheless, demanded another undertaking, plaintiff might refuse to give it, and place the responsibility for an improper release upon the officer. No other rule is compatible with reason and no other rule will insure an attaching creditor against arbitrary and illegal action upon the part of an attaching officer.

In the recent case of Arena v. Bank of Italy (Cal. Sup.) 228 P. 441, it was said:

"It would be idle to argue that the Legislature, in thus stating the specific requirements of a third party claim, the service of which upon the officer should supply the basis for his demand for indemnity, did not intend a substantial compliance with its terms as a prerequisite to such demand; and, while it may be still held to be true that the policy of the courts should be to protect public officers in the exercise in good faith of their function in relation to the levy of process upon the prop-

erty of litigants, it must also be held that the courts, in so doing, must have some reasonable regard for the express provisions of the statute regulating and limiting their powers and duties in respect to such levies."

That case goes on to hold that, unless the third party claim complies in all particulars with the statute, it fails to furnish the officer with any basis for a demand upon the plaintiff for an indemnifying bond. Likewise, in the instant case, when the plaintiff has furnished a good and sufficient indemnifying bond, the officer has no basis for a demand for another undertaking. He is bound to hold the goods under the attachment and has no right to let the property go out of his hands, except in due course of law, and, if he does and it is lost, he is responsible to the plaintiff in the attachment for the amount of the debt. *Sanford v. Boring*, 12 Cal. 539.

The judgment is affirmed.

We concur: NOURSE, J.; PRESTON, Judge pro tem.

72 Cal. App. 197

McGOWN v. DALZELL. (Civ. 5161.)

(District Court of Appeal, First District, Division 1, California. April 7, 1925.)

1. Attorney and client ☞176—Contract merely for contingent fee gives attorney no lien or interest in judgment in absence of express agreement.

A contract, providing merely for a contingent fee for legal services in an action for, and which results in, money damages for his client, gives the attorney no lien or interest in judgment, in absence of terms constituting in legal effect a transfer of part of claim or judgment.

2. Attorney and client ☞123(2)—Client may transfer interest in judgment to his attorney by oral agreement.

A client may, after judgment, transfer an interest therein to his attorney by oral agreement, in view of Civ. Code, § 1052.

3. Attorney and client ☞124 — Antecedent services and advances by attorney sufficient consideration to support assignment of interest in judgment to him.

Antecedent services and advances by attorney in securing judgment were sufficient consideration to support oral assignment to him of interest therein after final judgment rendered.

4. Attorney and client ☞124—Agreement of client that attorney was to collect and deduct fee from judgment held assignment of interest therein.

Where, after final judgment was rendered in his favor, client agreed with his attorney that latter was to collect judgment and deduct fee therefrom, held, in view of entire transaction,

that such agreement operated as assignment of interest in judgment to attorney to extent of his claim.

5. Attorney and client ☞123(2)—Attorney's interest in judgment, transferred to him by client, and assented to by judgment debtor, could not be extinguished by acts of client or debtor, or both.

Where a client assigned to his attorney an interest in a judgment, which assignment was assented to by the judgment debtor by his negotiating with attorney, the attorney's right in such judgment could not be destroyed by acts of client or debtor, or both.

6. Attorney and client ☞123(2)—Transfer by client to attorney of interest in judgment did not make judgment joint obligation.

Transfer by client to attorney of interest in judgment did not make judgment a joint obligation extinguishable by performance rendered to either within Civ. Code, § 1475.

7. Attorney and client ☞123(2)—Transfer by client of interest in judgment, assented to by debtor, created distinct and separate rights in attorney.

Transfer by client of interest in judgment to attorney, after final judgment, assented to by creditor, created distinct and separate rights in attorney which creditor was bound to observe.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Action by Malcolm McGown against William Dalzell. From an order permitting enforcement of execution after judgment, plaintiff appeals. Modified and affirmed.

George F. Witter, of Oakland, for appellant.

Stanley R. Sterne, of Oakland, for respondent.

CASHIN, J. Appeal by Malcolm McGown and George F. Witter from a portion of an order of the superior court of the county of Alameda made after judgment entered in said court in the action of McGown v. William Dalzell and other defendants. The order was based on a motion to recall execution issued in said action.

The facts as shown by the record are as follows: Appellant, George F. Witter, an attorney at law, practicing his profession in the county of Alameda, was during the year 1918 employed by appellant McGown to commence and conduct the action above entitled, being one to recover a sum represented by a promissory note. The undisputed agreement between Witter and McGown was that Witter should receive a contingent fee of 25 per cent. of all moneys received by or through said action and out of the proceeds thereof, and that McGown should reimburse him out of any judgment recovered for all costs and expenses incurred and advanced by him. Thereafter judgment in the sum of \$390.98, with costs in the sum of \$95.56, was recovered

in the superior court against all the defendants, except one R. H. Howk, who had deposited the sum of \$1,763 of the amount represented by said note in court, and which sum was later paid to McGown. Certain of the defendants, including Dalzell, moved for a new trial, and, the motion being denied, they appealed to the Supreme Court. Thereupon McGown agreed to pay Witter, in addition to the contingent fee of 25 per cent., an additional sum of \$250 and all costs and expenses incurred by Witter on the appeal, the whole to be paid out of any moneys procured through said judgment.

Thereafter, on April 7, 1919, the judgment was affirmed; the total amount thereof, including interest and costs, then being the sum of \$558.28. Appellant Witter then claimed to be entitled to receive from this amount the sum of \$471.09 as the unpaid balance of his fees and advances, the correctness of which claim, as to amount, was not disputed. An agreement was then made between Witter and McGown that Witter should collect from respondent out of the judgment said amount of his fees and expenditures, together with the balance of the judgment, for which latter sum he was to account to McGown. Witter thereupon notified respondent of the arrangement, who agreed to pay the judgment to Witter, and did pay to him sums aggregating \$100, which Witter applied to his own account. After these payments respondent made frequent promises in response to demands by Witter, the negotiations continuing until May 19, 1919, at which time the amount of the judgment, with interest unpaid, was the sum of \$458.28, of which Witter claimed to be the owner of an interest amounting to \$371.09. The record shows that all parties at this time recognized and acquiesced in Witter's claim that he owned an interest in the judgment to the amount stated above, and all joined in various conferences in an endeavor to arrive at a method whereby respondent might dispose of certain property owned by him in order to meet the demand. After the date last above mentioned no further communications were received by Witter from McGown or respondent; and in fact it also appears from the record that at this same time McGown notified Witter that he elected to terminate their relations as attorney and client. However, no substitution of record has been made. Thereafter, on May 7, 1924, Witter caused execution to issue on the judgment, which was followed by a motion by respondent to recall the execution, the order on which motion is here complained of. Why a delay of nearly five years occurred between the date of the last interview between Witter and the others and the issuance of execution, the record is silent; but upon the hearing of the motion it appeared that in May, 1919, without the knowledge of Witter, and with the intent and purpose on the part of McGown

and respondent to defraud him of his part interest in the judgment, respondent paid to McGown \$350 in full satisfaction of the judgment, and on the same day McGown executed a release thereof. According to the evidence, however, it has never been satisfied of record.

The court, by its order, denied the motion to recall the execution, but further ordered that appellant McGown be permitted to enforce execution for the sum of \$108.28, the difference between the sum of \$458.28 and the sum of \$350 paid by respondent to McGown.

Appellants contend that the order should have permitted the enforcement of execution for the sum of \$371.09, the unpaid balance of that portion of the judgment claimed by Witter; that the legal effect of the original agreement covering his fees was to make him the owner of a designated part of the judgment to the extent that his contingent fee was unpaid, which amounted on the day when the attempted settlement was made between McGown and respondent to the sum of \$112.39.

[1] The California authorities do not support this contention. We find no case that holds that a contract providing merely for the payment of an agreed contingent fee for legal services in an action for and which results in a money judgment, in the absence of other terms in legal effect constituting a transfer of a part of the claim or judgment, gives a lien upon or interest in the judgment. *Mansfield v. Dorland*, 2 Cal. 507; *Russell v. Conway*, 11 Cal. 93; *Gage v. Atwater*, 136 Cal. 170, 68 P. 581.

Appellant Witter further contends that the legal effect of the agreement that McGown made after the judgment had become final was to transfer to him an interest therein to the extent of his claim, with power to collect that and the interest of McGown therein; that respondent manifested his consent to the arrangement, and that such facts rendered the subsequent attempt to compromise and satisfy the judgment of no effect as against Witter.

[2-4] We are of the opinion that his position in this respect is supported by authority. It is a fair inference from the evidence that the agreement between McGown and Witter was intended by both to create more than a mere power, and was designed to accomplish more than simply to enforce the personal right of McGown, and was meant to secure Witter's claim by the transfer of an interest to that extent in the judgment. Such a transfer might be orally made. *Smith v. Peck*, 128 Cal. 527, 61 P. 77; *Civ. Code*, § 1052. The antecedent services and advances by Witter were a sufficient consideration therefor (*Greenlee v. Los Angeles Trust & Sav. Bank*, 171 Cal. 371, 153 P. 383); and from the entire transaction as shown by the record it is clear that the parties intend-

ed that an assignment of an interest in the judgment to the extent of Witter's claim should result (*Goldman v. Murray*, 164 Cal. 419, 129 P. 462; *McIntyre v. Hauser*, 131 Cal. 11, 63 P. 69).

[5-7] It appearing from the evidence that respondent, after the making of the agreement above described, made payments to Witter on account of the judgment, and that he negotiated frequently with Witter, as before mentioned, in an endeavor to arrange terms of payment to him, it may be reasonably inferred from all his conduct taken together that he assented thereto and recognized the right of Witter to such interest. Having thus assented, and McGown having made the agreement, the right could not be destroyed by either or both (*Hackett v. Campbell*, 10 App. Div. 523, 42 N. Y. S. 47; *Barlow v. Lande*, 26 Cal. App. 424, 147 P. 231), nor did the judgment by reason of the foregoing agreements become a joint obligation which might be extinguished by performance rendered to either (Civ. Code, § 1475; *Leese v. Sherwood*, 21 Cal. 151). The agreement and the assent operated to create distinct and separate rights in appellants which respondent was bound to observe.

It further appears from the record that appellant McGown has been paid by respondent a sum more than equal to his interest in the judgment, and that he has no further interest therein.

The judge of the superior court, in deciding the motion, drew from the evidence the foregoing conclusions of fact covering the agreement and the transfer thereby to Witter of an interest in the judgment. We think they find sufficient support in the evidence, and we are not inclined to disturb them. But we are of the opinion that the court's order should have provided that appellant Witter have and enforce execution for the sum of \$371.09, with interest thereon at the rate of 7 per cent. per annum from May 14, 1919, and costs. It is therefore ordered that the cause be remanded to the trial court with instructions to modify the portion of the order appealed from in accordance with the views herein expressed, and, as so modified, the order is affirmed, appellant Witter to recover his costs on this appeal.

We concur: TYLER, P. J.; KNIGHT, J.

72 Cal. App. 448

BAUMAN v. EDGAR. (Civ. 5064.)

(District Court of Appeal, First District, Division 2, California. April 27, 1925. Hearing Denied by Supreme Court June 25, 1925.)

1. Negligence ⚡122(1)—When defense of contributory negligence fails stated.

Defense of contributory negligence fails when defendant fails to prove either that

plaintiff was negligent or that such negligence was the proximate cause of the injury complained of.

2. Highways ⚡184(2)—Finding as to negligence and freedom from contributory negligence in automobile collision sustained.

Evidence held to sustain finding that defendant motorist, going north in approaching an intersection, was guilty of negligence, and that plaintiff motorist, who was going east on cross street, and who had the right of way under Motor Vehicle Act, § 20 (St. 1919, p. 215), was not guilty of contributory negligence.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by August H. Bauman against B. J. Edgar. Judgment for plaintiff, and defendant appeals. Affirmed.

William Sea, Jr., of San Francisco, for appellant.

Louis Oneal and Maurice J. Rankin, both of San Jose, for respondent.

NOURSE, J. Plaintiff recovered judgment for \$775 as damages for injuries received in a collision with the defendant's automobile. The cause was tried before the court, sitting without a jury, and all the allegations of negligence appearing in the plaintiff's complaint were found to be true, while the denials and allegations in defendant's answer were found untrue. The appeal is taken by the defendant from the judgment, and is presented upon the judgment roll and a bill of exceptions.

The only ground urged by the appellant is that the trial court erred in holding that the plaintiff was not responsible for the collision because he had the last clear chance to avoid it.

The facts of the case material to the appeal are that at about 7:30 a. m. the respondent was driving his automobile east on Fremont avenue, in the county of Santa Clara, crossing the intersection with Saratoga road, which road runs north and south. The two roads are paved, and are of about equal width. At the same time the appellant was driving his automobile along Saratoga road approaching from the south and crossing the intersection of Fremont avenue going north. The plaintiff approached the intersection traveling at the rate of about 7 to 10 miles an hour, while defendant approached the intersection going at a rate of about 35 to 40 miles an hour. The vision of both drivers was obscured by a house and a row of trees standing on the southwest corner of the intersection. When the plaintiff arrived at a point 25 feet west of the westerly line of Saratoga road he could see south on Saratoga road a distance of about 30 feet, and as he looked in that direction he was unable to see defendant,

as the latter had not yet come within his range of vision. He first saw defendant when the latter was approaching him at a high rate of speed and about 20 feet distant. Plaintiff continued to cross the intersection past the median line of the intersection running north and south before defendant's car arrived at the southerly line of the intersection. The defendant continued on his course across the intersection, and struck the car of the plaintiff towards the rear, just a little bit back of the center. The collision was with such force that plaintiff's car was thrown 30 feet from the point of collision, and came to a stop in a ditch along the side of the highway, having been turned completely around from the direction in which it was proceeding at the time of the collision. The testimony regarding the speed at which the defendant was proceeding is in some conflict, but there is uncontradicted testimony to the effect that with his brakes set and his wheels completely locked his car skidded a distance of 85 or 90 feet along the highway before it came into contact with plaintiff's car.

The facts which we have outlined are, with the exception noted, uncontradicted. In respect to the speed maintained by the defendant two witnesses testified to the fact that the plaintiff's car was struck in the rear, thrown a distance of 30 feet, and that defendant's car skidded a distance of 85 or 90 feet with brakes fully set and wheels completely locked. These facts corroborate the direct testimony that defendant was approaching the intersection at a speed of 35 or 40 miles an hour. The trial court's finding of the negligence of the defendant is amply supported by the evidence—a fact which is conceded on this appeal.

[1] The plea of the defendant that the plaintiff could have avoided the accident after he saw the danger is nothing more than a plea of contributory negligence on the part of the plaintiff. This plea raises the question whether the facts are such as to constitute contributory negligence in law or whether the issue is one to be left to the court or jury on the evidence.

The rule in this regard is aptly stated in *Gett v. Pacific Gas & Elec. Co.*, 192 Cal. 621, 631, 221 P. 376, 380, where Mr. Justice Myers said:

"Contributory negligence is in this state an affirmative defense by way of confession and avoidance. By pleading it the defendant, in effect, confesses his own negligence and pleads by way of avoidance thereof that plaintiff's own negligence helped to produce his injuries. In this defense the burden is upon the defendant to prove two things: (1) That the plaintiff was negligent; (2) that such negligence was a proximate cause of the injuries complained of. If he fails to prove either of these things this entire defense falls."

[2] Applying the foregoing rule to the case before us, it is apparent that the defendant failed in both instances. The plaintiff had the right of way within the provisions of section 20 of the Motor Vehicle Act (Stats. 1919, p. 215, the statute in effect at the time of the accident). The defendant approached the intersection at a rate of speed prohibited by section 22 of the same act. The plaintiff had the right to assume that the defendant would observe the law. There is nothing in the record to show contributory negligence as a matter of law on the part of the plaintiff. There is some conflict in the evidence as to the rate of speed, and some conjectures have been made as to whether the plaintiff might have avoided the accident if he had done something different, but these are all matters of fact which the trial court was to determine from the evidence. There is sufficient evidence to sustain the finding of the trial court that the defendant was guilty of negligence, and that the plaintiff was not guilty of contributory negligence.

Judgment affirmed.

We concur: LANGDON, P. J.; PRESTON, Justice pro tem.

72 Cal. App. 102

PEOPLE v. EDWARDS. (Cr. 1092.)

(District Court of Appeal, Second District, Division 2, California. April 1, 1925. Hearing Denied by Supreme Court May 28, 1925.)

1. Criminal law $\hookrightarrow$ 1023(12)—Order denying motion in arrest of judgment is not appealable.

An order denying a motion in arrest of judgment is not appealable.

2. Larceny $\hookrightarrow$ 13—"Taking" is essential to constitute larceny.

To constitute larceny, there must be a "taking," which must be against will of owner or at least without his consent.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Taking (In Larceny).]

3. Larceny $\hookrightarrow$ 14(1)—"Taking," to constitute larceny, must be against will of owner, but actual trespass is not necessary.

Though "taking," to constitute larceny, must be against will of owner, or a trespass to his possession, actual trespass or actual violence is not necessary, and fraud may take place of force.

4. Larceny $\hookrightarrow$ 14(1)—When "taking" within definition of larceny occurs stated.

A "taking," within definition of larceny, occurs when a person with a preconceived design

to appropriate property to his own use obtains possession of it by means of fraud or trickery; fraud vitiating the transaction, and owner being deemed to retain constructive possession of the property.

5. Larceny ⚡14(1)—Owner must part with possession only to constitute larceny; owner does not part with title where accused obtains possession fraudulently.

Owner must intend to part with possession only of property taken, and not to pass title, to constitute larceny, but owner does not part with title where thing taken is delivered by owner to accused to be applied by latter to a particular purpose, and he, having obtained possession fraudulently with preconceived intention to appropriate property to his own use, does subsequently convert it to his own use instead of applying it to purpose contemplated by owner.

6. Larceny ⚡62(1)—Evidence held to warrant inference of a "taking" sufficient to constitute.

Evidence that defendant's representations that money obtained from owner was to be used for purpose of bribing investigating officers in criminal proceedings against her husband and brother-in-law were false, and that, when he obtained possession thereof, it was his intention to convert it to his own use, held to warrant an inference that there was a "taking" sufficient to constitute larceny.

7. Larceny ⚡17—"Asportation" of thing which is subject-matter of offense is essential to constitute larceny.

"Asportation" of thing which is subject-matter of offense is essential to constitute larceny, and, to constitute "asportation," thing taken must have been in entire or absolute possession of taker.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Asportation.]

8. Larceny ⚡17—Subsequent conversion by defendant of money, possession of which was obtained by fraud, held to constitute an asportation sufficient to constitute offense.

Where defendant acquired possession of owner's money, by fraud or trickery, intending not to devote it to purpose for which it was delivered to him, but to convert it to his own use, his subsequent conversion of it to his own use, though but for smallest appreciable length of time, constituted an "asportation" sufficient to constitute larceny.

9. Larceny ⚡63—Evidence held to warrant implied finding of conversion.

In prosecution for larceny, evidence held to warrant implied finding of conversion.

10. Larceny ⚡14(1)—Wrongdoer holds property without consent of owner, where possession originally obtained by fraud.

Where possession of the thing which is subject of larceny was originally obtained by fraud or trickery, wrongdoer holds property all the while without right and against right and without consent of owner.

11. Criminal law ⚡1159(4)—Court of review must accept testimony of prosecution's witnesses, where uncontradicted, as true on conviction.

Where defendant is convicted, testimony of prosecution's witnesses, where uncontradicted, must be accepted by court of review as true.

12. Larceny ⚡3(1)—Offense is complete when, to possession fraudulently acquired, there is added felonious intent.

When, to possession of thing which is subject of larceny fraudulently acquired, there is added the felonious intent, larceny is from that moment complete.

13. Larceny ⚡7—Thing taken and carried away should be property of another to constitute offense; "ownership;" "possession."

Thing taken and carried away should be property of another to constitute crime of larceny; "ownership" and "possession" being synonymous when considered as an element of larceny.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ownership; Possession.]

14. Larceny ⚡8—Victim's possession of money was sufficient to make it subject of larceny, where defendant acquired possession by fraud.

Where defendant acquired possession of money by fraud, victim's possession, though money may have come into her hands illegally, was sufficient to make it subject of larceny, and ownership was properly laid in her.

15. Larceny ⚡3(2)—Felonious intent essential to constitute offense, and must exist at time of taking.

Felonious intent is essential to constitute larceny, and, where no actual trespass or violence is involved in original taking, it must exist at time of taking.

16. Criminal law ⚡1144(16)—Court of review must assume that jurors believed testimony of witnesses for prosecution.

On appeal from conviction, court of review must assume that jurors believed testimony of witnesses for prosecution.

17. Larceny ⚡57—Evidence held to warrant finding of existence of felonious intent to deprive owner permanently of her property.

In prosecution for larceny, evidence held to warrant finding of existence of felonious intent to deprive owner of her property wholly and permanently.

18. Criminal law ⚡1175—Defendant cannot complain of error in his favor.

In prosecution for larceny upon three counts, if defendant was wrongfully acquitted on first and second counts, error was in his favor of which he could not complain.

19. Criminal law ⚡878(3)—Court of review not required to reverse conviction on third count because defendant acquitted on other two counts.

In prosecution for larceny upon three counts, that defendant was acquitted on two of

the counts did not require court of review to reverse his conviction on the third count.

20. Criminal law ⚡1165(3)—Defendant cannot complain where determination was more favorable to him than evidence warranted.

Defendant cannot complain where determination of his case was more favorable to him than evidence warranted.

21. Criminal law ⚡93—Defendant's offense held to constitute grand larceny and to be within jurisdiction of superior court.

Defendant's taking of \$150 held to constitute grand larceny, and to be within jurisdiction of superior court, where offense occurred prior to amendment of Pen. Code, § 487, declaring that theft of property, value of which does not exceed \$200, shall be petit larceny; such statute, as amended, when construed with Pol. Code, § 329, declaring, in substance, that amendment shall not affect penalty for any offense previously committed.

22. Larceny ⚡43—Testimony of deputy district attorney, as to his reasons for reducing charges against relatives of owner of money taken by defendant for such purpose, held admissible.

In prosecution for larceny of money, which owner had given to defendant to bribe investigating officers in criminal prosecution existing against her husband and brother-in-law, court did not err in permitting deputy district attorney to testify as to his reasons for reducing charges of grand larceny against owner's husband and brother-in-law to petit larceny, where her testimony warranted inference that defendant intended her to understand that he would seek to so influence investigating officers that, if her husband and brother-in-law were not ultimately released, they at least would be required to answer for only such charges as carried least possible punishment, and defendant introduced court records showing such charges were reduced.

23. Larceny ⚡43—Testimony held admissible as against objection that reduction in criminal charges was made subsequently to defendant's arrest, and after date when he was alleged to have committed last act of larceny.

In prosecution for larceny of money which owner gave to defendant to bribe investigating officers in criminal prosecutions pending against her husband and brother-in-law, testimony of deputy district attorney as to his reasons for reducing charges of grand larceny against such persons to charges of petit larceny was admissible, as against objection that reduction in charges was made subsequently to defendant's arrest, and after date when he was alleged to have committed last act of larceny.

24. Criminal law ⚡769—Refusal of instruction, directing attention of jury to matters which they would keep in mind without being reminded, is not reversible error.

It is not reversible error to refuse an instruction which merely directs attention of jury to that which every intelligent man and woman on the panel would doubtless keep in mind, without being reminded of it by the court.

25. Criminal law ⚡829(1)—Refusal of requested instruction, substance of which was covered by court's instruction, held not erroneous.

In prosecution for larceny, refusal of defendant's requested instruction held not erroneous, where substance was covered by court's charge.

26. Larceny ⚡7—Title to money, subject of larceny, would remain in owner until accomplishment of purpose for which she gave it to defendant.

In prosecution for larceny of money, which owner gave defendant to bribe investigating officers, in a criminal prosecution against her husband and brother-in-law, if, when owner parted with possession of her money, it was with purpose that it was to be used to bribe the officers, but that defendant should do so in a manner which he saw fit, title would remain in her until accomplishment of such purpose.

27. Larceny ⚡78—Instruction held properly refused as misleading.

In prosecution for larceny of money, which owner gave to defendant to bribe investigating officers in criminal prosecutions against her husband and brother-in-law, instruction that, if owner gave defendant money to prevent filing of additional complaints against such persons, jury could consider that fact, and that no additional criminal complaints were filed, and that, if consideration of such circumstances raised a reasonable doubt in their minds as to defendant's guilt he should be acquitted, was properly refused as being misleading.

28. Criminal law ⚡814(16)—Instruction relating to defendant's denial of accusatory statements in his presence held properly refused under the evidence.

Instruction concluding that, if denials by defendant of accusatory statements made in his presence, taken in connection with all other facts and circumstances, created a reasonable doubt in jury's mind, then they should acquit him, held properly refused under the evidence.

29. Criminal law ⚡829(16)—Instruction as to credibility of witness held properly refused, in view of given instruction.

In prosecution for larceny, instruction that if owner, before testifying, had been informed by district attorney that she had committed a felony, such fact could be considered by jury in weighing her testimony, and if, from a consideration thereof, a reasonable doubt was aroused in jury's mind as to defendant's guilt, he should be acquitted, held properly refused in view of court's instruction that, if she was promised certain immunity, such fact might be considered in determining her credibility.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

J. M. Edwards was convicted of grand larceny, and he appeals. Affirmed.

Randall, Bartlett & White and A. P. G. Steffes, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and John L. Flynn, of Los Angeles, for the People.

FINLAYSON, P. J. [1] Defendant was convicted of the crime of grand larceny. He appeals from the judgment and from an order denying him a new trial. He also appeals from an order denying his motion in arrest of judgment, but, as that is not an appealable order, the appeal therefrom must be dismissed.

By an information containing three counts, defendant was charged with three separate acts of grand larceny. In the first count he was charged with the larceny of \$500 on July 2, 1923; in the second count with the larceny of \$250 on July 5, 1923, and in the third count with the larceny of \$150 on July 27, 1923. In each instance the money was alleged to be the property of one Frances Benoit. Defendant was acquitted of the offenses charged in the first and second counts, and was convicted of the crime charged in the third count. It is from the judgment of conviction on that count that he appeals. He claims: (1) That the verdict of guilty is contrary to law and to the evidence; (2) that the court erred (a) in admitting certain evidence over his objection, (b) in giving a certain instruction, and (c) in refusing to give certain instructions requested by him.

An outline of the case, sufficient for an understanding of the points raised, may be stated thus: It was the theory of the prosecution that possession of each of the three sums of money was obtained from Mrs. Benoit by fraud and trickery. It seems that Mrs. Benoit's husband and the latter's brother had been arrested for grand larceny prior to the first act of larceny with which defendant was charged. Mrs. Benoit's testimony, epitomized and reduced to narrative form, is substantially this:

I had known defendant for about nine years. A few days after the arrest of my husband and brother-in-law, I called upon defendant at his home in Los Angeles. I told him that "the boys" were not guilty, and that I was worried over their arrest. I pleaded with him to help me. He said he would do the best he could, and would let me know later what could be done. At our first conversation defendant told me that it possibly would cost me something, but that he did not know how much. He asked me who the investigating officers were. I described them to him as well as I could. From the description which I gave, he said that they were officers B— and K—. I saw defendant again the next day. At this second conversation he said he would be able to assist me, but that it would cost me \$1,000. I told him I did not have that amount, but I managed to get \$500 of it at that time and gave it to him. (It is this sum of \$500 which is described in count 1 as the subject-matter of defendant's first alleged act of larceny.) I asked him how he was going to help me. He said that the case was in the hands

of the investigating officers, and that it would depend upon the evidence produced by them "as to how many counts and how much would be put against my husband." He said that "the less that was brought up against the boys the less they would have to answer for, or something to that effect." I asked him how he was going to use the \$1,000. He said that it was not necessary for me to know—that he would use his own judgment in disposing of the money; that all that was necessary for me to do was to give it to him. He told me that he did not want any compensation for his services, that he was doing it merely for friendship's sake, "and that the money that I would give him would simply be to compensate the officers or the other parties interested, other than himself." Later he told me that he had seen the necessary people. Meanwhile I had telephoned to my sister for money, and she wired me \$500. I gave defendant half of it—\$250. (It was for the alleged theft of this sum that the charge in count 2 was made.) Defendant said he would trust me for the rest. He assured me that he was not going to use any of it for himself, but I told him that some time I would compensate him with something for helping me. I asked him again what he was going to do with the money, and he said I would have to leave it to his judgment—that it was not necessary for him to tell me. I understood the money had to be used to compensate the different officials that had something to do with the case against my husband and brother-in-law, for not prosecuting them. In a later conversation I had with defendant I asked him if he could not get the boys out of jail entirely. He said he did not know, but that he would try. He said that the investigating officers were the ones who had entirely to do with the cases against my husband and brother-in-law, and that what they said went. He assured me at every conversation I had with him that none of the \$1,000 was to be for him—that he did not need it and did not want it.

The next sum which Mrs. Benoit testified she gave to defendant—the \$150 referred to in the third count—was delivered by her to him, according to the testimony of the people's witnesses, under the following circumstances: Mrs. Benoit, it seems, had paid her husband's attorney the sum of \$250. When she paid the attorney she told that gentleman that she needed the money—that she needed it to give to defendant. The attorney replied that, if she really stood in need of the money, he would pay it back to her in a few days. Accordingly, on July 27, 1923, the day of defendant's arrest, the husband's attorney, who meanwhile had revealed to the district attorney Mrs. Benoit's intention to deliver the money to defendant, repaid to Mrs. Benoit an amount equal to the sum which she had paid him. The money thus repaid to Mrs. Benoit consisted of certain bills, aggregating \$250, the denominations whereof had previously been noted by the officers, who subsequently arrested defendant, though Mrs. Benoit does not seem to have had any inkling of that fact or of the fact that the district attorney had been noti-

fied of her intention to hand the money over to defendant. Indeed, there is nothing to indicate that Mrs. Benoit had any reason to believe that the bills which her husband's attorney delivered to her represented anything other than a sum of money to which she was lawfully entitled, although the officials had taken the bills from the treasury of the county of Los Angeles for the purpose of facilitating the entrapment of defendant. It seems that the district attorney, who was using the county's money for the purpose, had turned the bills over to the husband's attorney, who, in turn, delivered them to Mrs. Benoit; the latter evidently supposing the attorney was simply returning to her the sum of \$250 which she previously had paid to him, and which he had promised to repay if she needed the money to make up the balance of the \$1,000 which she had told the attorney she had agreed to deliver to defendant.

Mrs. Benoit's testimony regarding her last payment to defendant is substantially as follows:

After receiving the \$250 from my husband's attorney, I called defendant on the phone and arranged to meet him in front of the county jail. He arrived there in his automobile. When we met I asked him if I could keep \$100 of the amount to pay some debts. He said I could, and I then delivered him \$150 in bills—bills which I had received from my husband's attorney.

Mrs. Benoit, it seems, delivered the bills to defendant while seated in his automobile with him. After handing the money over to him, she stepped from the car, whereupon defendant drove a short distance from the scene, with the bills in his possession, when he was arrested by the officers. Defendant, testifying as a witness in his own behalf, denied that Mrs. Benoit had paid him either the \$500 or the \$250—the amounts mentioned in the first and second counts of the information, and which, according to Mrs. Benoit's testimony, were the first and second payments which she made to defendant on account of the total sum of \$1,000, which she said she had agreed to deliver to him. As to the \$150, defendant admitted receiving this sum from Mrs. Benoit on July 27, 1923, in the form of bills, but testified that it was paid to compensate him for certain legitimate efforts which he claimed to have made on Mrs. Benoit's behalf in an honorable endeavor to assist her husband and brother-in-law.

Each of the two officers who had been deputed by their superiors to investigate the charges of larceny pending against Mrs. Benoit's husband and brother-in-law testified that at no time did defendant approach him with an offer of a bribe to induce him to refrain from preferring additional charges against the two brothers.

Defendant put in evidence the court rec-

ords of the proceedings in the cases pending against Mrs. Benoit's husband and brother-in-law. These records showed that an information had been filed in the superior court against each of the accused, whereby each was charged with the crime of grand larceny, that each of them pleaded not guilty to that charge, and that subsequently each was permitted to withdraw his plea and to plead guilty to petit larceny. A deputy district attorney was then permitted to testify, over defendant's objection, that it was his duty to pass upon the dismissal of criminal cases and upon the reduction of charges of higher offenses to charges of lesser degree, and that the reason why the charges against Mrs. Benoit's husband and brother-in-law had been reduced from grand larceny to petit larceny was that the value of the property involved in the charges against the two brothers was found to be less than \$50. Defendant objected to this testimony upon the ground that it was incompetent, irrelevant, and immaterial, and upon the further ground that the reduction of the charges occurred subsequently to defendant's arrest, and after the date when he is alleged to have committed the last act of larceny.

Appellant earnestly insists that, with respect to the \$150 for the theft of which he was convicted, none of the essential elements of larceny was shown to exist. Because of the earnestness with which this claim is presented, we shall take up each element of the offense, and show how the evidence warranted the jury in inferring the existence of each essential ingredient of the crime.

[2-5] To constitute larceny, the first essential is that there be a "taking" (18 Am. & Eng. Ency. of Law [2d Ed.] p. 468); that is, the thing which is the subject of the crime must be taken from the possession of the owner into the possession of the thief. The taking, in order to support a charge of larceny, must be against the will of the owner, or at least without his consent; in other words, the act of taking must be a trespass against the owner's possession. *Id.* p. 469. Though the taking must be against the will of the owner or a trespass to his possession, still an actual trespass or actual violence is not necessary. Fraud may take the place of force. It is well settled that a taking, within the definition of larceny, occurs when a person, with a preconceived design to appropriate the property to his own use, obtains possession of it by means of fraud or trickery. In such case the fraud vitiates the transaction, and the owner is deemed still to retain a constructive possession of the property. 17 R. C. L. pp. 13, 14. Or, as has been said, "the fraud will supply the place of trespass in the taking, and so make the conversion felonious." *People v. Shaw*, 57 Mich. 403, 24 N. W. 121, 58 Am. Rep. 372.

It is essential in such cases that the owner shall intend to part with the possession only, and not to pass the title as well. If he intends to pass both the possession and the title, the transaction, though it may amount to the crime of obtaining property by false pretenses, will not constitute larceny. But the owner does not part with the title to the alleged thief, where the thing which is the subject of the theft is delivered by the owner to the accused, to be applied by the latter to a particular purpose, and the recipient of the property, having obtained the possession fraudulently with the preconceived intention to appropriate the property to his own use, does subsequently convert it to his own use instead of applying it to the purpose contemplated by the owner. 36 C. J., pp. 778, 779; *People v. Delbos*, 146 Cal. 734, 81 P. 131; *People v. Schwartz*, 43 Cal. App. 696, 185 P. 686. Thus, in *People v. Schwartz*, supra, we held it to be larceny where money is fraudulently obtained by the defendant for the ostensible purpose of using it to bribe a public official, but, instead of devoting it to that purpose, he converts it to his own use. In cases of that character the accused receives only the possession of the money, while the title remains in the owner until the money shall have been delivered by the defendant to the official whom the owner supposes is to be bribed by the defendant as the corrupting intermediary.

[6] Tested by the foregoing, it must be held that the evidence in this case was sufficient to justify the implied finding of a "taking" sufficient to constitute larceny. According to the testimony of the complaining witness, the \$150 was a part of the larger sum of \$1,000 which appellant represented to her would be used by him for the purpose of bribing the investigating officers. True, appellant told Mrs. Benoit that it was not necessary for her to know how he was going to use the money; but it is a reasonable inference from all of his statements to her that he intended her to understand that the money was to be used by him in some way to corrupt the investigating officers, though it was not necessary for her to know precisely how it was to be thus used.

While it is true that Mrs. Benoit testified that she told appellant that she expected some time to compensate him for the efforts which she supposed he had made on behalf of her husband and brother-in-law, her testimony is to the effect that she did not give him the \$150 as compensation for any services, but that she delivered that sum to him solely for the purpose of enabling him to carry out his representation that he could and would bribe the investigating officers.

That appellant's representations were false, and that, when he obtained possession of the money, it was his intention to convert it to his own use and not to devote it to the pur-

pose for which he ostensibly was receiving it, are facts which well may be inferred from the testimony of each of the investigating officers to the effect that at no time had appellant approached him with a corrupt suggestion. It will be recalled that Mrs. Benoit testified that appellant told her that these two officers were the men "who had entirely to do with the case against my husband and brother-in-law, and that what they said went." These facts warrant the inference that the possession of the \$150 was obtained by appellant from Mrs. Benoit by fraud, with a preconceived design not to devote the money to the purpose for which it was delivered to him, but to convert it to his own use—in short, that there was a "taking," within the law of larceny.

[7, 8] The second essential element in the crime of larceny is the asportation of the thing which is the subject-matter of the offense (18 Am. & Eng. Ency. of Law [2d Ed.] p. 496); that is, the taking must be followed by such a carrying away or asportation as to supersede the possession of the owner for an appreciable interval of time, be it ever so short (Id. p. 498). To constitute asportation, the thing taken must have been in the entire or absolute possession of the taker. Id. Where, as in the instant case, the accused acquires possession by fraud or trickery, intending when he acquired the possession not to devote the thing to the purpose for which it was delivered to him but to convert it to his own use, his subsequent conversion of it to his own use, though it be but for the smallest appreciable length of time, is such a complete, independent, and absolute possession and control of the thing, adverse to the rights of the owner, as to be tantamount to that asportation which occurs in those cases where the original taking and carrying away involved an act of trespass by actual violence. Here appellant, when the money was delivered to him by Mrs. Benoit, had its entire and absolute possession for an appreciable period of time before his arrest, and during that interval he converted it to his own use.

[9-12] Appellant strenuously insists that the evidence affords no warrant for the implied finding of a conversion. With this contention we cannot agree. After having accepted the money, appellant put it in his pocket and drove away from the scene. As we have pointed out, there is evidence to support the implied finding that, at the time when he acquired possession of the money, he took it with the preconceived intention to convert it to his own use. He was therefore a wrongdoer from the beginning, and in contemplation of law the wrongful act was continuous. In cases such as this, where the possession was originally obtained by fraud or trickery, the wrongdoer holds the property all the while without right, and against the right and without the consent of

the owner. *State v. Coombs*, 55 Me. 477, 92 Am. Dec. 610. There is nothing to indicate that appellant experienced a change of heart after he received the money—there is nothing to indicate that his intention to convert it to his own use ever wavered. The reasonable inference is therefore that, when he received the money into his possession, he took it and carried it away with the intention to keep it as his own. The conversion was then complete. It matters not how short the interval may have been between the manual taking of the money and its conversion to appellant's use. In fact, these acts were practically simultaneous in their occurrence. If the testimony of the people's witnesses be true—and with respect to the charge in the third count we are bound to accept it as true, in view of the nature of the verdict—appellant took the bills into his possession, put them in his pocket, and drove away with them, intending all the while to appropriate them to his own use. The very instant that he did this there was a conversion of the money. The rule is that when, to possession fraudulently acquired there is added the felonious intent—that is, the purpose to deprive the owner of his property wholly and permanently, without color of right or excuse, and to make it the property of the taker without the owner's consent—the larceny is from that moment complete. *State v. Coombs*, supra.

[13, 14] The third essential element in the crime of larceny is that the thing taken and carried away should be the property of another (18 Am. & Eng. Ency. of Law [2d Ed.] p. 498); that is, some one other than the taker must have in the thing taken a general or special property right, which is invaded by the trespass committed in the taking. Considered as an element of larceny, "ownership" and "possession" may be regarded as synonymous terms; for one who has the right of possession as against the thief is, so far as the latter is concerned, the owner. 36 C. J. p. 757. Since appellant acquired possession of the money by fraud and chicanery, he held it all the while without right, and as against him Mrs. Benoit had the right of possession. *State v. Coombs*, supra. It is of no consequence that the legal title to the bills was in the county. The actual status of the legal title to the stolen property is of no concern to the thief. Mrs. Benoit's possession, though the bills may have come into her hands illegally, was sufficient to make them the subject of larceny, and the ownership was properly laid in her. *State v. Pigg*, 80 Kan. 481, 103 P. 121, 18 Ann. Cas. 521; 36 C. J. p. 758.

[15-20] The fourth and last, essential of larceny is the felonious intent (18 Am. & Eng. Ency. of Law [2d Ed.] p. 500); that is, the taking and carrying away must be with an intent, without claim or pretense of right

or justification, to deprive the owner of his property wholly and permanently (*Id.*). And where, as here, no actual trespass or act of violence is involved in the original taking, the felonious intent must exist at the time of the taking. *People v. Morino*, 85 Cal. 515, 24 P. 892; 15 Cal. Jur. p. 908. If the jurors believed the testimony of the witnesses for the prosecution—and on this appeal we must assume they did—they were warranted in deducing the inference that appellant, when the bills were delivered to him by Mrs. Benoit, took them and carried them away, with the intention, then or previously fully conceived, to convert them to his own use as soon as he should obtain their possession, and to exclude Mrs. Benoit from all further dominion over them. Such purpose, amounting as it did to an intent permanently to deprive the owner of her property without any claim or pretense of right or justification therefor, constituted the requisite felonious intent.

Our conclusion from the foregoing is that the evidence was sufficient to warrant the jury in finding the existence of each and every element of the offense charged against appellant in the third count of the information.

It is earnestly urged that the verdict of guilty on the third count is repugnant to, and wholly inconsistent with, the verdicts of not guilty on counts 1 and 2, and that therefore the verdict on the third count is contrary to law. We cannot accept the contention thus earnestly made. The several counts in the information relate to three separate and distinct transactions—transactions which were alleged to have occurred on different dates, and to involve the theft of different sums of money. It may be conceded, for the purpose of the argument, that under the evidence the jury had as much reason for finding appellant guilty on the first and second counts as it had for finding him guilty on the third; but, even so, the fact remains that the evidence was sufficient to justify the verdict on the third count, and we must conclude that the jurors were convinced of his guilt thereon. If the jurors paltered with their oaths and with the law, they must make their own peace with conscience. If appellant was wrongfully acquitted on the first and second counts, the error was in his favor, and he cannot be heard to complain. The fact that the jurors relieved him on two counts does not oblige this court to relieve him on the third. *State v. Hund*, 115 Kan. 475, 222 P. 766; *State v. Brown*, 114 Kan. 699, 220 P. 174; *State v. Brundige*, 114 Kan. 849, 220 P. 1039; *Weinecke v. State*, 34 Neb. 14, 51 N. W. 307. *Griffin v. State*, 18 Ohio St. 438; *Boone v. United States*, 257 F. 963, 169 C. C. A. 113; *Carrigan v. United States* (C. C. A.) 290 F. 189. In the case last cited it is said:

"A verdict that is apparently inconsistent affords no basis for reversal of a judgment

predicated thereon, when the evidence is sufficient to support either of two separate offenses."

Addressing himself to a like objection, advanced by the defendant in *Boone v. United States*, supra, Judge Trieber expresses the view of the court thus:

"It is a well-known fact that juries frequently hesitate to return verdict of guilty on a large number of counts, when the punishment which may be imposed on each count is as severe as that provided for violations of this statute (the minimum punishment on each count is 5 years). They therefore satisfy their consciences by a verdict of guilty on one or two counts, and not always on the counts supported by the strongest evidence."

In *State v. Brundige*, supra, the court says:

"Undoubtedly the defendant was guilty of both burglary and larceny or he was not guilty of either. But the failure to convict him of larceny as well as of burglary was an error in his favor of which he cannot effectively complain."

It is the settled law of this jurisdiction that a defendant cannot complain where the determination of his case was more favorable to him than the evidence warranted. *People v. Coulter*, 145 Cal. 69, 78 P. 348; 8 Cal. Jur. p. 563.

[21] It is claimed that the superior court had no jurisdiction to try appellant on the offense charged in the third count, for the reason that when the information was filed, October 13, 1923, section 487 of the Penal Code had been so amended that, when read in connection with the following section, the theft of property, the value of which does not exceed \$200 is declared to be petit larceny. The offense of which appellant was found guilty was committed prior to August 18, 1923, the date when the amendment became effective. On July 27, 1923—the date when appellant committed larceny of the \$150—the crime was grand larceny; for section 487, as it then read, made it grand larceny to steal and carry away property having a value in excess of \$50. Therefore, at the date of the commission of the offense charged in the third count, the theft of the bills was a felony punishable by imprisonment in the state prison—a crime of which the superior court has jurisdiction.

There is nothing in section 487, as amended, to indicate an intention to interfere in any manner with the punishment of any offense previously committed, or with the procedure relating to the trial of such offense. The amended section must therefore be construed in connection with section 329 of the Political Code. When so construed, the effect is virtually to add to section 487, as amended, a proviso declaring, in substance, that the amendment shall not affect the penalty incurred for any offense previously

committed. *People v. McNulty*, 93 Cal. 427, 440, 26 P. 597, 29 P. 61; *People v. Davis* (Cal. App.) 227 P. 494. From this it follows that, notwithstanding section 487 had been amended at the time when the information was filed, appellant nevertheless was liable to the punishment which the law provides as the penalty for grand larceny. His offense, therefore, was a felony, and the superior court had jurisdiction. To sustain his contention appellant cites *People v. Tisdale*, 57 Cal. 104. But, as pointed out by Mr. Justice McFarland in the *McNulty* Case, 93 Cal. 440, 26 P. 597, 29 P. 61, the reasoning of the *Tisdale* Case is no longer applicable; section 329 of the Political Code having been amended in an important particular since that case was decided.

[22] It is claimed that the court erred in permitting the deputy district attorney to testify as to his reason for reducing the charges of grand larceny against Mrs. Benoit's husband and brother-in-law to charges of petit larceny. It is urged that this testimony was irrelevant and immaterial. The objection is based upon the assumption that appellant's representations to Mrs. Benoit amounted to no more than statements that he would use the money to prevent the filing of additional charges, and not that he would use it to bring about a reduction of the charges then pending. But Mrs. Benoit, as we have shown, testified that appellant told her "that it would depend entirely upon the evidence produced by the investigating officers as to how many counts and how much would be put against my husband," and that "the less that is brought up against the boys the less they would have to answer for"; also that he told her that he would try "to get the boys out of jail entirely." This testimony warrants the inference that appellant intended that Mrs. Benoit should understand him to mean that he would seek so to influence the investigating officers that, if the husband and brother-in-law were not ultimately released, they at least would be required to answer for only such charges as carried the least possible punishment. Moreover, if it was appellant's understanding that Mrs. Benoit's testimony meant that his representations to her amounted to no more than a statement that he would use the money merely to prevent the filing of additional charges, it may pertinently be asked what his purpose was in introducing the court records to show that the charges of grand larceny were reduced to accusations of petit larceny. If he did not intend that the jurors should be inoculated with the idea that he had carried out his part of the compact by causing a reduction to be made in the charges as originally brought, then why did he introduce these records in evidence? It was incumbent upon the prosecution to show that the several sums of money delivered to

appellant were not used by him to accomplish the purpose for which he received them. The action of the deputy district attorney in accepting pleas of guilty to petit larceny, if not explained by that officer, might well have warranted the jury in finding that appellant had in fact used the money in the manner he had agreed. The testimony, therefore, was relevant and material.

[23] It is claimed, however, that the testimony is objectionable upon the further ground that the reduction in the charges was made subsequently to appellant's arrest, and after the date when he was alleged to have committed the last act of larceny. There is no merit in this contention. If the money had been applied by appellant to the purpose for which he ostensibly received it, and if, as a result thereof, he had corruptly brought about the acceptance of pleas of guilty to the lesser charges, it would be possible for his initial act of corruption to have occurred long before the men were permitted to plead guilty to petit larceny. If the district attorney's acceptance of these pleas had in fact resulted from appellant's corrupt use of the money, the train of events which led thereto might readily have been put in motion by an act of corruption initiated by appellant and, so far as he is concerned, consummated by him, long before his arrest and prior to the commission of the last act of larceny with which he was charged.

It is claimed that the court erred in charging the jury that, so far as the present case is concerned, grand larceny is committed when the property taken is of a value exceeding \$50. For reasons already stated, the recent amendment of section 487 of the Penal Code did not operate to bar the punishment which previously had been prescribed for acts of larceny committed before the amendment became effective. Hence appellant, if guilty as charged in the third count, was punishable as for grand larceny, and the court therefore very properly charged the jury that, so far as this case is concerned, grand larceny is committed when the value of the property taken exceeds fifty dollars.

[24, 25] We find no prejudicial error in the rejection of the instructions requested by appellant. The first refusal of which appellant complains is that of an instruction to the effect that, if the jurors believed that Mrs. Benoit gave defendant the \$150 in recognition of his efforts in her behalf, they should find him not guilty. That appellant would be entitled to an acquittal if the money was intended to compensate him for any aid which he may have rendered Mrs. Benoit is a proposition which must be apparent to every person of common intelligence and experience. It is not reversible error to refuse an instruction which merely directs the attention of the jury to that which every intelligent man or woman on

the panel would doubtless keep in mind, without being reminded of it by the court. 8 Cal. Jur. p. 631. Moreover, the substance of the requested instruction was set forth in the court's charge, the jury having been expressly instructed that it would not be larceny if defendant received the money from Mrs. Benoit pursuant to a promise that she would pay him for his efforts in behalf of her husband.

[26] Appellant requested, and the court refused, an instruction to the effect that, if the prosecuting witness gave the money to defendant "with the understanding that he was to do with it as he saw fit in accomplishing the desired purpose," then it must be held that she intended to pass the title, and in that event defendant could not be found guilty of larceny. This requested instruction is not a rigorously accurate statement of the law. It does not necessarily follow that the title would pass to appellant if the money was given to him "to use as he saw fit in accomplishing the desired purpose." The "desired purpose" for which the money was given by Mrs. Benoit was the corruption of the investigating officers. If, when Mrs. Benoit parted with the possession of the money, it was her purpose that it should be used by appellant to bribe the officers, but that he should do so in a manner which he saw fit, the title would remain in her until the accomplishment of the purpose for which she gave him the money, i. e., until its final delivery by appellant to the officers whom she was led to believe were to be bribed. *People v. Delbos*, supra; *People v. Schwartz*, supra; 36 C. J. pp. 778, 779. It is a reasonable inference from Mrs. Benoit's testimony, considered in its entirety, that bribery was the only purpose to be accomplished by appellant's use of the money, even though, in accomplishing that purpose, he was to use the money "as he saw fit."

[27] Appellant requested an instruction to the effect that, if Mrs. Benoit gave him the money to prevent the filing of additional complaints against her husband and brother-in-law, the jury had the right to consider that fact, and the further fact that no additional criminal complaints were filed, and that, if the consideration of these two circumstances raised a reasonable doubt in their minds as to defendant's guilt, he should be acquitted. This instruction was calculated to mislead the jury, whose duty it was to consider, not alone the circumstances especially singled out and specifically referred to in the requested instruction, but every circumstance in the case which might have a legitimate bearing upon the question of whether appellant had secured possession of the money by fraudulent representations. The requested instruction is based upon the erroneous notion that appellant's representations, as testified to by Mrs. Benoit, amounted to no more than state-

ments by him that he would use the money to prevent the filing of additional charges. Appellant erroneously assumes that his representations, as testified to by the complaining witness, entirely excluded any idea that he was to use the money to secure a reduction in the pending charges. But, as we already have pointed out, the complaining witness testified that appellant told her that "the less that was brought up against the boys the less they would have to answer for"—language well calculated to lead Mrs. Benoit to believe that it was appellant's intention to use the money to bring about a reduction of the pending charges, as well as to prevent the filing of additional complaints.

[28] Another of the instructions requested by appellant, but refused by the court, would have charged the jury to the effect that accusatory statements made in the presence of an accused, which are not denied by him, are admissible in evidence solely for the purpose of enabling the jury to know his attitude in the face of such statements, and that such statements are not evidence of the truth of the matters stated therein. As an abstract proposition, this part of the requested instruction is a correct statement of the law. The vice of the instruction is in its concluding sentence, where we find these words:

"Therefore, I instruct you that if the denial by the defendant of the accusatory statements made in his presence, taken in connection with all the other facts and circumstances of the case, create a reasonable doubt in your mind, then you should acquit the defendant."

This language assumes a fact not borne out by the evidence. It implies that appellant denied all of the accusatory statements made in his presence. Such, however, is not the case. Some, at least, of the statements made in his presence were neither admitted, nor denied by him. When asked what he had to say as to some of them, he replied, "I have nothing to say."

[29] Appellant requested the court to give an instruction to the effect that, if Mrs. Benoit, before testifying in the case, had been informed by the district attorney that she had committed a felony for which she could be sent to the penitentiary, that fact could be considered by the jury in weighing her testimony; and that "if, from a consideration of such statements, you find such statements were made, or a reasonable doubt is aroused in your mind as to the guilt of the defendant, then you should acquit him." If this language means anything, it means that the defendant should be acquitted under either of these two alternatives: (1) If the jury found that such statements were made to Mrs. Benoit by the district attorney; or (2) if a reasonable doubt be aroused

in the jurors' minds as to defendant's guilt. Manifestly, appellant would not necessarily be entitled to an acquittal if the jury found the first alternative to be true. The mere fact that Mrs. Benoit had been advised by the authorities that she had committed a crime and was threatened with punishment therefor would not necessarily invalidate all of her testimony. Moreover, the court gave an instruction as follows:

"You are instructed that, if you believe from the evidence that the prosecuting witness was promised certain immunity for her husband or herself, then such fact is a circumstance which may be considered by you in determining her credibility."

This instruction went as far as the court could possibly be expected to go in singling out a particular witness and advising the jury as to what circumstances might be considered by it in weighing her testimony.

We find no substantial error in the record. Appellant had a fair trial, and there is sufficient evidence to support the verdict.

The appeal from the order denying defendant's motion in arrest of judgment is dismissed. The judgment and the order denying a new trial are affirmed.

We concur: WORKS, J.; CRAIG, J.

72 Cal. App. 139

SMITH v. TITLE INS. & TRUST CO. et al.
(Civ. 5014.)

(District Court of Appeal, Second District, Division 1, California. April 2, 1925.)

1. Appeal and error ☞628(1)—Delay in filing transcript beyond statutory period not justified.

Where fee for filing transcript, required to be paid in advance under Pol. Code, § 752, was not paid more than 3 months after expiration of time for filing, with full knowledge of appellant and his attorneys, delay held not excusable under Code Civ. Proc. § 473, and appeal dismissed.

2. Appeal and error ☞628(3)—Respondent not estopped to take advantage of default in filing transcript.

Where respondent wrote letter impliedly consenting to few days further delay in filing brief, he was not estopped to take advantage of appellants' default in filing transcript, in view of showing that at time letter was written he understood that transcript had been filed.

3. Appeal and error ☞800—Filing of delayed transcript, after notice of motion to dismiss, but prior to hearing, held no defense.

Filing of delayed transcript, after notice of motion to dismiss appeal, but prior to hearing of motion, held not to constitute defense to motion, except where reasonable grounds excusing delay might be established.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Charles Edgar Smith against the Title Insurance & Trust Company and another, as executors of estate of Emil Firth, deceased. Judgment for defendants on demurrer, and plaintiff appeals. On motion to dismiss appeal. Appeal dismissed.

Geo. D. Meiklejohn, C. H. Scharinkow, and Augustus Tilden, all of Los Angeles, for appellant.

Elias V. Rosenkranz, of Los Angeles, for respondents.

CONREY, P. J. [1] Respondents on February 9, 1924, served and filed notice of motion to dismiss the appeal "upon the ground that neither the transcript on appeal nor appellant's opening brief" were served or filed within the time prescribed by law and the rules of the court. The appeal is from a judgment entered after the court had sustained a demurrer to the third amended complaint, in an action to recover on a money demand against a decedent's estate. As it appeared from the clerk's certificate that the appeal should have been made to the Supreme Court, the same was transferred to the Supreme Court, whereupon the Supreme Court made its order retransferring the cause to this court. Thereafter the motion to dismiss was brought on for hearing, and was submitted on March 13th. As the time for filing brief does not begin to run until the transcript has been filed, the only delay which we need to consider is the delay in filing the transcript.

Notice of appeal from the judgment was filed in the superior court on the 27th day of September, 1924. Therefore the time for filing transcript expired on November 6, 1924.

The motion is based upon the certificate of the county clerk and upon an affidavit of Elias V. Rosenkranz, attorney for respondent. In this affidavit it was stated that appellant served on defendants his transcript on appeal on December 12, 1924, and deposited said transcript with the clerk of this court on the 17th day of January, 1925, but down to, and including, February 9, 1925, had not paid the filing fee therefor, and the transcript remained unfiled; that as early as the 8th day of December, 1924, affiant had informed the attorney for appellant that he would move to dismiss the appeal, "unless the transcript as corrected is served upon me within the next few days"; that on the 30th day of January affiant addressed a letter to plaintiff's attorney stating that, unless the opening brief was served and filed within the next week, he would make a motion to dismiss the appeal.

Affidavits in opposition to the motion were made by Augustus Tilden, one of the attorneys for appellant, and by R. M. Ferguson. Tilden stated that, "seasonably after the per-

fecting of the appeal," he made an agreement with a printing company which agreed to print and file the transcript in due time; that it had in its employ a Mr. Ferguson, who claimed to be qualified to superintend the printing and filing of the transcript according to the rules, and affiant relied upon him so to do; that on the day when the filing was due Mr. Ferguson reported to affiant that the transcript was not ready for filing; that affiant instructed Ferguson to procure an extension from Rosenkranz; that later on the same day Ferguson reported to affiant that Rosenkranz had granted such extension on certain conditions as to the contents of the transcript; that affiant agreed to these conditions, which increased the size of the transcript by about 83 pages; that the extension granted was not in writing and not definite as to time; that pending the printing of the transcript some delay in providing for payment of the same was experienced; that on January 24th Mr. Ferguson reported to affiant that the transcript had been paid for and filed, but that the filing fee had not been provided for; that a few days later Ferguson reported to affiant that appellant had assured Ferguson that the filing fee would be forwarded by him immediately to the clerk; that a few days later Ferguson reported to affiant that the clerk of this court had informed him that, while he had no record of the receipt of the fee, he was not aware of the delinquency of any fee of any transcript filed by Mr. Ferguson; that in fact Ferguson had inadvertently deposited the transcript with the clerk of the Supreme Court, and his inquiry as to the payment of the fee was inadvertently directed to the clerk of the Supreme Court; that immediately after January 24th affiant commenced the preparation of the opening brief; that on February 2d affiant received from Mr. Rosenkranz the letter referred to in the Rosenkranz affidavit; that affiant industriously tried to comply with the terms of the Rosenkranz letter; that by the end of the week ending February 7th affiant had prepared and placed in the hands of the printer about two-thirds of the brief; that on February 7th or February 9th, prior to service of the moving papers on this motion, affiant had "notified Mr. Rosenkranz' office" of the progress made in preparing the brief and assuring its filing in the early part of the ensuing week.

From a counter affidavit of Mr. Rosenkranz the following appears: That on about the 15th day of November Ferguson did inform affiant of his employment to print the transcript on appeal, and asked for an extension of time for the service and filing thereof; that affiant told Ferguson that he was willing to wait for several days upon the printer for the preparation of the transcript, and did request that certain pleadings be included in the transcript; that Fergu-

son agreed to have the transcript printed and served and filed within the next few days; that about November 20th the transcript was served upon affiant by the printer, and that the same contained a number of errors; that on November 22d affiant addressed a letter to Tilden requesting the correction of said errors and a re-service of the same as corrected, and insisted that the matter be taken care of promptly; that the transcript was not served upon affiant until December 12th, 4 days after said letter of December 8th; that said transcript was not actually left with the clerk of either the superior court or the Supreme Court until January 17th, and no fee was paid; that affiant did not know that no fee had been paid until a few days prior to serving and filing the motion to dismiss herein; that affiant, in making his demands concerning the prompt filing of appellant's brief, was ignorant of the fact that the transcript had not been filed; that affiant, on January 30th, wrote his letter to Tilden demanding the filing of the appellant's opening brief within the next week, but said brief was not served on affiant until the week following the period allowed by the letter; that the transcript on appeal contains only the judgment roll, and could seasonably have been prepared within a week.

The fee for filing transcript was not tendered to the clerk by respondent until the 21st day of February. Filing has been withheld to await disposition of this motion.

Appellant contends that he should be relieved from the consequences of his delay in filing transcript, and that he should have the benefit of the principle recognized by section 473 of the Code of Civil Procedure, which provides that the court may, upon such terms as may be just, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, where the case is appropriate for such relief; and that in a case where such relief would be granted directly on motion the court should refuse to dismiss the appeal. Appellant refers to *Chapman v. Bank*, 88 Cal. 419, 26 P. 608, and *Barbour v. Flick*, 121 Cal. 425, 53

P. 927, as cases in which the stated principle was applied in the denial of motions to dismiss appeals. In *Chapman v. Bank* the delay in filing transcript was only 10 days beyond the time limited by the rules, and had been occasioned by the fact that the attorney for appellant had been called out of the state by reason of the illness of his mother. The court held that appellant should be relieved from the consequences of his delay. In *Barbour v. Flick* the motion was based upon a delay in filing brief, which delay had been caused by excusable mistake in counsel's understanding of a stipulation concerning the brief.

The facts shown by the record and affidavits herein establish a case of persistent neglect in the prosecution of the appeal, without satisfactory extenuating circumstances. The attorneys for appellant, and appellant himself, continued their delay after they had full knowledge of the lack of payment of the filing fee and the lack of filing of the transcript. Section 752 of the Political Code expressly requires the collection, in advance, of a fee of \$10 for the filing of a transcript on appeal.

[2, 3] There is no merit in the suggestion that respondents are estopped to take advantage of the default because of the letter of Rosenkranz to Tilden, in which he impliedly consented to a few days' further delay in the filing of the brief for appellant. The affidavit of Rosenkranz shows that at the time he wrote that letter he understood that the transcript had been filed. Where a delayed transcript has been filed prior to the hearing of the motion to dismiss, but not until after notice given of motion to dismiss, such filing constitutes no defense to the motion, with a possible exception when the facts establish the existence of reasonable grounds excusing the delay. *Carter v. Paige*, 77 Cal. 64, 19 P. 2. Appellant has made no showing, within this rule, of legal excuse for his delay. *Erving v. Napa Valley Brewing Co.*, 16 Cal. App. 41, 116 P. 331.

The appeal is dismissed.

I concur: CURTIS, J.

72 Cal. App. 78

CENTRAL SAV. BANK OF OAKLAND v. COULTER et al. (Civ. 2873.)

(District Court of Appeal, Third District, California. March 30, 1925. As Modified April 23, 1925. Hearing Denied by Supreme Court May 28, 1925.)

1. Bills and notes $\S$ 167—Note, showing on its face that it is secured by trust deed containing terms destroying negotiability, held nonnegotiable.

In view of Civ. Code, §§ 1642, 3082-3085, a note stating on its face that it is secured by a trust deed, which requires payment of taxes and other charges, and provides for acceleration of maturity for nonpayment thereof, held nonnegotiable.

2. Frauds, statute of $\S$ 116(5)—Written instrument held sufficient to show existence of agency and trust relation.

Instrument by which principal agreed to pay commission to agent, who took title in his own name and executed note and deed of trust, held sufficient under statute of frauds to show existence of agency and trust relation.

3. Principal and agent $\S$ 175(1)—Ratification is equivalent to previous authority.

Ratification is equivalent to previous authority.

4. Frauds, statute of $\S$ 116(10)—Written instrument held sufficient ratification of agent's execution of deed of trust.

In view of Civ. Code, § 2310, instrument by which principal agreed to sell land subject to deed of trust to agent, held sufficient ratification of agent's act in making deed of trust while title was in his name to bind principal under statute of frauds.

5. Principal and agent $\S$ 145(2)—Contract made without disclosing principal is principal's contract on which latter is liable.

Contract made by agent in his own name without disclosing principal is principal's contract on which latter is liable.

6. Principal and agent $\S$ 173(3) — Writings, showing ratification by principal of acts of agent done without disclosing principal, will be liberally construed.

Writings, showing ratification by principal of acts of agent done without disclosing principal, will be liberally construed, when agency is shown.

7. Principal and agent $\S$ 175(2)—That trust deed was executed in name of agent instead of principal held not to limit application of rule relating to subsequent ratification.

That trust deed was executed in name of agent instead of principal held not to limit application of rule relating to subsequent ratification.

Appeal from Superior Court, Sacramento County; George L. Jones, Judge.

Suit by the Central Savings Bank of Oakland against Thomas Coulter and another.

Judgment against the named defendant, and he appeals. Affirmed.

Butler & Van Dyke, of Sacramento, for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, and McLaughlin & McLaughlin, of Sacramento, for respondent.

PLUMMER, J. Action by the plaintiff to recover the sum of \$18,070.98, with interest, against the defendant Thomas Coulter and Howard D. Kerr, as undisclosed principal and agent, respectively, as the balance due after the sale of certain lands included within a certain trust deed executed in favor of the plaintiff to secure the repayment of the sum of \$40,000 and such other liens, incumbrances, taxes, etc., as might be incurred in protecting the title to the premises covered by the trust deed. Judgment was entered in favor of the plaintiff against the defendant, Thomas Coulter, as principal, and dismissed as to Kerr, as agent of the defendant Coulter. From this judgment the defendant Coulter appeals.

It appears from the record that on or about the 18th day of September, 1919, the appellant entered into a written contract with one Hoffman, by which he agreed to exchange certain land in Sacramento county, and to pay Hoffman \$41,300 in cash, in return for a conveyance of about 730 acres of land situated in Colusa county. A few days after the execution of this agreement, the appellant entered into a written contract with the defendant Kerr, wherein it is recited that whereas said Coulter had authorized the said Kerr to negotiate the agreement for the exchange of properties herein referred to, the said Coulter agreed, upon said exchange being perfected and the agreement being performed by Hoffman and his wife, there would be due to the said Kerr the sum of \$500, for and on account of his services in negotiating said exchange, which sum Coulter agreed to pay Kerr.

The appellant transferred his lands mentioned in the agreement to Hoffman, but the deed by the Hoffmans conveying their Colusa county land was executed in favor of Kerr, Kerr taking the title in place of Coulter. The deed from Hoffman to Kerr was placed in escrow with the San Francisco Title Company, pending negotiations to secure a loan for the sum of \$40,000. These negotiations undertaken by Kerr, resulted in the plaintiff in this case loaning the sum of \$40,000 and taking as security a deed of trust upon the Colusa county lands transferred by Hoffman to Kerr, as aforesaid. This deed of trust was executed and delivered on or about the 17th day of November, 1919. On the following day the appellant paid to Kerr the sum of \$500 on account of commissions earned, as per the agreement for payment of serv-

ices hereinbefore mentioned and, at the time of taking conveyance by Kerr of the Hoffman lands and premises, Kerr executed a deed covering the same lands in favor of Blanche Brown, a daughter of the appellant Coulter. This deed was delivered to Coulter, held by him, never recorded, but was apparently a method taken to secure Coulter.

On the 18th day of December, 1919, the record shows that the appellant entered into a written contract with Kerr, by the terms whereof the appellant agreed to sell to Kerr and Kerr agreed to purchase from the appellant, all and singular the Colusa county lands included within the terms of the deed executed by the Hoffmans to Kerr, and then standing upon the records in the name of Kerr. This agreement, among other things, sets forth that the land was subject to the \$40,000 indebtedness to the plaintiff in this case, which indebtedness Kerr agreed to assume and to pay. The sale to Kerr was effected early in the month of January following, the record title to the Hoffman lands being finally conveyed by Kerr to one Stormer. Upon the trial of the action both oral and written testimony was offered in evidence. The oral testimony was to the effect that Kerr was acting as the agent of Coulter in the transfer of the lands, and securing the loan of \$40,000 with which to carry out the agreement between Coulter and Hoffman, and that the title was taken in the name of Kerr, to facilitate the transaction and that the ownership of the land was, at all times, vested in Coulter. Upon this testimony and the written instruments, to which we shall hereafter refer, the court found and entered its judgment that Kerr was the agent of Coulter, and was acting for him in that capacity at the time of the execution of the trust deed and the securing of the loan from the plaintiff in this action; that Coulter was, in truth and in fact, the principal in the transaction undisclosed to the plaintiff at the time the negotiations were being had; that the indebtedness was in fact Coulter's indebtedness; that the transaction was managed, as heretofore set forth, in order to consummate the deal between Coulter and Hoffman; that the record shows the agency and, also, a ratification of the execution of the trust deed, and that such facts sufficiently appear by written evidence. It is admitted by the appellant in this case that there is sufficient oral testimony to support the findings of the trial court, but that oral testimony is incompetent to establish the agency or trust relation existing between Coulter and Kerr and that the written evidence introduced is insufficient to comply with the statute of frauds. To support the contentions of the appellant, four propositions are set forth:

(1) The contract sued upon was a negotiable instrument, and an undisclosed principal cannot be held liable upon it.

(2) The contract sued upon was one re-

quired by law to be in writing, and hence an agency to execute it could neither be created nor proved, except by a written instrument.

(3) The contract sued upon being one which could only be authorized by a written instrument creating the agency, its execution could only be ratified with like formality.

(4) A contract made by a person intending to contract on behalf of a third party but without authority cannot be ratified by the third party so as to render him liable to be sued thereon, where the person who made the contract did not profess to be acting on behalf of a principal and contracted in his own name.

The note given by the defendant Kerr evidencing the terms to represent the \$40,000 obtained by loan from the plaintiff, was dated the 17th day of November, 1919, is in the usual form of a promissory note, but concludes with this statement: "This note is secured by a deed of trust dated the 17th day of November, A. D. 1919." The deed of trust executed by the defendant Kerr to secure the said loan of \$40,000 from the plaintiff is dated November 19, 1919, refers to the \$40,000 obtained by the defendant Kerr from the plaintiff in this action, and then proceeds to convey the Hoffman lands as security for the repayment of the said sum of \$40,000, with interest setting forth the usual and ordinary covenants contained in trust deeds.

[1] The note and deed of trust being executed, as just indicated, the appellant proceeds to argue that the note in question is a negotiable instrument, and, hence, is one upon which an undisclosed principal cannot be charged. A number of cases are cited in the briefs submitted by counsel, decided in states other than California, directly and emphatically holding that a note in the form as appears in this case, though secured by a trust deed, is a negotiable instrument. Two very strong cases supporting this view of the law are cited, to wit: *Blumenthal v. Jassoy*, 29 Minn. 177, 12 N. W. 517, and *Thorp v. Mindeman*, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003. In these cases other Eastern authorities are cited supporting the same doctrine.

It would serve no useful purpose to review the authorities cited by counsel in support of the rule followed in other states, by reason of the fact that the Civil Code of the state of California and the many decisions of both the Supreme and Appellate Courts establish a contrary doctrine. Section 1642 of the Civil Code reads as follows:

"Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."

Beginning with the case of *Meyer v. Weber*, 133 Cal. 681, 65 P. 1110, and down to the most recent decisions of our own courts, it has been consistently held that a note and

mortgage are to be construed together as constituting one agreement or instrument, and as said in that case of the note, "being inseparably connected with the mortgage, and affected by the conditions contained therein, the note is not negotiable." In *Lilly-Brackett Co. v. Sonnemann*, 157 Cal. 192, 106 P. 715, 21 Ann. Cas. 1279, the holding of the court is expressed in slightly different language, "the note and mortgage are one inseparable contract." In support of these declarations of the law the following cases are in complete harmony. *Flinn & Treacy v. Mowry*, 131 Cal. 481, 63 P. 724, 1006; *Frost v. Alward*, 176 Cal. 691, 169 P. 379; *McAuliff v. McFadden*, 42 Cal. App. 505, 183 P. 870, that such a note is not a negotiable instrument, we may cite the further cases of *National Hardware Co. v. Sherwood*, 165 Cal. 1, 130 P. 881; *Kohn v. Sacramento R. Co.*, 168 Cal. 1, 141 P. 626; *Metropolis Bank v. Monnier*, 169 Cal. 592, 147 P. 265; *Crocker Nat. Bank v. Byrne & McDonnell*, 178 Cal. 329, 173 P. 329; *Pitman v. Walker*, 187 Cal. 667, 203 P. 739; *Stoner v. Security Trust Co.*, 47 Cal. App. 216, 190 P. 500; *W. P. Fuller & Co. v. McClure*, 48 Cal. App. 185, 191 P. 1027.

Admitting that such was the law of California prior to the adoption of the Uniform Negotiable Instrument Act, it is further contended that such is no longer the law of this state. It is also contended that section 726 of the Code of Civil Procedure providing that there can be only one recovery on account of any debt, or the enforcement of any right secured by a mortgage upon real property is inapplicable to the case at bar, and that the cases which we have cited are therefore not controlling. It is insisted that the section refers only to notes secured by mortgages, and has nothing to do with notes secured by trust deeds. As we view this case, we do not need to decide this question. The authorities which we have cited most emphatically hold that all the writings executed at the same time, as a part of the same transaction, and referring to the same subject-matter, are to be considered as one instrument. In other words, they are all read together. The face of the note, given in this case, specifically states that it is secured by a trust deed, dated the same day, and the deed of trust refers to the same note, and incorporates the note into its terms and conditions. Thus whether there may be or may not be more than one action, or more than one form of action to enforce the collection or payment of a note secured by a trust deed, is immaterial, as affecting the negotiability of a note stating on its face that it is secured by a trust deed, if that trust deed contains terms and conditions which destroy the negotiability of the note, to secure the payment of which it is given. Sections 3082 to and including section 3085 of the Civil Code define what instruments must contain in order to be negotiable. Among other things, there must

be an unconditional promise or order to pay a sum certain in money, with interest at a definite time or by installments; may have a provision accelerating the due date with exchange, costs, and attorney's fees; the instrument must be payable on demand at a fixed or determinable future time; the time of payment may be on or before a certain specified event which is certain to happen. It is also provided that an instrument payable on a contingency is not negotiable. That the deed of trust set forth in the record violates many of the terms of the Uniform Negotiable Instrument Act of this state plainly appears by an analysis of its provisions. This analysis is set forth so succinctly in the respondent's brief that we take the liberty of quoting it in full:

"(a) It provides for the payment of further advances and all sums now or hereafter owing by the makers.

"(b) It provides for the payment of 'all taxes and assessments.'

"(c) Of all other charges and incumbrances now or hereafter appearing as a lien upon the property.

"(d) Of all expenses and attorney's fees expended by the creditor in any action affecting the property or the title thereto.

"(e) Of all sums expended by the creditor in settling or compromising of any adverse claim; or,

"(f) Of all sums expended by the creditor on account of taxes, assessments, etc.

"The deed of trust provides that the entire sum, secured by the deed of trust, may be declared due, 'if default be made * * * in the payment of any of the other moneys herein agreed to be paid,' or 'if breach be made in the performance of any obligation for which this deed of trust is a security.' This means that the entire sum secured becomes due, not alone in one year, nor upon the happening of an event 'which is certain to happen,' but (a) if the maker fails to pay any taxes; or, (b) if he fails to pay any assessments; or, (c) if he fails to pay any charge or incumbrance; or, (d) if he fails to repay any expenses or attorney's fee expended by the creditor in any action involving the property or the title; or, (e) if he fails to repay any sum paid in settlement or compromise of any adverse claim; or, (f) if he fails to repay any sum expended by the creditor on account of taxes or assessments."

We conclude that the note under consideration is a nonnegotiable instrument, and that the appellant's objection to testimony based upon the alleged negotiability of the note in question is not well founded.

[2] It is next insisted that there is no writing showing agency on the part of Kerr, and that his agency terminated on the 22d day of September, 1919. This contention is based upon the fact that the agreement on the part of Coulter to pay Kerr \$500, by reason of his services, is dated as of that day. There seems to us no real merit in this contention. The instrument to which we are referring reads, exclusive of the date and the address:

"Whereas, on this day of September, 1919, you were authorized to negotiate an agreement of exchange between ourselves and W. H. Hoffman and Evelyn Hoffman (his wife) of the following described property: (Here follows a description of the lands then belonging to the appellant situated in the county of Sacramento). Evidence of said exchange being agreement made on the 18th day of September, 1919, between ourselves and W. N. Hoffman and Evelyn Hoffman (his wife).

"We now hereby agree that, upon said exchange being perfected, and said agreement performed by said Hoffman and his wife, there will be due you for your services for negotiating said exchange the sum of five hundred (\$500) dollars, and we now hereby agree to pay you the said sum of \$500 when said exchange has been finally consummated." (Signed by the appellant.)

Following the execution and delivery of this instrument, all the proceedings to which we have heretofore referred in relation to the carrying out of that agreement, the part performed by Kerr, Hoffman, and Coulter, respectively, were taken and had and the agreement referred to in this instrument finally consummated on the said 17th day of November, 1919, on which date the deed of trust, given by Kerr to the plaintiff, was executed, and on the following day the appellant paid to Kerr the sum of \$500 agreed to be paid, as we have just stated. We think this writing sufficiently evidences the existence of the agency and trust relation existing between the appellant and Kerr during the entire time covered by the negotiations.

[3, 4] As we have seen, the trust deed in favor of the plaintiff was executed by Kerr during the time the record title stood in the name of said Kerr, and it is insisted by appellant that there is no admissible testimony in the case showing any authority for the execution of such deed or ratification of the act of Kerr. In making this contention, we think the appellant overlooks or minimizes the written agreement dated the 19th day of December, 1919, entered into between Coulter and Kerr. This transaction took place shortly after the consummation of the negotiation to which we have been referring. This agreement sets forth the following:

"Received from Howard D. Kerr five thousand dollars (\$5,000) on the purchase of that certain piece of realty situate in the county of Colusa, state of California, to wit: (Here follows a description of the property covered by the trust deed, and at that time standing in the name of Kerr) at the price of seventy thousand three hundred (70,300) dollars, balance of the purchase money of fifteen thousand dollars, to be paid in gold coin, within 20 days, or as soon thereafter as the papers can be arranged for transferring said property. It is hereby understood that there is a \$40,000 loan now on the said property held by the Central Savings Bank of Oakland, which the purchaser assumes and agrees to pay. * * *

"Upon the payment of the balance of the purchase money, I hereby agree to give and

grant deed to the above property, with a good title. * * *

Dated the 19th day of December, 1919, signed by Thomas Coulter and Rowena Belle Coulter, and at the bottom of said agreement appears the following:

"I hereby accept the terms of this contract, and agree to purchase the said property and pay therefor the amount as set forth." (Signed, Howard D. Kerr.)

This is a plain, unequivocal statement or acknowledgment by both Coulter and Kerr that the ownership of the property in question was vested in Coulter. If the contention made herein that Kerr was the owner of the property and not the agent of Coulter, and acting for him in the negotiation of the loan, the question necessarily occurs, why he (Coulter) should be agreeing to sell the land to Kerr, and Kerr agreeing to buy from Coulter lands actually vested in Kerr? We think there is but one answer to this question. The agency is clearly shown and the ratification of the act of the agent established by the writing.

Appellant relies upon the case of Keighley Maxsted & Co. v. Durant, 1 B. R. C. 351, to the effect that an undisclosed principal cannot be held liable upon any obligation by reason of ratification. Whatever may be the law in other jurisdictions, such is not the law here. Section 2310 of the Civil Code allows just such a ratification. That section reads:

"A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof."

[5-7] Ratification is equivalent to a previous authority. 1 Cal. Jur. p. 776, § 68. Here we have a previous appointment in writing of the agent, and acceptance of the benefits, a statement in writing of the ownership of the property during the period covered by the obtaining of the loan, and then an agreement in the same writing that the purchaser shall assume and pay the mortgage, which has been executed for the benefit and purposes of the seller of the land, and which enabled him to consummate his deal with the Hoffmans. The record does not show, so far as we have been able to discover, what became of the deed executed by Kerr to the daughter of the appellant, but we assume, as stated by counsel in argument, that that deed was subsequently destroyed. The ratification is not strictly formal in its terms, but we think it sufficiently direct and positive, in substance, to comply with the statute. The rule in this state is well established that the contract of an agent, who deals in his own name without disclosing that of his principal, is the contract of his principal, and the principal is

liable thereon. 1 Cal. Jur. 856, § 133. In all such cases where the agency is shown to exist, the rule is that the writings showing ratifications will be liberally construed. 2 Corp. Jur. p. 492 et seq. The fact that the trust deed was made in the name of the agent, instead of the principal, does not limit the application of the rule relating to subsequent ratification. 2 Corp. Jur. p. 522; *Garcia & Maggini v. Colvin*, 53 Cal. App. 79, 199 P. 1113; *Cook v. Newmark Grain Co.*, 54 Cal. App. 283, 201 P. 615. Other California cases might be cited to the same effect, but we deem these sufficient.

We think the written testimony in this case sufficient to comply with the statute of frauds, and that the testimony supports the finding of the trial court.

All transactions referred to herein having been had, and the note and deed of trust involved in this action having been executed and delivered prior to the amendment of section 3265, Civil Code (Stats. 1923, p. 193), the law of this case has been considered and set forth as of the date of the execution and delivery of said note and deed of trust.

The judgment is hereby affirmed.

We concur: FINCH, P. J.; HART, J.

72 Cal. App. 222

ALTAMIRANO v. CHEO. (Civ. 2987.)

(District Court of Appeal, Third District, California. April 9, 1925. Hearing Denied by Supreme Court June 8, 1925.)

1. Appeal and error ⇨1008(1)—Finding of trial court, in accounting as to reasonableness of partners' expenditures in farming agreement, conclusive.

Where one of conditions in oral agreement for joint working of leased farm land was that defendant should advance expense money against a final settlement, *held*, in action for accounting, that the trial court's finding, as to the reasonableness of such expenditures, was conclusive.

2. Partnership ⇨328(3)—Evidence held sufficient to support finding of conclusive settlement of partnership farming agreement.

In an action for accounting under a farming agreement, evidence *held* sufficient to support finding of a conclusive settlement between partners, though there was evidence justifying a finding to the contrary.

3. Appeal and error ⇨1011(1) — Determination on conflicting evidence for trial court.

In an action for accounting on a partnership farming agreement, determination on conflicting evidence of partners was for the trial court.

4. Landlord and tenant ⇨135—Ploughing on land reverts at termination of lease.

Ploughing, left on land at termination of a single cropping season lease, becomes the property of the landlord.

5. Partnership ⇨81—Partner need not account for ploughing left on land, when re-leasing alone in good faith.

A lessee in good faith of farm lands, worked the previous year on a single cropping season lease, need not, in the absence of express agreement, account to his partners of the previous year for the value of ploughing then left on the land or for part of crop raised thereon.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Bert Altamirano against Louis Cheo for an accounting. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

L. L. Steele, of Oakland, for appellant.

Joseph D. Malloy, of Stockton, for respondent.

FINCH, P. J. This is an action for an accounting. The defendant was given judgment for costs of suit, and the plaintiff has appealed.

The defendant is a farmer, and for a number of years the plaintiff and Joe Youritch were in defendant's employ as farm hands. In the fall of 1921, the three men rented 600 acres of land in San Joaquin county for the cropping season of the following year, and during the term of the lease they farmed the same under an oral agreement to the effect that defendant would furnish the required machinery, implements, and equipment, and plaintiff and Youritch would do the necessary work in the production of crops; the profits to be divided equally. The defendant was to advance whatever money was necessary to conduct the farming operations and to be reimbursed, without interest, out of the proceeds of the crops. According to defendant's testimony, he received from the sale of farm products the following amounts: Hay, \$917.58; barley, \$1,271.11; and stubble, \$189. There remained in his possession 1,750 sacks of wheat belonging to the partnership. He expended in behalf of the enterprise the sum of \$4,721.98. The plaintiff paid certain partnership expenses and, during the year, received \$150 from the defendant on account thereof.

November 10, 1922, the three men met together to adjust their partnership affairs. The defendant and Youritch testified that the former there presented a complete written statement of his receipts and disbursements, and that the plaintiff agreed to all the items thereof. The plaintiff and Youritch sold their interests in the wheat on hand to the defendant at what was stipulated at the trial to be the market price thereof. The net profits were then computed upon the basis of the foregoing receipts and disbursements, taking into consideration the amount defendant agreed to pay for the wheat. The defendant thereupon gave checks to plaintiff and

Youritch for their respective shares of such profits. They cashed their checks and departed shortly after the settlement, the defendant going to Oakland and Youritch to Los Angeles. "Some two or three weeks afterwards" the plaintiff called upon defendant and demanded a further adjustment of the partnership affairs, but the defendant refused to accede to the demand. The defendant testified that the adjustment of November 10th was a complete settlement of the partnership affairs, except as to 90 acres of summer-fallow plowing which will be later considered; that "everybody was satisfied"; that plaintiff "was afraid I was giving him too much money on the settlement."

[1, 2] Youritch also testified that the parties made a complete settlement of the partnership affairs. Material parts of the foregoing testimony were contradicted by the plaintiff. He testified that at the time of the settlement he said to defendant, "I had forgot a book I had at home. * * * 'If you wait a few days longer I will get that book; we will come up and we will straighten the matter out.' He says, 'All right, * * * any time you want to, come up here'"; that the defendant desired to settle for the amount he paid plaintiff "and I wouldn't stand for it." Youritch testified that at the time of the settlement the plaintiff said he forgot his book, "but he says he don't think the bills run over \$100; he says 'You put in \$100 for my expenses, that be O. K.' * * * He said he forgot his books, but he could come close; he said he guessed \$100, he don't think it is any more than \$100, about \$100." At the trial the plaintiff testified that he had paid out \$315.70 towards the expenses of the partnership. The defendant testified that the plaintiff paid out only \$125 towards the expenses, and that the defendant repaid that sum in the aforesaid \$150 admittedly paid to plaintiff prior to the settlement. While the determination of the conflict in the testimony was for the trial court, it may be observed that there is one feature of the settlement which tends strongly to support the conclusion reached by the court. There is no claim that Youritch had paid any part of the expenses of the enterprise. Yet the proceeds of the venture, after deducting the expenses thereof paid by defendant, were divided equally among the three partners. If the plaintiff was entitled to reimbursement for the expenditures which he now claims to have made, then the amount thereof should have been deducted from the proceeds before division, and it would follow that the defendant paid Youritch more than his just share. It is not probable that the defendant would

have made such payment to Youritch, if the parties understood that the plaintiff was to be further reimbursed by defendant. There is a conflict in the evidence as to whether the expenditures made by the defendant are reasonable in amount, but the trial court's determination thereof is conclusive on appeal. The evidence is ample to support the findings of the court upon the theory that the partners made a complete settlement of the partnership affairs among themselves, as well as upon the theory that the settlement was just and fair, although, as pointed out, there is evidence upon which contrary findings could have been made. An agreement between partners by which they settle their partnership affairs may be set aside for fraud or mistake, but the plaintiff made no attempt to prove either fraud or mistake; his claim being that no settlement was agreed to by him.

[3] The parties summer-fallowed 90 acres of land on which no crop was raised, the land apparently being too wet to plow until it was too late to raise a crop thereon. Plaintiff testified that it was agreed that "if the ranch had been rented out to some outsider, he (defendant) was to sell that summer fallow to them, and whatever he got for the summer fallow was to be divided between the three of us, and, if it was not, that he was to put it in the coming year and we were to divide that." The defendant testified that he did not agree to farm the 90 acres the following year, but that he said, "I will try to sell this off, if I can sell it we will divide the profit"; that "I tried to sell it, and I couldn't sell it to no one"; that the owner "took the land back and rented her to me again after the first of the year." Defendant's testimony in this respect is corroborated by that of Youritch. Here again the determination of the conflict in the evidence was for the trial court.

[4, 5] The lease to the partners was for a single cropping season. Any plowing left on the land at the end of the term became the property of the landlord. If, as stated by defendant, the owner retook possession and the defendant thereafter, in the succeeding year, in good faith, took a lease of the land and farmed it, without having agreed with the plaintiff and Youritch to do so or to pay for the plowing or divide the profits, he was not under obligation to account to them for the value of the plowing or for a part of the crops raised on the land. The question of his good faith was for the trial court.

The judgment is affirmed.

We concur: PLUMMER, J.; HART, J.

72 Cal. App. 240

**W. S. SMITH & SON et al. v. INDUSTRIAL
ACCIDENT COMMISSION et al.**
(Civ. 5159.)

(District Court of Appeal, First District, Division 1, California. April 10, 1925.)

Master and servant ⇨417(7)—**Industrial Accident Commission's award on competent evidence affirmed.**

Where testimony was conflicting, Industrial Accident Commission's award, based on competent evidence, should be affirmed.

Certiorari to Industrial Accident Commission.

Proceeding for compensation under the Workmen's Compensation Act (Laws 1913, p. 279), by Caroline H. Rountree, employé, opposed by W. S. Smith & Son, employer, and the Aetna Life Insurance Company, insurer. To review an award of compensation by the Industrial Accident Commission, the employer and insurer bring certiorari. Award affirmed.

E. L. Stockwell and J. M. Wallace, both of San Francisco, for petitioners.

Joseph A. Brown, of San Francisco, for respondent Rountree.

Warren H. Pillsbury, of San Francisco, for respondent Industrial Accident Commission.

CASHIN, J. Certiorari directed to the Industrial Accident Commission to review the proceedings resulting in an award made by the Commission, to Caroline H. Rountree, and against Aetna Life Insurance Company, a corporation, the insurer of W. S. Smith & Son, the petitioners herein.

Caroline H. Rountree was, on the 1st day of July, 1923, in the employ of petitioners W. S. Smith & Son. She alleged in her claim for compensation, under the provisions of the Workmen's Compensation, Insurance and Safety Act of 1917, that on that day in the course of her employment she fell from a horse, striking her head upon the ground, and receiving injuries which proximately caused a retinal hemorrhage in the left eye and permanent diminution of vision. The Commission made and filed its findings of fact and award in her favor against petitioner, Aetna Life Insurance Company, holding petitioner liable for the entire disability. Thereafter the Commission denied a rehearing of the matter.

Petitioners claim that the evidence does not justify the findings of fact, that the findings do not support the award, that the injuries, if any, were an aggravation of an existing disease, and that the Commission, in holding petitioner liable for the entire disability, acted in excess of its powers.

After an examination of the whole record in this case, we find that there was a con-

flict in the testimony, and that the conclusions of the Commission are based on proof supported by competent evidence. We are therefore of the opinion that the award should be affirmed; and it is so ordered.

We concur: TYLER, P. J., KNIGHT, J.

72 Cal. App. 244

**STEINECK, Deputy Labor Com'r, eto., v.
COLEMAN.** (Civ. 4953.)

(District Court of Appeal, Second District, Division 1, California. April 10, 1925.)

1. Appeal and error ⇨791—**Motion to dismiss appeal not considered, where grounds for dismissal were not suggested in previous similar motion.**

Motion to dismiss appeal, on the ground that appeal was taken for sole purpose of delay, and was frivolous, would not be considered, where, on a previous motion to dismiss the appeal, no reference was made to such ground.

2. Appeal and error ⇨757(1)—**Brief must contain such portions of record as party desires to call to attention of court.**

Legislature in 1923 (St. 1923, p. 748), by striking from Code Civ. Proc. § 953c, addition made in year 1919 (St. 1919, p. 261), providing that no appeal should be decided adversely to any party for failure to print in his brief portion of record in support of his points, reaffirmed its original enactment that parties must print such portions of record as they desire to call to the attention of the court.

3. Appeal and error ⇨935(2)—**Order appealed from presumed justified, where record incomplete.**

Where appeal was taken from order denying motion to vacate default judgment, and appellant failed to set forth in his brief notice of motion, affidavit, proposed answer in full, or counteraffidavit of respondent, order appealed from would be presumed to have been justified.

4. Appeal and error ⇨757(1) — **Appellant's failure to print affidavit in brief relieved respondent of printing counteraffidavit.**

On appeal from order denying motion to vacate default judgment, failure of appellant to present in opening brief affidavit in support of motion relieved respondent of presenting in his brief counteraffidavit.

5. Pleading ⇨85(4)—**Demand for bill of particulars does not extend time for answer.**

Serving on adverse party demand for bill of particulars, under Code Civ. Proc. § 454, does not of itself extend time for answer.

6. Judgment ⇨143(3) — **Refusal to relieve from default judgment was not abuse of discretion.**

Though mistake of attorney, in believing that filing demand for bill of particulars extended time for answer, may under some circumstances have entitled client to relief under

Code Civ. Proc. § 473, it was not abuse of discretion, where it appeared that defendant had intentionally evaded service of summons to refuse to relieve client from default judgment.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by W. E. Steineck, Deputy Labor Commissioner, Bureau of Labor Statistics, assignee, against Will H. Coleman. From an order denying a motion to vacate a judgment for plaintiff, defendant appeals. On motion to dismiss appeal. Motion dismissed, and order affirmed.

Andrew J. Copp, Jr., of Los Angeles, for appellant.

A. B. Edler, of Los Angeles, for respondent.

CONREY, P. J. [1] Respondent moves to dismiss the appeal from the order denying motion to vacate judgment, upon the ground that the appeal is taken solely for the purpose of delay and is frivolous. By an order made some time ago the court granted a motion of respondent to dismiss the appeal from the judgment, and denied a motion made at the same time to dismiss the appeal from the order. The grounds stated for the present motion might have been suggested in connection with the former motion, if respondent had elected to include them. This alone is a sufficient reason for declining to consider such motion at this time.

Respondent further moves for an order affirming the order denying the motion to vacate judgment, on the ground that appellant has not, in his brief or in any supplement thereto, printed any portion of the record. It is true that the opening brief for appellant does not contain quotation or copy of any part of the record. The reply brief of appellant, which has been filed pending the decision of this motion, does contain some quotations or copies from the transcript. Since the case has been submitted on the merits at the same time that this motion was submitted, we shall assume that appellant has now, although tardily, complied with section 953c of the Code of Civil Procedure, wherein it is provided that, in the case of an appeal taken upon a typewritten transcript, the parties must in filing their briefs "print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court."

[2] But we take occasion here to suggest that failure to comply with this statute by printing a sufficient part of the record to enable the court to determine the merits of the questions presented for decision is, in its probable results, somewhat analogous to the failure of a litigant to obtain a sufficient bill of exceptions. In the year 1919 (St. 1919, p. 261) the Legislature made an addition to section 953c which practically destroyed its effect by directing, among other things, that an appeal should not be decided adversely to

any party for failure to print in his brief the portion of the record or any part thereof in support of his points. Following that amendment, and referring directly thereto, the Supreme Court held that the statute requiring the printing in the briefs of the record and evidence relied upon in an appeal "must be regarded as one for the convenience of the appellate tribunals, and for that reason directory only, and should be disregarded by the court wherever substantial justice requires it to be done." *People v. Woods*, 190 Cal. 513, 517, 213 P. 951, 953. Thereafter the Legislature, apparently disapproving the policy indicated by the amendment of 1919, struck out from section 953c the addition which had been made thereto in 1919 (Stats. 1923, p. 748). It thus appears that the Legislature has reaffirmed its original definite enactment that parties to an appeal, although excused from printing their transcripts (when the record is made up under said section 953c), "must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court."

[3] Turning now to the briefs, and to the portions of the record printed therein, what do we find? We are informed by counsel that the appeal is from an order refusing to relieve the defendant from a judgment taken against him through the mistake, inadvertence, surprise, and excusable neglect of his attorney. (Said attorney was not his present attorney herein.) It is indicated that the judgment had been entered upon default, and that the motion was supported by an affidavit of the facts upon which the moving party relied. But in the opening brief of appellant we are not furnished with a copy of the notice of motion or of the affidavit. Neither is there printed any copy of the answer which the defendant proposed to file. In the reply brief there are set forth some paragraphs of the complaint and a part of the proposed answer, which purports to deny "generally and specifically each and all of the allegations" of said paragraphs of the complaint. And in the reply brief appellant finally has also printed the affidavit in support of the motion to vacate judgment. But in so doing appellant fails to set forth the counteraffidavit on the part of respondent, to which our attention should have been called in a full and appropriate presentation of the record. "It is a well settled rule of law that, where evidence is omitted from the record, this court must presume that the omitted evidence fully justified the order appealed from, although the evidence contained in the record itself is insufficient." *Berri v. Rogero*, 168 Cal. 736, 741, 145 P. 95, 97.

In this decision we are assuming that the answer, verified, and tendered with the motion, states a defense, and "meets all the requirements of an affidavit of merits." *Savage v. Smith*, 170 Cal. 472, 150 P. 353.

[4-6] Since the affidavit in support of the motion to vacate judgment was not presented to this court by appellant in his opening brief, respondent in preparing his brief was not under any obligation to present the affidavit used on his behalf in the court below. In view of these circumstances, we have examined said counteraffidavit made by the attorney for respondent. From the facts therein stated it appears that the defendant intentionally and for some time successfully evaded service of summons and complaint in this action, and thereby caused delay in the prosecution thereof; that the defendant had admitted that plaintiff's assignor had performed labor and services for him during a period of three and one-half months, and that he had not paid anything whatever for said services. The action is one to recover an amount alleged to be due for said services. The motion to obtain relief against default for failure to answer was based upon the claim, as set forth in an affidavit of the person who was defendant's attorney at that time, that he had served on plaintiff a demand for a bill of particulars, and believed that, as a matter of law, his time to answer was extended by virtue of such demand until after the furnishing of such bill of particulars. It seems to be admitted that the serving of such demand did not of itself extend the time for answer. Code Civ. Proc. § 454. While such mistake of law on the part of the attorney of the defendant might under some circumstances serve as a justification for relief under the provisions of section 473, Code of Civil Procedure, nevertheless the court on the hearing of the motion was entitled to take into consideration all of the facts presented, in order to determine whether or not the default had been suffered as the result of excusable delay, or was a part of a policy of intentional delay on the part of the defendant. The court in acting upon the evidence in this manner did not abuse its discretion therein.

The motion to dismiss appeal from the order denying motion to vacate judgment is dismissed. The order is affirmed.

I concur: CURTIS, J.

72 Cal. App. 143

PACIFIC ACCEPTANCE CORPORATION v. GOODMAN. (Civ. 4371.)

(District Court of Appeal, Second District, Division 1, California. April 2, 1925. Hearing Denied by Supreme Court June 1, 1925.)

1. Bills and notes ⚡497(5)—Where title of payee of check was defective in fact, burden was on plaintiff indorsee to prove itself a holder in course for value.

In an action on a check, where title of payee was defective in fact, within Civ. Code, §

3136, burden was cast on plaintiff indorsee, under section 3140, to affirmatively prove that it acquired title as a holder in due course for value, in view of sections 3133, 3137.

2. Bills and notes ⚡356—Indorsee's acceptance of check conditionally from his debtor payee for collection not payment of debt constituting indorsee a purchaser for value.

Where plaintiff indorsee conditionally accepted check from his debtor payee, with understanding it was to be collected and applied on debtor's existing account, such acceptance of the check did not operate as actual payment on the debtor's account, constituting indorsee a purchaser for value, in view of Civ. Code, § 3135, and indorsee held check subject to defenses available against payee.

3. Bills and notes ⚡352—Surrender to payee of his dishonored checks in return for third party's check not consideration for such third party's check.

Where plaintiff surrendered to payee his dishonored checks, in exchange for check of third party, such surrender was not, under the circumstances, the payment of a valuable consideration for such third party's check.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by the Pacific Acceptance Corporation against S. B. Goodman. From a judgment for plaintiff, defendant appeals. Reversed.

Hearing denied by Supreme Court; Shenk, J., not participating.

H. C. Millsap and N. J. Kendall, both of Los Angeles, for appellant.

Loewenthal, Collins & Loewenthal, of Los Angeles, for respondent.

CONREY, P. J. The defendant appeals from a judgment rendered against him for the amount due on a check of \$3,000, made by him and delivered to plaintiff's assignor. We have not been favored with any brief or argument on behalf of respondent.

Apparently it is a fact, and we shall so assume, that as against the Pacific Motors Corporation, named as payee in the check, the defendant at all times has had a good defense. The trial court, however, determined that the plaintiff is a holder of said check in due course and for value. If the record supports that decision, the judgment must be affirmed.

The payee's title to the check was defective, within the meaning of the Civil Code title relating to negotiable instruments, by reason of the fact that the payee negotiated the instrument to the plaintiff in breach of faith and under such circumstances as amounted to a fraud on the part of the payee. Civ. Code, § 3136. It is admitted that respondent took the check under conditions sufficient to establish its position as a holder in due course in all respects, except that

appellant contends that respondent did not receive the check for value or without notice of infirmity in the instrument or of the defect of the payee's title. Civ. Code, § 3133. To be charged with notice of such infirmity or defect, respondent must have had knowledge thereof, or knowledge of such facts that its action in taking the instrument amounted to bad faith. Civ. Code, § 3137.

The facts relating to the negotiation of the check by the payee to plaintiff are as follows: The Pacific Motors Corporation being indebted to the plaintiff, its president, Mr. Kux, on June 18, 1920, delivered to plaintiff several checks of the Pacific Motors Corporation, drawn on a bank in San Francisco. The bank advised plaintiff that there was not sufficient money to pay these checks. Thereupon an officer of plaintiff telephoned Kux in Los Angeles and advised him about said unpaid checks. In reply, Kux stated that he was working on a deal in Los Angeles and expected to leave that night for San Francisco, and would bring an amount of money to plaintiff the following morning. Accordingly Kux did go to San Francisco and brought with him the check which he had obtained from defendant, and on behalf of the payee indorsed and delivered the same to the plaintiff. We are unable to discover, in the circumstances shown by the stipulation of facts, that the plaintiff did not take the check in good faith, and without notice of any infirmity in the instrument or defect in the title of the payee.

There is only one question remaining. Was the plaintiff one who acquired the check for value? At the trial it was stipulated that at the time of delivery of the check to the plaintiff it was understood that the account of Pacific Motors Corporation should be credited with the amount of the check when the check was collected; that the check was received, presented to the bank upon which it was drawn, and not paid; that the delivery and acceptance of the check was not to affect the account in any way until paid; that the check was not delivered or received in payment of the account, or in payment of any part of the account; and that the account never was credited with any sum whatever by virtue of the execution of the check. It was further stipulated that certain testimony given in a deposition of Mr. Levin, vice president of plaintiff, was true. In that testimony Mr. Levin said:

"At the time Kux gave me the Goodman check he told me that he wanted me to return the checks which I had and which were refused payment by the bank, and I thereupon delivered to him three or four checks which he had previously given me, aggregating about \$3,000, drawn on the Anglo-Paris & London National Bank."

[1] At this point it is of importance to take into consideration the question as to which party must carry the burden of proof upon

the issue of fact. Since the title of the payee named in the check was in fact defective, the burden was thereby cast upon the plaintiff to prove that it acquired the title as holder in due course. Civ. Code, § 3140. It follows that the plaintiff is required to affirmatively prove that it took the check for value.

[2] Appellant contends that, according to the record herein, it is established that the check was accepted by plaintiff as a conditional credit or for collection, and that those facts are insufficient to constitute the plaintiff a bona fide holder for value and in due course. We are of the opinion that this contention must be sustained. The rule appears to be established by authority that the taking of a note, either of the debtor or of a third person, for a prior existing debt, is no payment, unless it be expressly agreed to take the note as payment, and that, upon failure to pay such note, the creditor may ignore it and sue upon the original debt. *Merchants' Nat. Bank v. Bentel*, 166 Cal. 473, 477, 137 P. 25. So here, by way of direct application of the rule above stated, it must be held that taking from plaintiff's debtor a check of a third person to plaintiff's debtor does not operate as payment of the debt to plaintiff unless plaintiff agreed to take the check as payment. Manifestly, this was not done in the present case. The original debt of the Pacific Motors Corporation to plaintiff remained unaffected by the transfer of the check, and was thus to remain until actual payment of the check. Under such circumstances the indorsee of the check has not become a purchaser for value. *Oppenheimer v. Radke & Co.*, 20 Cal. App. 518, 129 P. 798. Concerning actual payment of the consideration, as a condition essential to the position of one claiming to be a bona fide purchaser, Mr. Pomeroy says:

"It is further settled that there must be actual payment before any notice, or, what in law is tantamount to actual payment, a transfer of property or things in action, or an absolute change of the purchaser's legal position for the worse, or the assumption by him of some new, irrevocable, legal obligation." *Pomeroy's Equity Jurisprudence* (4th Ed.) § 751.

Section 3135, Civil Code, reads as follows:

"Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him."

[3] The consideration for the transfer of the check by the payee to plaintiff was purely conditional. It amounted to nothing more than an agreement at a future date to credit the account of the payee with the payment of \$3,000; said date being concurrent with and dependent upon the collection of the Goodman check. Since payment of that

check was refused, and since the infirmity and defect in the title of the payee was thereupon promptly disclosed, prior to the passing of any consideration from the plaintiff on account of the indorsement of the check to it, we are of the opinion that plaintiff holds the check subject to the original defenses which defendant had against the payee. We think that the surrender by plaintiff, to the payee, of its own dishonored checks, in exchange for the check of appellant, was not, under the circumstances, the payment of a valuable consideration for appellant's check.

The judgment is reversed.

I concur: CURTIS, J.

72 Cal. App. 132

MURPHY et ux. v. BOERICKE & RUNYON CO. et al. (Civ. 5089.)

(District Court of Appeal, First District, Division 2, California. April 2, 1925. Opinion Modified and Rehearing Denied May 1, 1925.)

1. Druggists ⇨10—Evidence of sale of stale medicine held inadmissible because barred by limitation.

In action against drug company for sale of medicine claimed to have harmed plaintiff, testimony of former sale of stale medicine, occurring more than year prior to filing of suit, and for which medicine claimed to be harmful had been exchanged, *held* error under Code Civ. Proc. § 340.

2. Appeal and error ⇨1170(7)—Inadmissible evidence of sale of stale medicine prejudicial.

In action against drug company for sale of medicine claimed to be injurious, evidence of former sale of stale medicine by a porter, which was inadmissible under Code Civ. Proc. § 340, *held* not within scope of Const. art. 6, § 4½, being prejudicial, especially in view of its emphasis in instructions covering requirement for drug stores to have licensed pharmacists.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by John H. Murphy and wife against the Boericke & Runyon Company and another. Judgment for plaintiffs, and defendants appeal. Reversed.

Brittain & Weise, F. S. Brittain, and J. H. Weise, all of San Francisco, for appellants.

William Klein, Reed M. Clarke, Alvin Gerlack, Clayton H. Garvey, and Alex. Sheriffs, all of San Francisco, for respondents.

LANGDON, P. J. This is an appeal by the defendants from a judgment against them for \$3,000 in an action brought by the plaintiffs, who are husband and wife, to recover damages alleged to have been caused by the defendants by reason of the sale by them to

Mrs. Murphy of certain medicine, which the jury has found greatly injured her health.

Appellants assert that the evidence is not sufficient to justify the verdict against them. We are relieved, however, of the task of discussing this contention, and stating, in detail, the evidence appearing in the record, because we have come to the conclusion that, aside from the soundness of this position, the judgment must be reversed for manifest error in the admission of testimony with reference to events which occurred more than one year before the bringing of the action, and which were barred, therefore, by the provisions of section 340, Code of Civil Procedure. We shall state herein only such portion of the evidence as is necessary to explain the situation with reference to this testimony.

[1, 2] On May 15, 1921, between 8 and 9 o'clock in the morning, the plaintiff John H. Murphy went to the drug store of the defendant Boericke & Runyon Company in San Francisco, Cal., to purchase for his wife a medicine to be used as a spring tonic. Mr. Murphy asked for "Rhus-Tox of the 30th" and a bottle of sulphur. It appears that defendant manufactured no preparation known as "Rhus-Tox of the 30th," but no explanation of this was made to Murphy, and the person in charge of the drug store sold him two bottles of medicine, one marked "Rhus-Tox 3X" and the other marked "Sulphur." Mr. Murphy delivered this medicine to his wife. She used it as directed for a few days. Both plaintiffs testified that the Rhus-Tox so purchased did not appear to be in good condition; that the pellets were lumped together so that it was difficult to determine the dosage, and that the medicine appeared to be stale and old. Because of these facts, Mrs. Murphy discontinued the use of the medicine after a few days, and on June 11, 1921, she took the medicine back to the drug store and saw Mr. Breckenfeld, a registered pharmacist employed by defendant company. She explained her objection to the medicine which had been sold to her husband. According to her testimony he told her that the medicine had been sold to Murphy by the porter, who was the only person in charge of the store at the hour of the morning when it was bought, and that a mistake had been made; that it was stale medicine which was kept for physicians. He told her not to take any more of that medicine, and gave her other medicine to take its place. There was other testimony in the record to the effect that the man who had furnished the first medicine did not appear to be familiar with the stock, and had searched for considerable time before he could find the medicine furnished to Murphy, and all of this testimony was offered in an attempt to place before the jury the fact that medicine had been dispensed by the defend-

ant through its porter, and not through a registered pharmacist.

The complaint was not filed until June 8, 1922, so that everything in connection with this incident of May 11, 1921, was barred, and objections were duly and properly insisted upon at the trial. The substitute medicine furnished to Mrs. Murphy on June 11, 1921, by the registered pharmacist employed by defendant, according to all the testimony in the record, is the medicine which caused her injury, if either of the medicines furnished by the defendant caused it, and only with reference to the furnishing of such medicine was she permitted to offer testimony because of the bar of section 340 Code of Civil Procedure. There is no dispute about this matter, and counsel for respondents maintains in his brief that damages are only sought by reason of the action of the second medicine furnished. But respondents contend, and the trial court proceeded upon the theory, that the testimony of the earlier incident was admissible under the case of Perkins v. Trueblood, 180 Cal. 437, 181 P. 642. There recovery was sought for negligence of a physician in setting a broken bone. It appears that the break occurred in March, 1912, and defendant was employed to treat the injury. The healing process was not satisfactory, and defendant separated the surfaces of the bone during April, 1912, and again set the plaintiff's leg. It was for negligence in the latter operation that recovery was sought. Recovery for the earlier treatment was barred by the statute, and it does not appear that plaintiff sought to show such earlier treatment was negligent. The evidence of the original break and the treatment that followed was admitted merely to explain conditions at the time the negligent treatment was administered, and this evidence was necessary to determine what should have been the proper treatment under the circumstances. No recovery was had because of the earlier treatment.

In the instant case, if the testimony regarding the incident of May 11, 1921, had merely been to the effect that plaintiffs had purchased medicine which was not satisfactory, and upon taking it back to the drug store had been furnished with the objectionable medicine from which the evil consequences flowed, it would have come within the reason and intent of the case last cited. But here we have a situation where great stress was laid upon the fact that the original medicine was old and stale, and had been furnished by a porter, and a mistake had been made—all facts tending strongly to convict the defendants of

negligence, and to greatly prejudice their cause before a jury, and all facts which, so far as any recovery by plaintiffs is concerned, were absolutely immaterial. It is useless for counsel for respondents to contend upon appeal that no recovery was sought for negligence occurring on May 11, 1921. Not only was testimony showing such negligence repeatedly put before the jury so that it must have influenced their judgment, but it was emphasized to them by the following instructions:

"It is incumbent upon every pharmacy * * * for the sale * * * of drugs, medicines * * * to have in charge thereof at all times a registered pharmacist or an assistant registered pharmacist.

"It is unlawful for the owner of a drug store to leave the same at any time in charge of any person not a duly licensed and registered pharmacist. * * *

"Any sale of drugs by an unregistered clerk from which injury proceeds is prima facie evidence of negligence."

"The court instructs you as a matter of law that if you find from the evidence that the defendants sold or permitted to be sold to the plaintiffs any drugs * * * by an unregistered pharmacist * * * and such * * * drug so sold to plaintiff was the approximate cause of the injury complained of, then * * * the court instructs you that as a matter of law the defendants were guilty of negligence."

An examination of the transcript of the testimony shows that there was absolutely no evidence in the record to which these instructions could possibly be applicable except evidence relating to incidents which were barred by the statute. With these instructions given to the jury, and with the large amount of evidence appearing in the record which was inadmissible and most prejudicial to which they refer, we are not impressed with the argument that the general instruction to the effect that no recovery could be had for negligence occurring prior to June 8, 1921, corrected the erroneous impressions given to the jury.

The error in the admission of this testimony is not within the scope of section 4½ of article 6 of our Constitution; it permeates the entire fabric of the case, and it appears to be very probable that the jury arrived at their verdict by reason of the very facts which furnished no basis for a recovery.

The judgment is reversed.

We concur: NOURSE, J.; STURTEVANT, J.

72 Cal. App. 249

FIRPO v. MURPHY et al. (Civ. 5000.)

(District Court of Appeal, First District, Division 1, California. April 11, 1925. Hearing Denied by Supreme Court June 1, 1925.)

1. Brokers ⇐42—Statute regulating licensing of salesmen construed.

St. 1919, p. 1252, and amendment St. 1921, p. 1294, are construed to be for protection of the public and under the various provisions of the act (St. 1919, p. 1256, § 10, subd. 4, and sections 1, 2, 17-20, and section 11, as amended by St. 1921, p. 1295, § 1), real estate broker is charged with knowledge of whether his salesman has a license, and no business can be conducted by broker through a salesman until a license is procured by him, or, where there has been a change in the employment of the salesman, a reissue of his license.

2. Contracts ⇐107—Statute made for protection of public renders contract in violation thereof void.

A contract in violation of a statute made for the protection of the public is void, and a penalty prescribed for a violation of such statute is the equivalent of an express prohibition and renders a contract in violation thereof void.

3. Brokers ⇐42—Commission not recoverable when made through unlicensed salesman.

Where real estate broker employed salesman who had been duly licensed as a salesman for another firm, but who was not licensed as employee of broker, broker could not recover commission for securing of lessees of apartment house through such salesman, in view of act regulating brokers and salesmen (St. 1919, p. 1252, amended by St. 1921, p. 1294).

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by E. Firpo against Leland S. Murphy and others. From a judgment for plaintiff, defendants appeal. Reversed.

Robert B. Gaylord, of San Francisco, for appellants.

Raymond Perry, of San Francisco, for respondent.

TYLER, P. J. Action to recover a broker's commission. The complaint recites that defendants became indebted to plaintiff's assignors, Rucker & Tarp, a copartnership, in the sum of \$770 for and as a commission for the securing of lessees of a certain apartment house.

The complaint was demurred to upon the ground that it did not sufficiently appear therefrom whether, at the time the alleged cause of action arose, plaintiff's assignor or its salesman, who handled the transaction, were duly licensed under and pursuant to the provisions of the act of the Legislature regulating such brokers and salesmen, approved May 27, 1919. Stats. 1919, p. 1252,

amended in 1921; Stats. 1921, pp. 1294, 1295. The demurrer was overruled.

Defendants, answering, denied specifically the allegations of the complaint, and as a second defense alleged on information and belief that neither plaintiff's assignor nor its salesman, who it is alleged rendered the entire services, had a registered license to transact business under or pursuant to the act mentioned. Judgment went in favor of plaintiff, and defendants appeal.

It is admitted that a tenant was obtained and a lease executed. As ground for reversal, however, defendants claim that, as the evidence shows without conflict that the transaction was handled by a salesman employed by Rucker & Tarp, who held no license, that plaintiff therefore cannot recover, as the contract is unlawful and contrary to the policy of express law. They also claim that, as the contract was not in writing, no recovery can be had thereon. Lack of evidence to sustain the amount of the judgment is also assigned as error. If there is merit in defendants' first contention, the other objections raised become unimportant. The evidence shows without conflict that one Thomas L. Ricks was employed by Rucker & Tarp as a salesman. He had previously been employed as such by another firm in the year 1922, and was duly licensed as a salesman for such firm. He entered the employ of Rucker & Tarp about October or November of that year, but no surrender of his license as a salesman of his former employer was ever had as provided for by statute. Under his new employment he acted as salesman to negotiate leases and the sale of real estate. In the performance of these duties he procured employment from defendant Murphy to obtain a tenant for a certain apartment house owned by him. He was instructed by his employers to carry on the negotiations between the parties and come to an agreement. The only connection that Rucker & Tarp, his employers, had in the transaction was that they kept in touch with the negotiations as reported by Ricks.

After the tenant had been obtained and the lease executed, there was a dispute between the owner and Rucker as to the amount of the compensation to be paid; there being no express agreement by the parties upon the subject. There is evidence in the record to show that Murphy was willing to pay the sum of \$500, but objected to paying the amount equivalent to the first month's rent which it seems was the rate fixed by the real estate board's schedule. The negotiations for the lease were commenced in December, 1922, and they were completed and the lease executed on January 26, 1923. At no time during this period did Mr. Ricks hold a license in accordance with the terms of the statute hereinafter referred to. Ricks made no attempt during the month of January,

1923, to obtain a salesman's license for that year, nor until the following February, nearly a month after the transaction was closed. It may be said in passing that licenses under the act automatically expire at the close of each calendar year. They do not run from year to year, but a new license is issued for each year. If no application, therefore, is made on or before January 1st, a salesman has no license for the coming calendar year merely because he held one during the preceding year. Stats. 1919, p. 1256, § 10, subd. 4.

Other provisions of the act controlling the situation are as follows: Section 1, defining real estate brokers and salesmen, provides in substance that it shall be unlawful for any person, partnership, or corporation to engage in the business or act in the capacity of a real estate broker or a real estate salesman in this state without first obtaining a license therefor. Section 2 defines a real estate salesman, among other things, to be one who is employed by a broker or others in their interest "to lease or offer to lease" any real estate "as a whole or partial vocation." By section 17 of the act it is made a criminal offense to act as such salesman without a license. Section 18 makes it unlawful for any licensed broker to pay a commission for performing any of the acts specified to any person who is not a licensed broker or salesman. Section 19 permits the commissioner to temporarily suspend or permanently revoke a license for a violation of certain provisions of the act. Section 20 denies to any person, copartnership, or corporation engaged in the business or acting in the capacity of a real estate broker or a real estate salesman the right to maintain any action in the courts of this state for the collection of compensation for the performance of any of the acts mentioned in section 2 without alleging and proving that such person, copartnership, or corporation was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose. Section 11, as amended (Stats. 1921, p. 1295, § 1), provides that the license of both broker and salesman shall be "prominently displayed" in the office of the broker, and that the license authorizes business only at the location named in the license; it further provides that the salesman's license shall remain in the possession of the employing broker until it is canceled or the employment terminated; that, when the salesman leaves the broker's employ, the broker shall return the salesman's license to the commissioner for cancellation. It also declares that a change of location without notification to the commissioner, and the issuance of a new license, automatically cancels the license previously issued.

[1] It is therefore manifest from the various provisions of the act that the law charges the employer with knowledge of the fact whether his salesman has or has not a li-

cense, and contemplates that no business can be conducted by a broker through a salesman acting in his behalf until a license is procured by him or reissued when there has been a change in the employment of the salesman. The statute in question is one designed for the protection of the public. It is in keeping with the statutes of a similar character regulating the pawnbrokerage business, and certain professions.

[2] Whenever a statute is made for the protection of the public, a contract in violation of its provisions is void. The pawnbrokers act provides that it is a misdemeanor to carry on the business of pawnbroker without a license. Pen. Code, §§ 338, 339.

While there is no express declaration in these sections that the transactions condemned are unlawful, or that no recovery shall be had thereon in the event that the provisions are violated, still it has been held that they, being designed for the protection of the public, and a penalty prescribed for a violation thereof, that such penalty is the equivalent of an express prohibition, and that a contract made contrary to the terms thereof is void, and further that whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. *Levinson v. Boas*, 150 Cal. 185, 88 P. 825, 12 L. R. A. (N. S.) 575, 11 Ann. Cas. 661.

So, also, it has been held that a physician or surgeon, who is employed before he has procured the certificate required by the laws of this state regulating the practice of medicine, cannot recover any compensation for the services rendered before the procuring of the certificate upon any contract, express or implied, the contract being illegal and against public policy.

The principle is in accord with the positive provisions of our Civil Code, which makes that unlawful which is either contrary to the express provision of law or contrary to the policy of express law, though not in terms prohibited. *Gardner v. Tatum*, 81 Cal. 370, 22 P. 880; Civ. Code, § 1667.

The rule is universally established that, where a broker fails to procure the license required by law to carry on his business, he cannot recover commissions for acts as such. *Whitfield v. Huling*, 50 Ill. App. 179; *Richardson v. Brix*, 94 Iowa, 626, 63 N. W. 325; *Yount v. Denning*, 52 Kan. 629, 35 P. 207; *Buckley v. Humason*, 50 Minn. 195, 52 N. W. 385, 16 L. R. A. 423, 36 Am. St. Rep. 637.

In some of the states courts have allowed the recovery of a commission by a non-licensed broker where the license laws are enacted solely as revenue measures, in which case it has been held that such laws have no effect on the rights of the parties inter se.

[3] That situation is not here presented. The cause of action here relied upon is founded on the violation of a state law. Plaintiff's assignor, having carried on its business

in violation of law, any rights arising out of such unlawful transaction, can form no proper cause of action.

Counsel for respondent seeks to avoid the effect of his rule by claiming that, plaintiff's assignor, having so far as it was concerned complied with the requirement of the act with reference to its license, its assignee can properly maintain the action. If such a contention could be maintained, it would in a measure destroy the very purpose of the creation of the act.

The partnership did violate the law in failing to see to it that its salesman had a license before it permitted him to do business in its behalf. The interest of the copartnership in the transaction is tainted with all the illegality which the statute gives to it, and the assignee takes the cause of action subject to its infirmities.

The judgment is reversed.

We concur: CASHIN, J.; KNIGHT, J.

72 Cal. App. 148

BEARD v. LANCASTER MIDWAY OIL CO. et al.

CONSOLIDATED PIPE CO. v. SAME.
(Civ. 4370.)

(District Court of Appeal, Second District, Division 1, California. April 2, 1925.)

1. Mines and minerals — 117—Lien claimant held not entitled to prosecute judgment against owner.

Code Civ. Proc. § 1183, gives one performing labor and furnishing materials, in connection with drilling of oil well on leased property, only a lien on owner's property, and does not impose a personal liability on owner.

2. Mortgages — 151(3)—Rights under trust deed, recorded before mechanic's lien, held superior to that of lien claimant.

Where trust deed was of record before labor and material liens of plaintiffs under Code Civ. Proc. § 1183, attached to property held that, under section 1186, rights of trustees and beneficiary under trust deed were superior to that of plaintiffs' lien.

Appeals from Superior Court, Ventura County; Merle J. Rogers, Judge.

Consolidated actions to foreclose mechanics' liens by Sam Beard and the Consolidated Pipe Company against the Lancaster Midway Oil Company and others. From decrees of foreclosure, which denied personal judgment against owners, plaintiffs appeal. Affirmed.

Henry O. Wackerbarth, of Los Angeles, for appellants.

Bowker & Sheridan, of Ventura, for respondents.

CONREY, P. J. In these consolidated actions, the plaintiffs obtained a decree fore-

closing liens held by them, under the Mechanic's Lien Law, on account of work done and labor furnished in performance of contracts made by the plaintiffs with defendant Lancaster Midway Oil Company in connection with the drilling of an oil well on property leased to the company. The lease was made by defendants Francesco Vacca, Giuseppe Vacca, and Pasquale Vacca, who owned the property subject to a recorded deed of trust made by the owners to defendants Gianini and Pedrini, as trustees under a deed of trust given to secure a loan made to the owners by defendant Bank of Italy. The plaintiffs have appealed from those portions of the decree of foreclosure, whereby the court refused to allow a personal judgment against the defendant owners of the land, and from that portion of the decree, which adjudged the right, claim, or lien of the defendant Bank of Italy, under its deed of trust, to be prior and superior to the liens of the plaintiffs.

[1] In support of their demand for personal judgment against the owners of the land, appellants rely upon that part of section 1183 of the Code of Civil Procedure which, after stating that persons, performing labor upon a mining claim, or upon any real property worked as a mine, have a lien thereon for the value of such work or labor done or materials furnished, declares that every contractor or other person, having charge of any mining or work or labor performed in and about such property, either as lessee or under a working bond or contract thereon, "shall be held to be the agent of the owner for the purposes of this chapter."

We are satisfied that the effect of said section 1183 is limited to the establishment of a lien upon the owner's property, under the stated conditions, and does not extend to the point of imposing personal liability upon the owner as a party to the contract. There is nothing in the decisions cited (*Higgins v. Carlotta Gold Mining Co.*, 148 Cal. 700, 81 P. 758, 113 Am. St. Rep. 344; *McClung v. Paradise Gold Mining Co.*, 164 Cal. 517, 129 P. 774) tending to support the contention that the owners are made personally liable for the debt.

[2] The trust deed was recorded prior to the execution of the lease, and prior to the transactions between appellants and the oil company. The fact, that the Bank of Italy, by its vice president, indorsed on the lease a consent to the execution and delivery of the lease, did not constitute a waiver of the priority of its lien as against persons furnishing labor or materials to the lessee.

The trust deed being of record before the liens of appellants attached to the property, the prior right of the trustees and of the bank is clearly recognized by section 1186, Code of Civil Procedure, which provides only that "the liens provided for in this chapter"

are preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the structure was commenced or work done or materials were commenced to be furnished, and to any lien, mortgage, or other incumbrance of which the lienholder had no notice, and which was unrecorded at the time when the structure was commenced, work done, or materials commenced to be furnished. We have found no reason or authority tending to support the claim of appellants that the provisions of said section 1186 do not apply to claims like the present claims, arising under section 1183, Code of Civil Procedure.

The judgment is affirmed.

I concur: CURTIS, J.

72 Cal. App. 278

HOLDENER et al. v. HOWARD. (Civ. 4913.)

(District Court of Appeal, First District, Division 1, California. April 15, 1925.)

I. Appeal and error ⇨907(3)—Findings of trial court are binding on appeal on judgment roll, where evidence not in record.

Implication that vendor was obligated to put vendee in possession of premises on exercise of option to purchase was overcome, where on appeal on judgment roll it appeared that trial court had found that option to purchase the land had been given subject to rights of a tenant in possession; there being no evidence before the appellate court, the findings of the trial court must be taken as true.

2. Vendor and purchaser ⇨334(5)—Amount paid for option agreement held not recoverable on failure to exercise option.

A written contract was executed giving an option to purchase certain real estate and the consideration therefor paid. At the time the option matured the possessory rights were in a tenant. *Held*, that under the findings of the trial court that it was not intended by the agreement to provide for possession of the premises upon the exercise of the option, which was never exercised, though vendor was ready, able, and willing to perform, the amount paid for the option could not be recovered on the ground of want of consideration.

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Action by Ferdinand Holdener and another against Edward A. Howard. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Ernest K. Little, of San Francisco, for appellants.

Cary Howard, of Oakland, for respondent.

TYLER, P. J. Action to recover the sum of \$500 paid by plaintiffs upon an option to purchase certain lands.

The complaint in substance alleges that defendant on December 5, 1919, entered into a written contract with plaintiffs and one Dettling whereby in consideration of the sum of \$500 he agreed to give such parties the right, privilege, and option to purchase on May 5, 1920, for the sum of \$24,700, certain real estate, upon terms set forth in the option agreement. Plaintiffs and Dettling were engaged in the dairy business and in the conduct thereof owned a large herd of milk-producing cattle, and were desirous of purchasing the property for use in their business. The complaint recites it was intended by the agreement to provide for the possession of the property, and that defendant was so informed and knew that the proposed purchasers did not and would not desire to acquire the land or any part thereof except that they would obtain immediate possession upon the exercise of the option.

It is then alleged that plaintiffs knew that there was some party other than defendant in possession of the lands either as tenant or otherwise, and that they were informed that defendant would be able to oust the tenant and obtain possession of the premises prior to May 5, 1920. That, believing such statement, the sum of \$500 was paid by them for the purchase of the option, and that defendant thereafter commenced a suit to recover the possession of the property, but judgment went against him; the tenant's right to possession in the premises being established in him up to and including September 30, 1920—a period beyond the time fixed for possession under the option agreement. Then follows an allegation of assignment by Dettling of his interest in the agreement to plaintiffs.

Defendant, answering, admitted that the parties entered into a written contract whereby, in consideration of the sum of \$500, he did give to plaintiffs and Dettling an option to purchase the lands in question in accordance with the terms of a written agreement, and not otherwise.

The answer denies that the contract provided for or was intended to provide for possession of the premises by the proposed purchasers upon the exercise of the option, and it avers oral negotiations preceding its execution to the effect that the proposed purchasers well knew that a tenant was in possession thereof, and that the lease under which he held had not by its terms then expired, and that the option agreement was entered into subject to the possessory rights of the tenant.

The trial court found, among other things, in substance that it was not true, as alleged in the complaint, that it was ever intended to provide for possession of the premises by the vendees upon the exercise

of the option to purchase, but, on the contrary, defendant informed them that he would and could not make any agreement as to possession, and that the option was given subject to the possessory rights of the tenant of which rights they were thoroughly familiar.

The judgment was that the plaintiffs take nothing by the action.

Plaintiffs appeal on the judgment roll alone, and they claim that the findings do not support the judgment. The option agreement contained, among others, provisions to the effect that plaintiffs should keep the premises insured and pay the taxes on the lands, and that they would not nor permit any other person to commit waste or damage to the buildings located on the premises or to the wood or standing timber located on the land. Appellant argues that these provisions clearly indicate that possession at the time of the exercise of the option was contemplated by the parties, as it would be unreasonable to require the plaintiffs to pay the insurance and taxes and protect the buildings and timber from damage and waste unless they were to be entitled to the use and enjoyment of the property.

In support of this contention we are cited to the case of *Pierce v. Edwards*, 150 Cal. 650, 89 P. 600. It is there held in substance that a written contract for the sale and purchase of real estate which by its terms provides that the vendor agrees to sell certain land to the vendee for a specified sum and to deliver the same on a specified date, and the vendee agrees to take the land and pay the amount so specified, imposes the obligation on the vendor to put the vendee in the actual physical possession of the land, and until such possession is tendered the vendee is not in default. It is there further held that the fact that the purchaser knew at the time of the contract that the land was in the possession of the tenants cannot be considered in construing the contract so as to make the obligation to deliver one subject to the lease.

[1] Here, however, the findings of the trial court expressly negative any such implication. Defendants by answer set forth the oral negotiations surrounding the execution of the agreement. As the evidence is not before us, we must take the findings as true. Appellants further claim that there was a total failure of consideration, as the defendant was at no time in a position to make delivery upon the day stipulated by reason of the existence of the lease.

It is true that a vendor must be ready at all times during the life of an option contract to convey an unclouded title, and that he cannot insist upon a forfeiture if he is unable to perform the contract on his part

for want of title, as there is in such a case a complete failure of consideration.

[2] Here, however, there is an express finding that the contract set forth in the complaint did not nor was it intended to provide for possession of the premises upon the exercise of the option which the trial court further found was never exercised, although defendant was ready, able, and willing at all times to perform.

The claim of appellants, therefore, that they were entitled to actual possession is contrary to the express findings on the subject, which in the absence of evidence, are here controlling.

All the allegations of the complaint which are essential to plaintiffs' right to recover are found by the trial court to be untrue.

There being no evidence before us, these findings must be taken as true.

This being so, it follows that the judgment should be and it is hereby affirmed.

We concur: KNIGHT, J.; CASHIN, J.

72 Cal. App. 179

JOY et al. v. ROUSSEAU. (Civ. 2884.)

(District Court of Appeal, Third District, California. April 3, 1925. Hearing Denied by Supreme Court June 1, 1925.)

1. Evidence ⚡448—Parol evidence, including conversation of parties, admissible when language of contract ambiguous, or susceptible of two interpretations.

Where language is ambiguous, or susceptible of two interpretations, parol testimony is admissible for purpose of construing contract according to true intent of parties, and not only surrounding circumstances, but conversation of parties, may be introduced in evidence and considered by court.

2. Payment ⚡39(8)—Creditor, to be entitled to make application, must do so before suit.

Where debtor makes payments without designating application, creditor, to be entitled to make application, must do so before suit is brought.

3. Payment ⚡41(1)—Law will make applications of indefinite payments in manner most just and equitable.

Where indefinite payments are made by a debtor to a creditor, to whom he owes different obligations, and neither party makes any application of payments, law will make application most just and equitable.

4. Payment ⚡42—Court held to have properly applied payment, received by assignee of contract of sale, to interest owing assignor; "prorate;" "adjust."

Under assignment of contract of sale of real property, providing that it was subject to a "prorating of interest, * * * to be adjusted when interest is received," where certain sum was placed to credit of assignee, without any directions whatsoever, held that, under Civ.

Code, § 1479, court properly construed provision to mean that interest should be paid as soon as assignee received sufficient moneys on contract to discharge it; "prorate" meaning to distribute, as well as allot, and "adjust" meaning to fix, to arrange, to ascertain and settle.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adjust; Pro Rata—Prorate.]

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Richard A. Joy and another against Arthur F. Rousseau. Judgment for plaintiffs, and defendant appeals. Affirmed.

Walter H. Robinson, of San Francisco, for appellant.

Everts, Ewing & Wild, of Fresno, and Gavin McNab and Nat Schmulowitz, both of San Francisco, for respondents.

PLUMMER, J. This action was begun to secure judgment for the sum of \$7,035.28 on account of interest accrued on a certain contract of sale of real property from the last prior interest date to the date of the assignment of the contract of sale; said sum being claimed as the pro rata to which the plaintiffs were entitled out of payments aggregating the sum of \$15,000. The record discloses the following:

On or about March 8, 1918, one Dr. Charles M. Pusey, being the owner of a certain vineyard situate in the county of Fresno, contracted with Alfreda Verwoert for the sale thereof for the sum of \$123,000, payable in installments. On the 30th day of July, 1919, the said Verwoert agreed to sell, subject to the first-named contract, the same real property to George Noroian for the sum of \$200,000, payable in installments. On or about August 12, 1920, the said George Noroian, by an instrument in writing agreed, subject to the previous contracts, to sell and convey the same property to the Planters' Company, a corporation, for the sum of \$365,000, payable partly in cash, the remainder in installments. Thereafter and prior to the transactions had with the defendant herein, the said George Noroian transferred his interest in the agreement herein referred to and the profits to be received therefrom to the plaintiff Richard A. Joy. Thereafter, and on or about the 7th day of April, 1921, the said Richard A. Joy sold and transferred to the defendant Arthur F. Rousseau, all and singular, his interests in and to said lands and premises; the contract relating thereto and the profits to be realized therefrom. In the agreement executed between the plaintiffs and the defendant there appears the following:

"In consideration of the payment and agreements herein contained by said party of the first part, said parties of the second part agree to transfer and assign by good and sufficient in-

struments, such as may be required by counsel of the party of the first part, all the right, title, and interest of George Noroian, and his wife, derived by them under said agreement, dated July 30, 1919, and all the benefits to be derived by said George Noroian and his wife, pursuant to said agreement of August 12, 1920, hereby guaranteeing that such interests shall be in accordance with the representations herein contained and shall be subject to the provisions of said agreements of March 8, 1918, July 30, 1919, and August 12, 1920, and subject to a prorating of interest on said last-named agreement as of this date, to be adjusted when interest is received."

Thereafter, and during the months of August and September, there was deposited with the French-American Bank, to the credit of the defendant Arthur F. Rousseau, the sum of \$15,000, by one E. Y. Foley, to which the Planters' Company had assigned the crops growing on the premises covered by the agreement to that value, with the direction to deposit the same to the credit of the defendant. After learning of the deposit of said sums to the credit of the defendant, the plaintiffs demanded of the defendant payment of interest on the assigned contract, calculated up to the date of the assignment thereof, claiming that the contract provided for such payment. The defendant, alleging that he had received no amounts as interest, declined payment, and thereupon the plaintiffs instituted this suit and recovered judgment for the amount claimed. From this judgment the defendant appeals.

The whole controversy hinges around the interpretation of the following words in the clause of the contract heretofore quoted, to wit:

"And subject to a prorating of interest on said last-named agreement as of this date, to be adjusted when interest is received."

The court interpreted these words to mean that payment of the interest accrued on the agreement transferred and assigned by the plaintiffs to the defendant should be paid as soon as the defendant received sufficient moneys on said contract to discharge the same. On the part of the defendant it is contended that the accrued interest on the contract at the date of the assignment was not to be paid until he, the defendant, had received from the Planters' Company moneys specifically paid as interest. The \$15,000 herein referred to was paid by Foley from the proceeds of the crop grown by the Planters' Company to the French-American Bank, and directed to be placed to the credit of the defendant without any directions whatsoever. The testimony in the transcript, we think, shows that no designation or further application of such payments had been made by the defendant at the time of the beginning of this action. It appears that some time elapsed, after said moneys

were deposited to the credit of the defendant, before the defendant knew the exact amount thereof. Under these circumstances, the plaintiff claiming one interpretation of the contract, and the defendant a different one, oral testimony was introduced and admitted of the surrounding circumstances of the transaction and of the conversations which took place between the plaintiff Richard A. Joy and the defendant, at the time of the execution of the contract, and at the time the words which we are considering were inserted in the contract. It appears, from an inspection of the record and by the testimony, that the contract, as first drawn, did not contain the last-quoted words; but the same were inserted by the defendant, at the time the conversation was had concerning the prorating of the interest and the time of its payment. The transcript shows that, at the time of the execution of the agreement between the plaintiff and the defendant, the plaintiff, Richard A. Joy, asked the defendant: "What about the interest I am to receive? Didn't you agree to pay me the interest on this contract?" The defendant replied: "Yes; we have agreed that I should pay this interest to Mr. Joy." Mr. Joy then asked, "When am I to get this interest?" and the defendant answered, "As soon as there is any money paid, I will give you your money." There was some other testimony as to prorating the attorney's fees, etc., which is immaterial here.

[1, 2] The defendant claims that this testimony is not admissible, under the rule that a written contract cannot be altered by parol evidence. In relying upon this contention, we think the appellant has misconceived the purpose of the testimony. Where the language used is ambiguous, or fairly susceptible of either one of two interpretations contended for, such testimony is always admissible for the purpose of construing the agreement, according to the true intent of the parties at the time of its execution. Under this rule, not only the surrounding circumstances, but the conversations of the parties, may be introduced in evidence and considered by the court. In *Balfour v. Fresno C. & I. Co.*, 109 Cal. 221, 41 P. 876, this question is fully considered and the law thus stated:

"For the purpose of determining what the parties intended by the language used, it is competent to show not only the circumstances under which the contract was made, but also to prove that the parties intended and understood the language in the sense contended for; and for that purpose the conversation between and the declarations of the parties during the negotiations at and before the time of the execution of the contract may be shown"—citing Code Civ. Proc. §§ 1860, 1861; *Atlanta v. Schmeltzer*, 83 Ga. 609, 10 S. E. 543; *Keller v. Webb*, 125 Mass. 88, 28 Am. Rep. 209; *Long v. Long*, 44 Mo. App. 141; *Swett v. Shumway*, 102 Mass. 365, 3 Am. Rep. 471.

The rule also seems to be that, where the debtor has made no designation, the creditor, if entitled to make application, must make the application before suit is brought. *Haynes v. Waite*, 14 Cal. 446; *United States v. Kirkpatrick*, 9 Wheat. 720, 6 L. Ed. 199; *Pierce v. Knight*, 31 Vt. 701. The court, not only interpreted the contract according to the expressed views of the parties at the time of the execution of the agreement, but also followed, as fully as may be, the provisions of section 1479 of the Civil Code, wherein it is specified that the court shall make application of payments, where the parties have not so done, as follows: (1) Of interest due at the time of the performance; (2) of principal due at that time; (3) of the obligation earliest in date of maturity; (4) of an obligation not secured by a lien or collateral undertaking; (5) of an obligation secured by a lien or collateral undertaking.

On the part of the appellant it is contended that the court had no authority so to do. To support this allegation considerable argument is made upon the meaning of the word "due," it being contended that there was not any interest due on the contract in question, either at the time of the assignment thereof, or at the time of the deposit of the said \$15,000 to the credit of the defendant. It is true that the time of payment of either interest or of any installment of principal had not arrived, when the moneys just referred to were so deposited to the credit of the defendant. That date was fixed at a considerable time subsequent to the receipt of the \$15,000. The word "due" has a double meaning. In 19 *Corpus Juris*, p. 818, we find the following definition given of this word:

"According to the consensus of judicial opinion, the word has a double meaning: (1) That the debt or obligation to which it applied has by contract or operation of law become immediately payable; (2) a simple indebtedness, without reference to the time of payment, in which it is synonymous with 'owing,' and includes all debts, whether payable in present or in futuro. In its larger sense the word is often used to cover liabilities, matured and unmatured, or as importing an existing obligation, whether the time of payment has arrived or not."

To the same effect are a number of other definitions there given, and numerous authorities cited in support thereof. See, also, *Crocker-Woolworth Nat. Bank v. Carle*, 133 Cal. 409, 65 P. 951, where the double meaning of the word is also considered. A somewhat similar case is presented in that of *Monroe v. Fohl*, 72 Cal. 568, 14 P. 514. The note there involved was dated June 25, 1885, and the interest made payable annually. On October 10th of the same year the defendant paid \$800 on the note without anything being said as to whether the same should be ap-

plied to the interest or principal. The court said:

"Conceding, in favor of the defendant, that the payment was to be applied first to the interest, it will be so only as to interest up to the date of the payment. The balance of the payment must be applied to the principal. The law will not apply it to future or unearned interest."

In the case at bar, at the time of payment, the interest claimed by the plaintiffs had been entirely earned. In 30 Cyc. 1249, § 11, the text, in relation to interest where payments are made without designation or election, reads:

"Except where otherwise agreed, a payment made on an indebtedness consisting of principal and interest, not applied by either the debtor or creditor, will be applied first to the interest due and then to the principal. If neither principal nor interest is due, some cases hold that the payment must be applied to the principal, but the weight of authority holds that it should be applied to the extinguishment of principal and such proportion of interest as has accrued on the principal so extinguished."

And further, where the rights of third parties are involved, the text reads:

"So, where the court is called upon to appropriate payments, the equities of third persons, although not controlling, should be considered. Of course, the parties cannot apply a payment to an invalid debt," etc.

[3] In *Murdock v. Clarke*, 88 Cal. 384, 26 P. 601, the court holds that, where the rules prescribed by section 1479 of the Civil Code are not sufficient, the application must be made according to equitable principles. The law is thus stated:

"It is the settled rule in this country, wherever the common law prevails, that where indefinite payments are made by a debtor to his creditor, to whom he owes different obligations, and neither party makes any application of the payments, the law will make the application in such a manner, in view of all the circumstances of the case, as is most just and equitable, and will best protect and maintain the rights of both parties,"—citing a number of cases.

[4] We think in this case an equitable application of the rules set forth in section 1479 of the Civil Code has been made. Were we to hold otherwise, it would be possible for the entire principal of the contract to be paid, and the plaintiffs debarred from obtaining or collecting a cent of the interest agreed to be paid them under the terms of the contract which we have quoted. The words "pro rata" and "adjusted" have double meanings. The word "prorate" means to distribute as well as allot. In the agreement under consideration, the active form of the word is used, the expression being "prorating of interest." The word "adjust" means to fix, to arrange, to ascertain and settle,

and, "when used in reference to a liquidated claim, it has the meaning of settle in the sense of pay." 1 C. J. 1247.

For the purpose of ascertaining also the meaning in which these words were used, we think the oral testimony hereinbefore referred to was admissible. The judgment is affirmed.

We concur: FINCH, P. J.; JONES, Justice pro tem.

72 Cal. App. 258

CURRAN v. SUPERIOR COURT IN AND FOR FRESNO COUNTY et al.
(Civ. 5167.)

(District Court of Appeal, First District, Division 1, California. April 13, 1925.)

1. Contempt ⚡54(1)—Affidavit supporting order to show cause held not required.

Order to show cause why attorney should not be punished for contempt of court while cross-examining witness need not be supported by affidavit, because not served until after close of trial, where based on facts within immediate knowledge of court, who delayed action only because of possible prejudicial effect on jury.

2. Contempt ⚡63(4)—Facts on which attorney was adjudged guilty of contempt held fully stated in court's order.

All facts on which defendant's attorney was adjudged guilty of contempt of court while cross-examining witness in criminal case *held* stated, as required by Code Civ. Proc. § 1211, in court's order containing questions asked by him, district attorney's objections, court's remarks and orders, his replies, objections, and assignments of error in full, and court's findings.

3. Contempt ⚡6—Language of exception to court's remarks held not contemptuous.

Attorney's statement, "I take exceptions to your honor's remarks and assign them as error," following court's statement that it was entirely unbecoming for attorney to use word "guess" in questions to witness being cross-examined by him, *held* not contemptuous, but within his legal right and duty.

4. Contempt ⚡20—Attorney's refusal to obey court's order to be seated, and conduct further cross-examination of witness from chair, held not contempt.

Attorney *held* not guilty of contempt in refusing to obey court's order to be seated, and conduct further cross-examination of witness from chair.

5. Evidence ⚡42—Judicial notice of necessity of movement of counsel between his desk and witness stand in examining witness.

That examination of witness often requires near approach of counsel and movement between his desk and witness stand are matters of common knowledge, of which appellate court takes judicial notice.

6. Contempt ⚡67—No presumptions or intendments against petitioner for certiorari to annul order adjudging him guilty of contempt.

No presumptions or intendments can be indulged against petitioner on certiorari to annul order adjudging him guilty of contempt of court.

7. Contempt ⚡6—Attorney held not guilty of contempt in standing and walking between court and jury while cross-examining witness, after court ordered him to be seated.

That attorney, after court directed him to be seated and conduct further cross-examination of witness from chair, stood and walked between court and jury during such examination, held not to warrant order adjudging him guilty of contempt of court, in absence of finding that acts were done in disorderly, contemptuous, or insulting manner, where witness was seated between court and jury.

8. Contempt ⚡6—Intonation of voice and vehemence of, or physical attitude in, making objections insufficient to support order adjudging counsel guilty of contempt.

Intonations of voice, vehemence of objections, or physical attitude in making them, in hotly contested criminal case, will not alone support order adjudging defendant's counsel guilty of contempt of court, where occasion and language used were proper.

Certiorari by Frank Curran to review and annul an order of the Superior Court in and for Fresno County and Denver S. Church, Judge thereof, adjudging petitioner guilty of contempt of court. Judgment annulled and vacated.

Richard K. Stewart, F. E. Cook, B. M. Benson, and Frank Curran, all of Fresno, and Frank J. Blake, of San Francisco, for petitioner.

G. R. Lovejoy, Dist. Atty., and C. M. Ozias, Deputy Dist. Atty., both of Fresno, for respondents.

CASHIN, J. Petitioner was by the superior court of Fresno county adjudged guilty of contempt of court and ordered to be punished by the imposition of a fine in the sum of \$100 and imprisoned in the county jail of that county for the period of one day. Petitioner contends that the court, in so adjudging and punishing him, exceeded its jurisdiction, and by this proceeding asks this court to review and annul the action of the superior court.

The alleged contempt occurred on February 19, 1925, during the trial of the case of the People v. Griffin, a criminal action, in which defendant Griffin was charged with a felony, and who was represented as counsel by petitioner. The record shows that during the cross-examination by petitioner of a witness for the prosecution certain questions were asked by petitioner, certain answers given by the witness, and that certain proceedings

were had by the court, which were as follows:

"Q. Now, after you went on this dirt road, where did you go? A. Went back to the store.

"Q. Now, wait a minute. You say you went on this dirt road a mile and a half? A. Yes.

"Q. That is another one of your guesses, isn't it? A. I don't understand you.

"Q. That is another one of your guesses, isn't it? A. Well, I know the county pretty well.

"Q. I mean, as to distance? A. It would have to be approximately.

"Q. It might have been more? A. It might have been a little bit more, or a little bit less.

"Q. You have no way of fixing that at all? A. Not without actually measuring it.

"Q. You didn't actually measure it? A. No.

"Q. After you were on the dirt road, where did you go? A. I came back onto the pavement in the city of Clovis.

"Q. How far was that from the dirt road when you struck the—rather, how far was it from the city when you struck that pavement that leads into Clovis? A. The streets are paved on Fifth street two blocks east of the railroad track; across the railroad track it is not paved, and we strike the pavement again in the city proper.

"Q. How far was it from the city of Clovis that you came on the paved highway that you speak about? A. It was within the city limits.

"Q. It was within the city limits? A. Yes.

"Q. All right. How long were you with Mr. Whiton? A. About 15 or 20 minutes, perhaps.

"Q. About 15 or 20 minutes? A. Yes.

"Q. Is that a guess? A. That is a guess; yes.

"Q. Now, whereabouts was it that you met this car that you speak of? A. It was on what we call the Flume road.

"Q. It was on what you call the Flume road? A. Yes.

"Q. Is that a paved road? A. No.

"Q. Was it the Flume road that I asked you about, the name of that dirt road, that you said you didn't know? A. No, sir.

"Q. You were on some other road besides the highway and the dirt road? A. I have given you the four roads that I was on.

"Q. What was that third road that you were on, then? A. The third road, the third turn we made, brought us onto the Flume road.

"Q. How far did you travel on that? A. About a mile and a half to a mile and three-quarters, approximately.

"Q. That is another one of your guesses, isn't it? A. Yes.

"Q. All right. How far had you been traveling on that Flume road before you came by this car? A. Approximately half a mile.

"Q. That is another guess? A. Yes.

"Mr. Lovejoy: If the court please, I object to that kind of language to the witness, 'That is another guess.'

"The Court: It is entirely unbecoming to an attorney to use that language to a witness.

"Mr. Curran: I take exception to your honor's remarks, and assign them as error.

"The Court: You sit down in that chair while you are questioning the witness.

"Mr. Curran: I have a perfect right to stand up, and I assign your honor's remarks as error, and prejudicial to this defendant.

"The Court: Will you sit down?"

"Mr. Curran: The Supreme Court has said that I have a perfect right to stand up, and I will not sit down. I will conduct this cross-examination on my feet, as is customary.

"The Court: After the court is adjourned this evening, you remain in court.

"Mr. Curran: All right.

"Q. Now, what was the last question before I was interrupted?"

At the time of the adjournment of court on that day, the court by order continued further consideration of the matter until the conclusion of the trial of the criminal case. This trial terminated on February 25, 1925. Petitioner had withdrawn from the criminal case on the same day of the incident described, and during the further proceedings in the trial was not present in court. Defendant Griffin was found guilty by verdict of the jury, and on February 28, 1925, the judgment of the court in that case was pronounced. Thereafter on the 2d day of March, 1925, the court made its order, directing that a citation—which was not supported by affidavit—be issued, requiring petitioner to appear before the court on March 6, 1925, "to show cause why he should not be punished for contempt of court for contemptuous and offensive conduct in open court and in the presence of the court while engaged in the cross-examination of Henry F. Good on the 19th day of February, 1925." On March 6, 1925, the matter was regularly continued to March 7, 1925, when petitioner appeared before the court, and, after a hearing, the court made its order in writing, the material part of which, after reciting the facts and the portion of the stenographic report of the examination of the witness Good hereinbefore set forth, was as follows:

"From said statements so made by you at that time in open court and to the court, the court finds that the said statements above outlined were disorderly, contemptuous, and insolent to the court on your part; that the same were made during the sitting of this court, and in the immediate presence and view of the court, and directly tended to interrupt the proceedings of said court, and to impair the respect due to the authority of said court. The court further finds that said statements addressed to the court were spoken in a very loud, combative, and antagonistic tone of voice, and that by reason of said statements so made and expressed by you the court finds that said attitude and intonations and loud expressions by you were disorderly, contemptuous, and insulting to the court, and were made during the sitting of this court, and in the immediate presence and view of this court, and directly tended to interrupt its proceedings and to impair the respect due to its authority. And the court further finds that at said time, notwithstanding the court ordered you to sit down and proceed with the cross-examination of said witness,

that you not only refused to do so, as mentioned above, but that you did not obey the order of the court in that respect, but continued for a period of 20 minutes to remain on your feet, and to stand and walk in a position directly between the position of the court and the jury; that said conduct was disorderly, contemptuous, and insulting to the court, and committed during the sitting of this court, and in the immediate view and presence of the court, and that the same directly tended to interrupt its proceedings and to impair the respect due to its authority."

Upon these findings the court adjudged petitioner to be guilty of contempt of court, and imposed the punishment mentioned, which judgment was entered in the minutes of the court. Petitioner thereupon filed in this court his petition for a writ of review, which was granted, made returnable on March 25, 1925, and the execution of the judgment of the superior court stayed pending the decision of this court.

[1] Several objections are made by petitioner to the sufficiency of the proceedings leading up to the judgment of the court. It is contended by petitioner that the court, by failing to act at the time when the alleged contempt occurred and to then adjudge petitioner to be in contempt, lost jurisdiction to proceed summarily against petitioner, and that any subsequent proceedings, based on an occurrence in the immediate view and presence of the court, must be founded upon an affidavit filed and an order to show cause or attachment issued. No affidavit was filed in this case, but the matter was regularly continued to the close of the trial, and the court two days thereafter caused to be issued and served the citation mentioned above.

The occurrence on which the contempt proceeding was based was in the immediate view and presence of the court. The action of the court thereon, as shown by the record, was delayed only by the situation created by the pendency of the trial mentioned above and a proper consideration of the possible prejudicial effect on the jury of a further reference to the matter during the trial. The action of the court thereafter was timely. The order to show cause was based on facts within the immediate knowledge of the court, and needed no affidavit to support it, and the court, as to the form and manner of its procedure, retained jurisdiction to act. *Lamberson v. Superior Court*, 151 Cal. 458, 91 P. 100, 11 L. R. A. (N. S.) 619.

[2] Petitioner also contends that the order of the court does not recite the facts on which petitioner is thereby adjudged guilty of contempt of court. Section 1211, Code Civ. Proc. The order, the material portions of which are set forth in this opinion, contains the questions asked by petitioner of the witness, the objections by the district attorney, the remarks and orders of the court, the replies, objections, and assignments of er-

ror by petitioner in full, and also the finding by the trial court therein:

That the "statements addressed to the court [by petitioner] were spoken in a very loud, combative, and antagonistic tone of voice; * * * that said attitude and intonations and loud expressions by you were disorderly, contemptuous, and insulting to the court; * * * that at said time, notwithstanding the court ordered you to sit down and proceed with the cross-examination of said witness, you did not obey the order of the court in that respect, but continued for a period of 20 minutes to remain on your feet, and stand and walk in a position directly between the court and the jury; that said conduct was disorderly, contemptuous, and insulting to the court."

It thus appears that all the facts on which the court proceeded to judgment are set forth in the order, together with other statements which petitioner contends are conclusions not supported by facts shown by the record.

[3] Petitioner further contends that a consideration of the whole record shows that the acts of petitioner, which are made the basis of the contempt proceedings, do not constitute contempt. It is clear from a reading of the record that the questions addressed by petitioner to the witness were proper on cross-examination, were in no sense insulting or degrading, and the replies elicited directly tended to lessen the weight of the previous testimony of the witness. Nothing in the record shows that the physical attitude or acts of the petitioner up to the time when the district attorney interposed an objection to the use of the word "guess" in the questions by petitioner were in any way offensive to the court. Upon the objection, however, the court remarked to petitioner that "it is entirely unbecoming an attorney to use that language to the witness," upon which petitioner took an exception to the remark or ruling of the court in the following language:

"I take an exception to your honor's remarks, and assign them as error."

In so doing petitioner was entirely within his legal right and duty. It was necessary and proper for him to except to and assign as error any remark of the court which in his opinion tended to prejudice him or his client in the minds of the jurors, and we cannot say from the record that the exception was frivolous. The language used by petitioner was not in itself insulting, but was brief and directly to the point.

[4] Then followed immediately an order by the court, directed to petitioner, requiring him to be seated and conduct the further cross-examination of the witness from his chair. This order the petitioner refused to obey, as shown by the portion of the record hereinbefore set forth. No reason appears from the record for the order of the court requiring the petitioner to seat himself and conduct the examination from that position.

It has always been assumed that the orderly conduct of a trial permits, if not requires, counsel in presenting his case, whether directly to the court or jury, or indirectly to them through the examination of witnesses, to stand, if only as a mark of respect; indeed, the effective cross-examination of witnesses has been shown by experience to require that he do so; and we think that in the premises the order of the court was unconsciously in excess of its proper authority; that it was due to a momentary forgetfulness of the rights of the petitioner as an officer of the court in the discharge of his duty to his client and the public, and was not made necessary or proper by any preceding act or misconduct on the part of petitioner.

The California cases of *In re Shortridge*, 5 Cal. App. 371, 90 P. 478, and *Platnauer v. Superior Court of Sacramento*, 32 Cal. App. 463, 163 P. 237, present situations similar in fact to the case at bar. In each of these cases the petitioner had not, preceding the order of the court that he sit down, been guilty of any act, nor had any situation arisen at the trial, that made the order necessary or proper in the orderly conduct of the proceedings. The conclusions of the trial court in these cases that the conduct of petitioners was boisterous and offensive was held by the appellate court to mean no more than that petitioners persisted in addressing the court in violation of the order of the court, that the refusal was justified by the facts, and that petitioners were not guilty of contempt of court.

[5-7] The only remaining questions are whether the findings of the court—first, that after the order made by the court that petitioner be seated and conduct the examination of the witness while seated, petitioner "continued for a period of 20 minutes to stand and walk in a position directly between the position of the court and the jury"; and, second, the finding that the statements of the petitioner to the court "were spoken in a loud, combative, and antagonistic tone of voice"—are findings of fact which, in view of all the facts shown by the record, will support the judgment. We find from the record that the language used by the petitioner in his objections and assignments of error was altogether proper; his refusal to be seated and to conduct in that position the further examination of the witness, in the absence of other conduct making the order to be seated legally justifiable, were not facts upon which alone the court had jurisdiction to adjudge him guilty of contempt. That petitioner, in the further conduct of the examination after the court directed him to be seated, stood and walked between the court and the jury, might be a sufficient fact on which to predicate the judgment in this case, were it not also the fact that the witness under examination was seated between the

court and the jury. That the examination of a witness often requires the near approach of counsel, and that such examination necessitates movement between the desk of counsel and the witness stand in the conduct of trials, are matters of common knowledge, and of which this court takes notice without proof. This, in connection with the rule that no presumptions or intendments can be indulged against petitioner, and that the court in its order does not find that the manner in which the acts were done was disorderly, contemptuous, or insulting to the court, but simply the fact of the doing of the acts was so, leads us to the conclusion that the facts found in this connection did not legally constitute contempt of court.

[8] The second finding, namely, that the remarks addressed by the petitioner to the court were spoken in a loud, combative, and contentious tone of voice, and that such loud expressions and intonations were disorderly, contemptuous, and insulting to the court, can refer only to the statements heretofore shown in the order and taken down by the shorthand reporter at the time. As the court said in the case of *Platnauer v. Superior Court*, supra, page 475, 163 P. 242:

"If, in discharging his duty, he [counsel] happens to be persistent or vehement, or both, in the presentation of his points, he is still, nevertheless, within his legitimate rights as an attorney, so long as his language is not offensive, or in contravention of the common rules of decorum and propriety."

While the courts in other jurisdictions have held that the tone of voice and attitude of counsel in making on proper occasions proper statements to the court may constitute contempt, yet we are reluctant to extend the rule farther than was done in the *Platnauer* and *Shortridge* Cases, supra, and to hold that, the occasion and the language being proper the intonations of the voice, the vehemence of the objections or the physical attitude of counsel in making them would alone support the conclusion of the judge that such behavior was disorderly, contemptuous, or insolent toward the court, and tended to interrupt the due course of the trial, and thus subject the offender to a judgment of fine and imprisonment. The relations between court and counsel may and often do during the course of a trial become strained; mutual conditions of irritation may be created in the heat of debate, leading to tones and demeanor which in other situations would clearly manifest contempt, but which, under the conditions often existing in a hotly contested criminal case, such as is indicated by the record here, should lead to no such conclusion. Much must be pardoned under the circumstances to the infirmities of human nature, and as much to the liberty of speech, which cannot in court always insure the em-

ployment of expressions coldly precise and unmarked by tones indicating excitement or even anger.

We are of the opinion that the facts on which the court acted in adjudging petitioner guilty of contempt do not, all the evidence considered, constitute contempt of court, from which it follows that the order and judgment were beyond the jurisdiction of the court, and therefore void; that the judgment must be annulled and vacated; and it is so ordered.

We concur: TYLER, P. J.; KNIGHT, J.

72 Cal. App. 169

LARSON v. LARSEN. (Civ. 5087.)

(District Court of Appeal, First District, Division 2, California. April 3, 1925.)

1. Evidence ⇨129(5)—Commission of act not proved by commission of similar acts.

Commission of an act cannot be proved by showing commission of similar acts by same person at other times and under other circumstances.

2. Evidence ⇨134—Commission of act proved by commission of similar acts, where state of mind is in issue.

Where commission of an act is conceded and state of mind is in issue, it is permissible to show commission of similar acts by same person at other times and under other circumstances.

3. Evidence ⇨134—When evidence of commission of similar acts admissible to negative innocent intent stated.

Where doing of wrongful act is conceded, and innocent intent is in issue, doing of same or similar act on other occasions is admitted in evidence to negative innocent intent.

4. Criminal law ⇨369(1)—When proof of commission of independent crimes not competent stated.

It is not competent to prove commission of independent crimes by defendant, evidence of which has no tendency to prove some material fact in connection with crime charged.

5. Criminal law ⇨369(1)—Evidence held inadmissible to show defendant's disposition to commit similar offenses, or as corroborative of testimony as to proof of offense charged.

Evidence to prove commission of independent crimes is inadmissible, either to show disposition of defendant to commit such offense as he is charged with, or as corroborative of testimony directed to prove specific offense for which he is on trial.

6. Appeal and error ⇨1048(6)—Admitting testimony of similar acts held prejudicial, in view of circumstantial evidence only.

Where plaintiff relied almost entirely on circumstantial evidence to prove defendant's alleged assault by shooting him with a shotgun, permitting cross-examination of defendant as to other similar acts on his part held prejudicial error.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Action by John Clyde Larson, by his guardian ad litem, against P. A. Larsen. Judgment for plaintiff, and defendant appeals. Reversed.

Lindsay & Conley, of Fresno, and G. B. Helm, of Turlock, for appellant.

Everts, Ewing, Wild & Everts and Dan F. Conway, all of Fresno, for respondent.

LANGDON, P. J. This is an appeal from a judgment in favor of plaintiff for \$5,000 in an action for damages for personal injuries. Plaintiff is a boy 13 years of age and sued by his guardian ad litem, charging that the defendant willfully, unlawfully, and wrongfully assaulted him on August 15, 1922, at defendant's ranch near the city of Fresno, by shooting plaintiff with a shotgun, causing the injuries enumerated in the complaint. In view of the conclusion we have reached with reference to the action of the trial court in admitting certain testimony over objection, we shall not discuss the facts of the case more fully than is necessary to show the effect of such testimony.

The defendant denied the shooting. The evidence offered by plaintiff was largely circumstantial. Defendant owned a vineyard near Fresno. Plaintiff went upon this property and was attempting to pick some grapes, when he received a charge of birdshot in his legs, the shot scattering from his knees down. He testified that after he was shot, he saw a man about 50 or 60 feet away from him with a gun in his hand. He said this man was tall, slim, and had dark clothes on. The deputy sheriff told of visiting the home of defendant after the shooting, and that the defendant denied he had fired at the boy; that the deputy sheriff found apparently fresh tracks from approximately the spot where the plaintiff said he saw the man standing with the gun to the home of defendant. There were also other tracks all over the orchard, where some one had been plowing. The case of plaintiff had to rest upon the inferences to be drawn from these and a few other circumstances, such as the evasive and rather hostile attitude of the defendant when questioned about the matter, except for the testimony which furnished the ground for the main attack upon appeal. That testimony was given under the following circumstances:

The defendant was called as a witness for plaintiff, under section 2055, Code of Civil Procedure. After he had denied knowledge of the shooting, he was asked:

"Q. You had used your gun prior to the 15th of August of last year for the purpose of shooting at other boys who came in there, in your vineyard, had you not?"

The question was objected to as incompetent, irrelevant, and immaterial, and the ob-

jection was overruled. Defendant was then asked:

"You shot at other parties before that time, didn't you? A. No, sir. * * *

"Q. Didn't you shoot at another boy there in your orchard with your shotgun? A. No, sir.

"Q. Prior to the 15th of August. A. No, sir.

"Q. You did not? A. No, sir; not that year.

"Q. How is that? A. Not that year.

"Q. Not that year? Did you do it the year before? A. Well, I have tried to scare boys a couple of times with it.

"Q. Answer the question. Did you shoot toward boys with your shotgun the year before, out there at your orchard? A. I tried to scare them a couple of times.

"Q. What did you do in trying to scare them? Did you discharge the shotgun toward them? A. I shot in the air.

"Q. Do you know whether or not you hit them? A. No; I didn't.

"Q. How many boys did you shoot at prior to the 15th of August, last year, with the shotgun? A. I couldn't tell you.

"Q. How is that? A. I couldn't tell you.

"Q. Can you approximate, and tell about how many you shot at? A. No."

A witness was then called, who testified, over objection, that he had seen defendant on two occasions prior to the shooting of plaintiff, lying behind a fallen tree in his vineyard with a shotgun in his hand. The next witness was asked if he had ever seen Mr. Larsen in his vineyard with a shotgun. Over objection, he answered that he had. He was asked if he had ever seen defendant shoot any one and answered, "Yes." "Q. Who did he shoot?" Objected to as incompetent, irrelevant, and immaterial. Objection overruled, and examining counsel told to avoid leading questions.

"Q. When was this? A. It was in the year 1921, along about either the first or the last of July. I don't remember which.

"Q. Who was the boy that you saw Mr. Larson shoot? A. An Armenian boy."

This was objected to by counsel as incompetent, irrelevant, and immaterial, and the objection overruled. The questions and answers then continued, eliciting the details of the shooting of a boy a year prior to the injury to plaintiff.

[1-3] It is a fundamental rule of evidence that you cannot prove the commission of an act by showing the commission of similar acts by the same person at other times and under other circumstances. Such evidence is simply not relevant; it does not tend to prove the issue. There is a change in the rule, where the act is conceded and the state of mind is in issue. In such a case, the ordinary doctrine of chances is apt to assist materially in coming to a decision. Greenleaf on Ev. (16th Ed.) vol. 1, § 14q, p. 71. Where the doing of a wrongful act is conceded, and the innocent intent is in issue, the doing of the same or a similar act up-

on other occasions is admitted in evidence to negative innocent intent. The limitations of this use are: (a) That the wrongful act itself is conceded, or otherwise proved to be done, and the evidence is used only to negative innocent intent; and (b) the other acts must be of the same or a closely similar sort, and not widely separated in time, in order to exclude an innocent explanation. *Id.* p. 72.

The case of *Martinez v. Planel*, 36 Cal. 578, was an action to recover damages for negligence of defendant in the management of his hotel, by reason of which the plaintiff fell and was injured. Evidence was offered that other guests of the hotel had fallen in the same passageway shortly before the accident to plaintiff. Upon appeal, it was said that it was error to admit such testimony.

"That was *res inter alios acta*—a collateral issue, which the defendants could not be required to try in this case. If it was competent for the plaintiffs to prove that other persons had met with like accidents at the same place, it would be competent for the defendants to rebut it, and there would be no end, or might be no end, to the issues tried. The rule is too well established to need more than a citation of authorities" (citing authorities).

Respondent cites numerous authorities to the effect that the rule involved here does not vary with the criminal or civil character of the action; that it is more frequent in criminal actions to have an issue as to intent, motive, etc., but that whenever these matters are issues in civil cases, the same evidentiary rules apply. There seems to be no doubt about that question. The ultimate question is one of relevancy, and it is unaffected by the nature of the proceeding. But that does not justify the rulings of which complaint is made. The difficulty in the instant case is that intent is not in issue. The very doing of the act is the only issue between the parties. Upon that issue, evidence of similar acts a year before the occurrence of the incident under investigation is not helpful. In the case of *Starr v. Los Angeles Ry. Corp.*, 187 Cal. 270, 281, 201 P. 599, 603, it was said:

"Evidence as to the previous conduct and habit of the conductor as to sitting down and talking to passengers was improperly received, not only because of the fact that the matter was not in issue, but also because of the fact that his habit was not competent" (citing cases).

[4, 5] It has been repeatedly held that it is not competent to prove the commission of independent crimes by the defendant, the evidence of which has no tendency to prove some material fact in connection with the particular crime charged. *People v. Canfield*, 173 Cal. 309, 159 P. 1046; *People v. Cook*, 148 Cal. 334, 83 P. 43; *People v. Buckley*, 143 Cal. 375, 77 P. 169; *People v. Glass*, 158 Cal.

650, 112 P. 281; *People v. Valliere*, 127 Cal. 65, 59 P. 295. Such evidence is inadmissible either to show a disposition on the part of the defendant to commit such offenses as he is charged with or as corroborative of the testimony directed to the proof of the specific offense for which he is on trial. *People v. Koller*, 142 Cal. 621, 76 P. 500.

[6] It is apparent that this objectionable line of testimony must have been highly prejudicial to the defendant, and in view of the fact that the judgment against him is based almost entirely upon circumstantial evidence, we are not prepared to say that, exclusive of the objectionable testimony, the record shows that justice has been done between the parties.

The error, therefore, compels a reversal of the judgment. It is so ordered.

We concur: STURTEVANT, J.;
NOURSE, J.

72 Cal. App. 187

WOODWORTH v. TOWN OF SEBASTOPOL
et al. (Civ. 2892.)

(District Court of Appeal, Third District, California. April 4, 1925. Hearing Denied by Supreme Court June 1, 1925.)

1. Municipal corporations § 330(4)—Proceedings for improvement held not void because requiring use of patented materials.

Proceedings for improvement of streets under St. 1911, p. 730, and St. 1915, p. 1441, were not void because they required contractor to purchase patented materials at fixed price, where named manufacturer thereof stipulated to furnish successful bidder materials ready for use; use thereof being authorized by St. 1911, p. 767, § 79, subd. 6.

2. Municipal corporations § 330(4)—License agreement of manufacturer of paving materials construed most strongly against it.

License agreement of manufacturer of patented materials for street paving, stipulating to furnish materials to successful bidder for street improvement, at any time within four months from date, or at any time thereafter till offer was withdrawn, is construed most strongly against manufacturer.

3. Municipal corporations § 330(4)—Whether time for completion of improvement was reasonable held question of fact.

Where manufacturer stipulated on August 22, to furnish patented materials to successful bidder for street improvement at any time within four months, or at any time thereafter till offer was withdrawn, and after contract was executed on November 8, successful bidder had but 44 days for completion of work, whether time allowed was reasonable was a question of fact.

4. Municipal corporations § 330(4) — That patented materials for improvement could be bought from no one but controller of license held immaterial.

Fact that in proceedings for improvement of streets patented materials therefor could be

bought from no one but controller of license thereof was not material.

5. Municipal corporations ⚙️339(3)—**Specification requiring damage from unforeseen difficulties to be borne by contractor held not unwarranted burden.**

Specifications for street improvement, providing that all loss or damage from unforeseen construction or difficulties, which may be encountered in prosecution of work, shall be borne by contractor, *held not to impose unwarranted burden on him rendering proceedings void.*

6. Municipal corporations ⚙️533—**Retention of warrants by owner and omission of name from verification in recording return held immaterial.**

Where verified return on warrant under Improvement Act 1911, § 25, as amended by St. 1921, p. 309, § 2, and section 27, clearly showed by whom it was made, fact that superintendent of streets in recording return omitted affiant's name at beginning of verification, and that owner of warrant retained possession of same after record thereof, *held not fatal to validity of return or record thereof.*

Appeal from Superior Court, Sonoma County; H. L. Preston, Judge.

Injunction by C. W. Woodworth against the Town of Sebastopol and others to restrain the issuance of street improvement bonds. Decree for defendants, and plaintiff appeals. Affirmed.

E. S. Page, of Oakland, for appellant.

G. W. Libby, of Sebastopol, and H. C. Symonds, of San Francisco, for respondents.

FINCH, P. J. The plaintiff brought this action to enjoin the defendants from issuing bonds for the cost of the improvement of certain streets in the town of Sebastopol. Judgment was entered in favor of defendants, and plaintiff has appealed. The resolution of intention to make the improvement stated that the work would be done under the Improvement Act of 1911 (Stats. 1911, p. 730) and amendments thereto and that serial bonds to represent unpaid assessments would be issued in the manner provided by the Improvement Bond Act of 1915 (Stats. 1915, p. 1441) and amendments thereto. The record does not disclose the terms of the contract under which the improvement was made.

[1] Appellant's first point is that "the proceedings are void because they require the contractor to purchase materials from Warren Bros. at a fixed price, thereby preventing competitive bidding." The "objection * * * is not that a patented material is specified, but that the proceedings are so framed that only one person or firm can be dealt with." The resolution of intention prescribes that the streets shall be graded, a water-bound macadam four inches in thickness placed thereon, upon which shall be laid a 2-

inch pavement of "asphaltic concrete, with 1½ inches of Warrenite Bitulithic wearing surface." A subsequent clause reads as follows:

"Attention is called to Warrenite Bitulithic license mixture agreement of Warren Bros. Company, of Boston, Mass., in relation to the above-described work, and dated August 22, 1921, and on file in the office of the town clerk of said town of Sebastopol."

The agreement referred to in the resolution of intention is in the general form of that considered in Warren Bros. Co. v. Boyle, 42 Cal. App. 246, 257, 183 P. 706. It recites that it is deemed advisable by the board of trustees to use Warrenite-Bitulithic pavement; that the company is the owner of the patents covering the use of the materials therefor; that "competitive bidding in the letting of contracts is deemed advisable," and contains the following:

"Warren Bros. Company hereby proposes and agrees to furnish to the town of Sebastopol, and to any bidder to whom a contract may be awarded, and who shall enter into a contract with said town of Sebastopol, to pave said roadways with the Warrenite-Bitulithic pavement, and to the owners of lots and lands proposed to be assessed for the improvement of said roadways in said town of Sebastopol, hereinafter designated as property owners, who may elect to take the work and enter into a contract to pave said roadways with the said Warrenite-Bitulithic pavement, at any time within four (4) months from this date, or at any time thereafter until this offer is withdrawn, or an amended proposition is filed with the proper authorities, the following material ready for use, as specified and required under and by said specifications and service, with the right to use any or all of the patents, trademarks, or trade-names now owned or which may hereafter be owned by Warren Bros. Company, necessary to lay said pavement."

The agreement stated the price per ton at which the material would be furnished and provided:

"The execution of the contract for the said work * * * shall bind the undersigned Warren Bros. Company to this agreement."

Certain parts only of the specifications appear in the record. It appears that the following clauses, and in the order here given, are contained therein:

"Bitulithic Cement.—Bitulithic cement is produced under the direction, laboratory supervision of, and using ingredients approved by Warren Bros. Company * * * Warrenite-Bitulithic wearing surface, gravel aggregate—one and one-half inches. Wearing Surface.—On the foundation prepared, as hereinbefore specified, shall be laid the Warrenite-Bitulithic wearing surface described below, so as to have a thickness of one and one-half inches after thorough compression. Said wearing surface shall be composed as follows: [Then follow specifications of the ingredients to compose

such wearing surface and the methods of producing, laying and rolling the same.]”

The board of trustees duly advertised for bids for making the proposed improvements and received five bids therefor. On the 14th of October, 1921, a resolution was adopted awarding the contract to the successful bidder. On the 8th day of the following November, this bidder entered into a contract with the superintendent of streets to do the work. There is no contention that the work was not properly done in strict compliance with the specifications.

Nicolson Pavement Co. v. Painter, 35 Cal. 699, contains language implying that the governing board of a municipality, in ordering public improvements, cannot specify the use of a patented material which is not available to bidders for the work. In *Page's California Street Laws*, § 128, referring to the case cited, it is said:

“Subsequent cases have confined the doctrine within narrow limits, and from statements of the courts in later cases, there is some question as to whether the early cases would now be followed even within the limits.”

To hold that patented materials cannot be specified would be to “exclude all methods of paving which were patented, even though such method, because of its superiority, or even because of its cheapness, would be specially advantageous to the owners of lots liable for the expense of paving, as well as the municipality charged with its maintenance.” *Perine C. & P. Co. v. Quackenbush*, 104 Cal. 684, 688, 38 P. 533.

See, also, 19 Cal. Jur. 181; *Vale v. Boyle*, 179 Cal. 180, 186, 175 P. 787; *Sarver v. Los Angeles*, 156 Cal. 187, 189, 103 P. 917; *Warren Bros. Co. v. Boyle*, 42 Cal. App. 246, 258, and note at page 247, 183 P. 706.

The Improvement Act of 1911, § 79, subd. 6, provides:

“The words ‘paved’ or ‘repaved,’ as used in this act, shall be held to mean and include pavement of stone, whether paving blocks or macadamizing, or of bituminous rock or asphalt, or of iron, wood or other material, whether patented or not, which the city council shall by ordinance or resolution adopt.”

In the absence of such a statutory provision authorizing the use of a patented material, it is said that:

“Where * * * the owner of the patent has stipulated with the city that the patented article will be furnished to the successful bidder, without a reservation, the authorities uphold the right to make the contract”—citing several cases. *Great Northern R. Co. v. Leavenworth*, 81 Wash. 511, 142 P. 1155, Ann. Cas. 1916D, 239, 243.

[2, 3] The license agreement is dated August 22, 1921. The resolution of intention was adopted August 26, 1921. It fixed September 19th as the day upon which objections

to the proposed improvement would be heard. Bids for doing the work were opened and the contract awarded October 14th and the contract was executed November 8th. Appellant contends that Warren Bros. Company agreed to furnish material during a period of four months only from August 22, and that therefore the contractor was allowed but 44 days after the execution of the contract in which to purchase the specified materials from the company. It is argued that, under such circumstances, no one could safely bid for the work without further assurance from the company that it would furnish such materials after the expiration of the 4-month period, an assurance which the company could give or refuse at its pleasure, and that therefore free competitive bidding was not possible. In view of the circumstances under which the license agreement was executed and filed, the nature of the work to be done, and the length of time required to take the statutory steps leading up to the execution of the contract, it is somewhat uncertain whether the limitation of four months relates to the furnishing of the materials or to the execution of the contract to do the work. Under familiar rules of construction, the license agreement is to be construed most strongly against the company. If it be construed in accordance with appellant's contention, however, it cannot be held on this appeal that 44 days was not a reasonable time within which to complete the work. Neither the terms of the contract nor the extent of the work to be done are shown. Nor was any evidence produced to show the length of time which was reasonably necessary for the completion of the work.

[4] Whether or not the time allowed was reasonable is a question of fact and not of law. It does not appear within what time the work was actually completed, but it was shown that the company at no time withdrew its offer to furnish the required materials at the price stated in the license agreement. The fact that such materials could be purchased from no one but the company is not material, otherwise patented materials could not be used, even though authorized by the statute, because the owner of a patent can always control the production and the price of the article patented.

[5] The specifications provide:

“All loss or damage arising from any unforeseen construction or difficulties, either natural or artificial, which may be encountered in the prosecution of the work, shall be borne by the contractor.”

Appellant contends that the proceedings are void because the foregoing provision imposes “an unwarranted burden upon the contractor in regard to damages”—citing *Blochman v. Spreckels*, 135 Cal. 662, 67 P. 1061, 57 L. R. A. 213. In *Stanwood v. Carson*, 169 Cal. 640, 650, 147 P. 562, 566, a provision substan-

tially the same as that of which complaint is here made was held not to invalidate the proceedings. In that case it is said:

"The early tendency toward a rigid strictness in these matters which has found expression in some of the cases, such as *Blochman v. Spreckels*, 135 Cal. 664 (57 L. R. A. 213, 67 P. 1061), has been much relaxed by later decisions, and wisely so, because it became apparent that a strict enforcement of the street law to its very letter often resulted in depriving street contractors, who had honestly performed their work, of their just compensation. The inevitable result was that subsequent contracts would not be undertaken by such contractors owing to the hazard arising from such strict construction, excepting at largely increased prices, and, in consequence, while in an individual case a property owner might through some technicality escape paying what he should in equity have paid, property owners generally would be compelled to pay excessive prices because of the imminent peril of total loss which confronted contractors."

[6] The act provides for the issuance of a warrant by the superintendent of streets, authorizing the contractor to demand and receive from property owners the amounts of their several assessments for the cost of work done. Section 25 as amended provides:

"The warrant shall be returned to the superintendent of streets within thirty days after its date, with a return attached thereto signed by the contractor or his assigns or some person in his or their behalf, verified upon oath, stating the nature and character of the demand. Thereupon the superintendent of streets shall record the return so made with the record of the warrant and assessment either in the margin of said record or in the same book with and immediately following the record of the assessment; * * * and shall sign the record. * * * If any contractor shall fail to return his warrant within the time and in the form provided in this section, he shall thenceforth have no lien upon the property assessed." Stats. 1921, p. 309, § 2.

The required return was made in this case, and the superintendent of streets recorded the same and signed the record thereof. The original return was then delivered to the agent of the contractor's assignee, who took it away with him. Appellant urges that the statute requires the warrant and the return attached thereto to be filed and left with the superintendent of streets, and that therefore the foregoing acts did not constitute the return required by the statute. The statute does not expressly provide that such warrant and return shall be filed, and appellant's argument is based upon the use of the words "returned" and "return" as used in the act. No authorities are cited, except such as relate to returns of writs or processes in judicial proceedings. The warrant was the contractor's evidence of his right to collect unpaid assessments. That right did not cease with the return required by the statute. Section 27 of the act provides that, at any time

after the period of 35 days from the date of the warrant, the contractor or his assigns "may sue, in his own name, the owner of the land, lots, or portions of lots, * * * and recover the amount of any assessment remaining unpaid," and that, in any suit so brought, "the said warrant, assessment, certificate and diagram, with the affidavit of demand and nonpayment, shall be held prima facie evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrant, assessment, and diagram are based, and like evidence of the right of the plaintiff to recover in the action." It cannot be presumed, in the absence of an express provision to that effect, that it was the legislative intent to require a contractor to surrender possession of the evidence of his right of action.

The verified return, in so far as material here, is as follows:

"J. B. Piatt, being duly sworn, says he is the agent of the assignee of the contractor named in the annexed engineer's certificate, assessment, diagram and warrant. * * * United States National Bank of Portland, Oregon, by J. B. Piatt, Agent."

In the record of the return made by the superintendent of streets, the name "J. B. Piatt" at the beginning thereof was omitted. Subsequent to the recording of the return, upon the hearing of the appeal of plaintiff and others to the board of trustees, the board adopted a resolution directing the superintendent of streets to correct the error in the record by inserting therein the name of "J. B. Piatt." The superintendent thereupon made the correction.

In *A. P. Hotaling v. Brogan*, 12 Cal. App. 500, 107 P. 711, the court had under consideration an affidavit which was signed "A. P. Hotaling & Co. By R. M. Hotaling, President." The court said:

"That the affiant affixed the corporate name, followed as it is—'By R. M. Hotaling, President,' does not change the fact, clearly appearing, that he, Hotaling, personally made the affidavit and was the one who subscribed and swore to it. * * * Nor do we doubt that the test suggested by respondent is here met, namely, that the affidavit must 'be so clear and certain that an indictment for perjury may be sustained upon it if false.'"

The fact that the superintendent of streets omitted the affiant's name at the beginning of the affidavit in the record of the return is not deemed fatal. Even with the name so omitted, the affidavit clearly shows by whom it was made. To hold that the omission is fatal would be to return to the technical strictness condemned in *Stanwood v. Carson*, supra.

The judgment is affirmed.

We concur: JONES, J. pro tem.; PLUMMER, J.

72 Cal. App. 174

STOWE v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY et al.

(Civ. 2954.)

(District Court of Appeal, Third District, California. April 3, 1925. Rehearing Denied May 4, 1925. Hearing Denied by Supreme Court June 1, 1925.)

i. Criminal law ⚡996(2)—**Superior court cannot amend, alter, or modify judgment in criminal case after it has become judgment of appellate court.**

In view of Code Civ. Proc. § 955, jurisdiction of superior court to amend, alter, or modify judgment in criminal case, after it has become in effect judgment of an appellate court, does not exist.

On Application for Rehearing.

2. Criminal law ⚡996(2)—**When notice of appeal filed, judgment became final, and trial court was without jurisdiction to amend, alter, or modify it.**

Where appeal was prosecuted under Pen. Code, § 1247, when notice thereof was filed, jurisdiction of trial court as to judgment was transferred to District Court of Appeal, and whether dismissal of appeal was accomplished either by operation of law or by order of court, judgment from which appeal was taken became final, and superior court was without jurisdiction to amend, alter, or modify it.

Mandamus by C. D. Stowe against the Superior Court, in and for the County of Sacramento, and another. Writ denied.

Charles L. Gilmore and Work & Ashby, all of Sacramento, for petitioner.

J. J. Henderson, Dist. Atty., and W. A. Green, Deputy Dist. Atty., both of Sacramento, for respondents.

PLUMMER, J. Petitioner prays for an order of this court directing and commanding the superior court of the state of California, in and for the county of Sacramento, and Hon. Charles O. Busick, as judge thereof, to hear and determine a certain petition filed in said court by the petitioner herein, in a certain action tried in said court, entitled the "People of the State of California, Plaintiff, v. C. D. Stowe, Defendant."

The record before us shows the following: That the petitioner herein, on the 4th day of February, 1925, pleaded guilty to an information charging him with the crime of driving an automobile upon a public highway in the city of Sacramento, while under the influence of intoxicating liquor; that, after the entry of said plea, the defendant asked that he be granted probation, which request, after hearing, was denied by said court and on the 11th day of February, 1925, the said court, the Honorable Charles O. Busick, presiding, rendered judgment against the defendant and pronounced sentence to the ef-

fect that the defendant be imprisoned in the state prison of the state of California, as provided by law, for the offense of which he pleaded guilty; that thereafter, and on the same day, the said court made its order that a commitment issue in accordance with said sentence, and that, in pursuance of said order and judgment, a commitment was duly issued, directed to the sheriff of the county of Sacramento, commanding him to deliver the person of the said defendant to the warden of the state prison at San Quentin, in execution of said judgment and sentence; that thereafter the defendant regularly, and in the manner provided by law, appealed from the judgment of said court entered in said cause to the Appellate Court of the Third District of the state of California; that thereafter, and without filing any record on appeal in said cause, upon motion of defendant, the appeal theretofore taken by him from the judgment of said superior court to said District Court of Appeal was duly dismissed, by order of said District Court of Appeal, in and for the Third Appellate District; that thereafter, and on or about the 25th day of February, 1925, after notice regularly given upon verified petition filed therein, said defendant moved said superior court of the state of California, in and for the county of Sacramento, to set aside the judgment and sentence theretofore entered against him in the cause hereinbefore referred to; that the said superior court and the said Hon. Charles O. Busick, presiding therein, then and there refused and still refuses to entertain or pass upon said motion, upon the ground that the said superior court's jurisdiction over the cause of the People of the State of California, Plaintiff, v. C. D. Stowe, Defendant, on the charge hereinbefore referred to no longer existed, and that said superior court no longer had jurisdiction to alter, amend, or vacate said judgment, or modify the sentence pronounced in said cause.

In the presentation of this case a large number of authorities have been called to our attention relative to the power of a trial court to amend, vacate, or modify its judgments prior to the time when actual execution thereof has been begun; that is, prior to the time when the defendant has been actually delivered to the custody of the officer, whose duty it is, under the laws of the state, to execute the sentence and judgment of the trial court. These cases, while practically presenting an unbroken line of authorities on the subject, are for the reasons hereinafter stated, inapplicable, and need not either be stated or considered herein.

A recital of the facts contained herein shows that the petitioner regularly appealed to this court from the judgment of the trial court, and that upon his motion said appeal

was dismissed. By section 955 of the Code of Civil Procedure it is provided that "the dismissal of an appeal is in effect an affirmation of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal." This, of course, relates specifically to a civil action, but the same principle, as we shall subsequently show, applies as well to criminal cases. Upon the appeal being dismissed, the judgment becomes a final judgment, not simply of the trial court, but of the court to which the appeal was taken, unless it is otherwise controlled or limited as therein stated.

In the case of *United States v. Howe* (C. C. A.) 280 F. 815, 23 A. L. R. 531, it is held that a trial court has no power, even during continuance of the term at which it was rendered, to alter or amend a judgment after it has been affirmed by an appellate court. After considering the power of trial courts in general to amend, alter or change judgments before execution thereof has been had, the court uses the following language, which we think decisive in this cause:

"Another restriction upon the power to alter or amend a judgment is that such power does not exist after the judgment has been affirmed by the appellate court. In the federal courts, after an appellate court has decided a case brought before it on writ of error, it sends its decision down to the court below, whose proceedings have been reviewed, by means of a mandate which directs that court to enforce or reverse and set aside the judgment as the case may be; and the jurisdiction of the court below, which was lost by the suing out of the writ of error, is reacquired when such a mandate is filed with it. Now we understand it to be well-established law that a judgment which the appellate court has affirmed, and by its mandate directed the court below to enforce, cannot thereafter be altered in any way by the lower court, and that irrespective of whether the term was extended or not. In *Encyclopedia of Pleading and Practice*, vol. 13, p. 850, it is correctly laid down that 'the judgment of the appellate court cannot be modified or vacated by the lower court on the remand to it of the case, nor can the lower court alter or modify the judgment originally entered by it.' In the case of *Re Sanford Fork & Tool Co.*, 160 U. S. 247, 255, 40 L. Ed. 414, 416, 16 Sup. Ct. Rep. 291, 293, the Supreme Court said: 'The circuit court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution, or give any other or further relief, or review it, even for apparent error, upon any matter decided on appeal, or intermeddle with it, further than to settle so much as has been remanded.' The above statement of the law is alike applicable to civil and criminal cases, and the fact that

the term has been extended is quite immaterial. The judgment which was before this court was in law disposed of and finally settled by our decision, and is the law of the case beyond the power of the court below, which must carry it into execution according to the mandate. *Sibbald v. United States*, 12 Pet. 488, 492, 9 L. Ed. 1167, 1169."

[1] In a note accompanying the report of this case are a number of decisions of state courts to the same effect. To the same effect is the case of *Meyer v. Kohn*, 33 Cal. 484, also the case of *Kirby v. Superior Court*, 68 Cal. 604, 10 P. 119. Irrespective of whether a trial court may or may not amend, alter, or modify a judgment in a criminal case before execution thereof has been had, which we do not decide, it is clear that jurisdiction to do so after the judgment has become, in effect, a judgment of an appellate court, does not exist.

The petition for a writ of mandate is denied.

We concur: FINCH, P. J.; JONES, Justice pro tem.

On Application for Rehearing.

PER CURIAM. [2] The petitioner, in his application for a rehearing herein, calls attention to the fact that the appellant, in his appeal in the case of the *People of the State of California v. C. D. Stowe*, dealt with in the opinion of the court herein, did not perfect his appeal according to the provisions of section 1247 of the Penal Code and that under the provisions of said Code, after the time had expired for taking the requisite steps specified to be taken after filing his notice of appeal, the law automatically dismissed appellant's appeal, irrespective of the order of dismissal entered by the court, and that under such circumstances the cases relied upon as to modifying the judgment after affirmance or after dismissal, when an appeal had been taken, are inapplicable. We think that when the notice of appeal was filed the jurisdiction of the trial court in relation to the judgment was transferred to the District Court of Appeal, and that whether the dismissal of the appeal was accomplished, either by operation of law, or by the order of this court, the judgment from which the appeal had been taken became final, and that the principle as to the lack of jurisdiction to modify or change a final judgment in the trial court, as set forth in the opinion heretofore filed in this case, applies. These matters were considered but not set forth in the opinion of the court.

The petition for a rehearing is denied.

72 Cal. App. 160

PEOPLE v. BOOTH et al. (Cr. 1237.)

(District Court of Appeal, First District, Division 1, California. April 3, 1925.)

1. Robbery $\S$ 24(3)—Evidence held ample to identify defendants as perpetrators of robbery.

Evidence held ample to fully identify defendants as perpetrators of crime of robbery.

2. Robbery $\S$ 24(3)—Minor discrepancies and inaccuracies held not to affect positive identification of defendants.

In robbery prosecution, where there was ample evidence to identify both defendants as perpetrators of crime, minor discrepancies and inaccuracies in testimony of witnesses held not to affect their positive identification.

3. Criminal law $\S$ 622(1)—Question whether separate trial should be granted is discretionary.

When two or more defendants are jointly charged with public offense, question whether separate trial should be granted under Pen. Code, § 1098, is within trial court's discretion.

4. Criminal law $\S$ 622(1)—Fact that, in joint trial, confession or other evidence is admissible as against one defendant only, does not entitle defendants jointly charged to separate trial.

Fact that, in joint trial, confession or other evidence may be admissible as against one and not against other defendant, does not of itself entitle defendants, jointly charged, to separate trial.

5. Criminal law $\S$ 686(1)—Permitting prosecution to reopen case is discretionary.

Permitting prosecution to reopen its case is within sound discretion of trial court.

6. Criminal law $\S$ 706—Witnesses $\S$ 337(5)—Defendant not testifying may not be questioned as to conviction of felony, but if he testifies he may be asked for purpose of impeachment.

Where, under Pen. Code, § 1025, defendant was charged with prior conviction to which he had pleaded guilty, district attorney had no right to refer to prior conviction where defendant had not taken stand in his own behalf, but, where he later became witness, it then became proper to ask him if he had been convicted of felony for purpose of impeachment.

7. Criminal law $\S$ 1169(2)—Erroneous admission of evidence of facts, subsequently proved by defendant's testimony, is harmless.

Erroneous admission of evidence of facts subsequently proved by defendant's testimony, is harmless.

8. Criminal law $\S$ 369(2)—Testimony that automobile used in robbery had been stolen rightfully received.

As automobile was instrumentality in commission of robbery, and ownership thereof became question as to manner in which defendants obtained its possession, there was no error in admitting testimony to show that it had

been stolen; it being positively identified with defendants, both before and immediately after robbery.

9. Criminal law $\S$ 369(2)—Evidence of independent and distinct crime, if necessary to prove crime charged, is admissible.

Although, in general, proof of independent and distinct crime than that charged is not admissible, yet, if evidence of another crime is necessary and pertinent to proving of crime charged, it is admissible.

10. Criminal law $\S$ 1171(6)—Defendant's substantial rights not affected by misconduct of district attorney in address to jury.

In robbery prosecution, in view of convincing character of evidence against defendant, misconduct of district attorney in summing up case referring to other crimes committed by defendant held not to affect defendant's substantial rights.

11. Criminal law $\S$ 742(1)—Truth of alibi was for jury.

In robbery prosecution, where defendant's witnesses testified that he was in another city at time crime was committed, truth of such alibi evidence was for jury.

12. Criminal law $\S$ 1171(5)—District attorney's comments on defendant's failure to testify held not miscarriage of justice.

In view of convincing evidence of defendant's guilt of crime of robbery, misconduct of district attorney in commenting on his failure to take the stand and testify held not to result in miscarriage of justice.

13. Criminal law $\S$ 1171(6)—Misconduct of district attorney in cross-examination of defendant held not to result in miscarriage of justice.

In robbery prosecution, misconduct of district attorney in asking defendant if he had not met codefendant in prison held, in view of overwhelming evidence of guilt, not to have resulted in miscarriage of justice.

14. Criminal law $\S$ 1036(1)—Objection to admission of evidence necessary to require review thereon.

Objection to admission of evidence is necessary to require review of ruling thereon.

15. Criminal law $\S$ 1169(5)—Objection to volunteered statement of witness, withdrawn from jury, held without merit.

Where witness volunteered, in response to question as to circumstances of arrest, that he had gone to place where defendant was apprehended to arrest another, and that defendant gave assumed name, and, on motion, statement was stricken, error assigned on admission of statement was without merit.

16. Criminal law $\S$ 519(4)—Confession held free and voluntary.

Where defendant voluntarily sent for district attorney and made full statement of all circumstances in connection with crime, without inducement or intimidation, defendant merely asking that he be sent to institution different from where codefendant would be in-

carcerated, it was not inadmissible as not being free and voluntary.

17. Criminal law ⚡532(2)—**Question whether confession is free and voluntary ordinarily addressed to court.**

Question as to whether confession is free and voluntary is ordinarily one of fact addressed to trial court, and considerable discretion must be allowed in his determination thereof.

18. Criminal law ⚡518(2)—**Fact that defendant was not advised of constitutional rights held not to make confession involuntary or render it inadmissible.**

Where defendant voluntarily sent for district attorney and made full statement of circumstances of crime, fact that he was not advised as to his constitutional rights to remain silent, and was not told that confession would be used against him, did not make it involuntary or render it inadmissible.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Ernest Booth and another were convicted of robbery, and they appeal. Affirmed.

F. M. Pearce, of Oakland, for appellant Huston.

Ernest Booth, in pro. per.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

TYLER, P. J. Appellants herein were jointly accused by information with the crime of robbery. The offense was alleged to have been committed on May 19, 1924, at about the hour of 1:30 p. m. At that time it is charged that both defendants did unlawfully, and through use of force and fear, take and carry away from the person of one Eugene McCormick personal property consisting of the sum of \$2,000 lawful money of the United States, which personal property belonged to the Oakland Bank, a corporation.

The information further charged both defendants with a prior conviction of a felony. They were jointly tried, and both were found guilty. Motion for a new trial was made on behalf of both defendants. These motions were denied.

The case of the prosecution rests entirely upon the identification of the defendants as being the perpetrators of the crime.

[1] Several grounds are relied upon for a reversal of the judgment. Both of the defendants claim that the evidence upon the subject of their identification is weak and far from satisfactory, for which reason the errors complained of are highly prejudicial to them. An examination of the record shows that their identity was fully and completely established.

It appears therefrom that upon the day above mentioned the officers of the Allendale Branch of the Oakland Bank were held up

and robbed by two men, one of whom was colored. The robbery was committed in broad daylight, and neither of the perpetrators of the crime was masked. Huston engaged the attention of the manager by pointing a pistol at him, while his accomplice threatened the assistant manager and demanded from him and obtained the money stolen. Both these officers positively identified the defendants upon their arrest, which took place shortly after the robbery.

They were both further identified by other witnesses. A lineman employed by the Federal Electric Company recognized both of them as being the participants in the crime, and pointed them out from among other prisoners at the jail where they were confined.

Defendant Huston was further identified by two witnesses who were engaged in business in the immediate vicinity of the bank, and from one of whom he had made small purchases on two occasions just prior to the robbery.

[2] Some of the witnesses disagreed as to the color of the clothing worn by Huston and upon the question whether or not he was smoothly shaven. There was also a discrepancy in the testimony relative to the probable age of Booth. These minor discrepancies and inaccuracies in no manner affected the positive identification of defendants. As was said in *People v. Connelly* (Cal. Sup.) 234 P. 374, such discrepancies are bound to occur in attempts to reproduce descriptively the features of defendants from mental pictures, but where, as here, they are brought into the presence of the witnesses, and each one identifies them as the persons who committed the crime, such identification is sufficient. In the case last cited it is further said that ordinarily the power to accurately describe human features is with most persons a limited one, and therefore on questions of identification, except in special instances, much must depend upon the intelligence and honesty of the person called upon to make the identification. The wife of defendant Booth interviewed one of the witnesses and discussed his testimony with him. The district attorney sought to show that an attempt had been made to induce this witness to change his testimony. On their cross-examination two of the witnesses became less positive in their identification with reference to defendant Booth. Notwithstanding this fact, however, there is ample evidence in the record to fully identify both defendants as the perpetrators of the crime.

It also appears in evidence that after his arrest Huston, of his own volition, had sent for the district attorney and voluntarily made a full and complete statement of the facts of the case, implicating Booth as his

accomplice, a matter hereinafter discussed. We will consider the different points raised by appellants separately. Appellant Booth has filed a brief in his own behalf, in which he cites several grounds of misconduct and error which he claims justify a reversal.

[3] It is first urged on his behalf that the trial court abused its discretion in not granting to him a separate trial. Under the provisions of section 1098 of the Penal Code, when two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court orders separate trials. In ordering separate trials, the court in its discretion may grant a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant. The question of whether or not a separate trial should be granted is left within the discretion of the court.

[4-6] The claim that the court abused its discretion in denying appellants' motion is based principally upon the fact that it had knowledge that Huston had made a confession implicating Booth, which would be received in evidence, though it was inadmissible as to him. The mere fact that in a joint trial a confession or other evidence may be admissible as against one and not against another does not of itself entitle defendants jointly charged to a separate trial. 16 Cor. Jur. p. 787. If this were so, joint trials could seldom if ever be had, for this question must of necessity constantly arise with defendants placed in such a situation. The matter of granting a severance is one within the discretion of the trial court. To hold otherwise would be to render nugatory, in most cases, the very purpose of the act. The jury was properly instructed upon the subject, for it was told that the evidence was admitted solely against defendant Huston. We conclude therefore, that there is no merit in this objection. Complaint is next made that the court abused its discretion in permitting the prosecution to reopen its case. This is a matter also within the sound discretion of the trial court. *People v. Oxnam*, 170 Cal. 211, 149 P. 165. Error is further claimed by reason of the action of the district attorney in commenting upon the fact that defendant had suffered a prior conviction.

[7] Appellant was so charged, to which he had pleaded guilty. The district attorney had, under these circumstances, no right to refer to the prior conviction, as the defendant had not at that time chosen to take the stand in his own behalf. Pen. Code, § 1025.

Here, however, he later became a witness on his own behalf, and it then became proper to ask him if he had ever been convicted

of a felony for the purpose of impeachment. 8 Cal. Jur. p. 647. The question was asked, and defendant admitted that he had suffered such a conviction. Erroneous admission of evidence of a fact subsequently proved by defendant's testimony is harmless. *People v. Bennett*, 65 Cal. 267, 3 P. 868; *People v. Collins*, 75 Cal. 412, 17 P. 430. Moreover, the matter of his prior conviction was already in evidence, a witness having testified that he had made defendant's acquaintance in San Quentin.

[8, 9] It is again claimed that the court erred in admitting testimony to show that a Cadillac coupe used in the perpetration of the robbery had been stolen. This machine was positively identified as the one in which both defendants were seen prior to the commission of the robbery and the one in which they drove away from the scene of the crime. The automobile was an instrumentality in the commission of the offense, and its ownership became an important and material question as going to prove how or in what manner defendants obtained the possession thereof. The fact that it had been stolen from the owner was a circumstance that made possession by the defendants possible, and proof of this fact was rightfully received. It is true that the jury might have inferred that the defendants had stolen the car; still this fact did not warrant the exclusion of the evidence. Although in general proof of an independent and distinct crime than that charged is not admissible, yet, if the evidence of another crime is necessary and pertinent to the proof of the crime charged, it is admissible. *People v. Rogers*, 71 Cal. 565, 12 P. 679; *People v. Sanders*, 114 Cal. 216, 46 P. 153.

[10] Misconduct of the district attorney in his address to the jury in summing up the case against defendant is assigned as error. The remarks complained of had reference to other crimes committed by defendant. They were ordered stricken from the record, and the jury instructed to disregard them. Under these circumstances, and considering the convincing character of the evidence against defendant, we cannot say that his substantial rights were affected thereby, or that there has been miscarriage of justice.

[11] And, finally, our attention is drawn to the fact that this defendant attempted to prove an alibi. His associates and his wife and her sister testified that Booth was in San Francisco at or about the time when the crime was committed. The truth of this evidence was a matter for the jury to determine. By their verdict it is manifest they rejected it.

[12] Defendant Huston cites us to the misconduct of the district attorney in several particulars, as constituting error. He first complains that comment was made by that officer upon the fact that he did not take the stand and testify. It appears from the rec-

ord that the court immediately admonished the jury to disregard the remark, and later fully instructed it upon the subject.

Misconduct of district attorneys in this particular has so often been condemned by the appellate courts that it seems strange that they should persist in committing this error. Here, however, the evidence of defendants' guilt is of such a convincing character that we cannot say that the incident resulted in a miscarriage of justice. *People v. Nakis*, 184 Cal. 105, 116, 193 P. 92.

[13] Further misconduct of this officer in asking defendant Booth if he had not met Huston at San Quentin is assigned as error. An objection to the question was sustained. While the question might imply a previous criminal record, what we have said with reference to the error just discussed applies with equal force to this objection.

[14, 15] Reception of evidence, to the effect that at the time of his arrest Huston gave an assumed name, is complained of. The record shows that no objection was interposed to the question. In this connection further error is assigned for the reason that the officer, in detailing the circumstances of the arrest, testified that he had gone to the place where defendant was apprehended, for the purpose of making the arrest of one Clark for grand larceny. The statement was volunteered by the witness in response to a question asking for the circumstances under which the arrest was made. Upon motion it was stricken from the record. There is therefore no merit in this objection.

[16] In conclusion, defendant Huston claims that his confession was not free and voluntary, and evidence of the same should not have been admitted. The record shows conclusively that defendant voluntarily and of his own accord sent for the district attorney and made a full statement of all the circumstances in connection with the crime. The confession was made without any inducement or intimidation; Huston merely asking that he be sent to an institution different from where his codefendant would be incarcerated, as he had threatened to kill him.

[17, 18] The question as to whether a confession is free and voluntary is ordinarily one of fact addressed to the trial court, and a considerable measure of discretion must be allowed in the determination thereof. *People v. Siensen*, 153 Cal. 387, 95 P. 863. It appears in this connection that defendant was not advised as to his constitutional rights to remain silent, and was not told that the confession would be used against him. This fact did not make the confession involuntary or render it inadmissible. *People v. Clark*, 28 Cal. App. 735, 153 P. 980. And this is especially so where, as here, the record as a whole, and aside from the confession, so con-

vincingly indicates the guilt of the defendant. No other questions are presented.

From what we have said, it follows that the judgments against defendants should be, and each of them is hereby, affirmed.

We concur: KNIGHT, J.; CASHIN, J.
